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### Repository Citation

Laura Phillips-Sawyer, *Restructuring American Antitrust Law: Institutionalist Economics and the Antitrust Labor Immunity, 1890–1940s*, 90 *University of Chicago Law Review* 659 (2023),  
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# Restructuring American Antitrust Law: Institutionalist Economics and the Antitrust Labor Immunity, 1890–1940s

Laura Phillips-Sawyer†

*Labor unions and their leaders were cast as the perennial antitrust defendants for the first fifty years of federal antitrust law, and this historic imbalance fostered a movement in economic scholarship and labor activism to restructure American antitrust law. The progressive liberal-institutionalist movement in economics played an important role in legitimizing trade unions by recasting them, not as anticompetitive cartels, but rather as a necessary corollary to the growing market power of industrial firms. Louis Brandeis, the litigator and future jurist, drew from institutionalists' work to support antitrust reform. He argued that antitrust law was not necessarily anathema to the interest of labor organizations, and he advocated for both the application of the rule of reason to labor association activities and the revision of antitrust laws to exempt certain labor activities. The Clayton Act of 1914 created such an antitrust labor exemption, but as soon as union activity spilled over into interstate commerce the Supreme Court insisted on antitrust liability and applied it categorically against laborers. Even after the passage of additional labor exemptions in the 1930s, the reigning Commerce Clause doctrine rendered labor's immunity from antitrust liability uncertain. This lingering uncertainty was exacerbated by a fracturing within the progressive liberal movement as some economic institutionalists, schooled in the legal realist tradition, revived the Department of Justice's antitrust prosecutions in the late 1930s. Assistant Attorney General Thurman Arnold led this renewed antitrust agenda; armed with a more expansive interpretation of federal commerce power, he targeted labor groups in several headline-grabbing cases, enraging his former allies on the Left. Arnold, however, seemed to represent a divergent institutionalism that embraced both the Brandeisian distaste for economic concentration and the Keynesian macroeconomic policies of mass consumption. Ultimately, in 1941, an uneasy settlement was reached in *United States v. Hutcheson*, where the Supreme Court authorized a nonstatutory labor exemption for secondary boycotts. The ruling helped establish guardrails for lawful labor union activities; however, it did not resolve this division on the progressive Left, and laborers continued to seek protective legislation and statutory immunities. Recasting antitrust law's bias against laborers as historically contingent*

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*demonstrates the moments of possibility to reconcile this historic imbalance, and it implicitly argues that the progressive law and economics movement provided necessary groundwork but also required interest group organization and statutory interventions.*

## INTRODUCTION

Over the past decade, a great deal of economic scholarship has emphasized the connections between economic concentration and rising markups as well as stagnant wages and rising income inequality.<sup>1</sup> Additionally, the twenty-first century has witnessed a burgeoning of legal studies focused on the myriad ways that the law structures—and perpetuates—inequality across a variety of metrics, including income, wealth, gender, and race.<sup>2</sup> Identifying these legal structures and their resultant economic trends has informed current progressive political activism on a variety of policy proposals, including raising corporate tax rates, capital gains taxes, and minimum wages; bolstering job-training and retraining programs; and reinvigorating market competition through the antitrust laws.

Antitrust policymakers, activists, and scholars are increasingly turning their attention to the role that antitrust law has played in facilitating, or at least failing to stem, economic concentration.<sup>3</sup> And that economic concentration is being blamed for a whole host of societal ills—from the monopolization of two-sided

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<sup>1</sup> On economic concentration and markups, see generally Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020). *But see* Leena Rudanko, *Is Rising Product Market Concentration a Concerning Sign of Growing Monopoly Power?*, 6 ECON. INSIGHTS 2 (2021) (arguing that an increase in large firms does not necessarily indicate an increase in widespread monopoly power). On monopsony and wages, see Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538 (2018) (estimating the effect of monopsony power as reducing wages by 22%).

<sup>2</sup> For example, on the difference between income and wealth inequality, and the persistent problem of continuously higher returns to capital (as opposed to labor income), see generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Belknap Press 2014) (2013). *But see generally* Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, 2015 BROOKINGS PAPERS ON ECON. ACTIVITY 1.

<sup>3</sup> *See generally, e.g.*, BARRY LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2009); MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019); AMY KLOBUCHAR, *ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE* (2021); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

platforms to collusive price fixing by mass-market chicken producers.<sup>4</sup> The unifying aspect across much of this inquiry is its focus on consumer harms in product markets, the traditional domain of antitrust law.<sup>5</sup>

One aspect of antitrust law that has gained unprecedented attention is the relationship between antitrust law and labor market power. The term “labor market power” refers to the power of employers in a given market and, recently, has been attributed to declining labor share and real wage stagnation.<sup>6</sup> As Professor Eric Posner has explained in *How Antitrust Failed Workers*, antitrust law does not technically distinguish between monopoly and monopsony; both forms of market power facilitate anticompetitive conduct and harms.<sup>7</sup> On the product market side, a monopolist may reduce output and increase price from the competitive level, creating deadweight loss. In monopsony markets, the monopsonist may use its market power to suppress the price of its inputs, including labor costs.<sup>8</sup> While no U.S. antitrust statutes or agency guidelines prohibit the consideration of monopsony power in adjudicating antitrust law, neither do they provide much instruction. Indeed, the Supreme Court has only recently addressed the problem of buy-side market power in relevant product markets.<sup>9</sup>

The problem of labor market power, however, is not a new concept, especially to labor organizers who have explicitly challenged employers’ market power through a variety of methods over time. From Pennsylvania’s coal mines to Connecticut’s hat factories, nineteenth-century laborers lobbied for protective legislation and unionized in order to improve wages and working conditions

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<sup>4</sup> See generally, e.g., *United States v. Google, Inc.*, 12-CV-04177 (N.D. Cal. Nov. 16, 2012); *Othart Dairy Farms, LLC v. Dairy Farmers of Am., Inc.*, 22-CV-251 (D.N.M. filed April 4, 2022).

<sup>5</sup> On traditional domain of antitrust law focusing on product markets, see PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 256e1 (5th ed. 2020).

<sup>6</sup> Cf. José Azar, Ioana Marinescu, & Marshall Steinbaum, *Measuring Labor Market Power Two Ways*, 109 AM. ECON. ASS’N PAPERS AND PROCEEDINGS 317, 320 (2019).

<sup>7</sup> ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 3 (2021).

<sup>8</sup> See *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 253 (D.D.C. 2017), *cert. dismissed*, 137 S. Ct. 2250 (2017) (affirming a district court’s injunction against a merger due to labor market power effects); see also Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1038 (2019).

<sup>9</sup> See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–21 (2007); see also *United States v. Anthem, Inc.*, 855 F.3d 245 (D.C. Cir. 2017), *cert. dismissed*, 137 S. Ct. 2250 (2017) (affirming the district court’s injunction against a merger due to anticompetitive product-market effects in light of the government’s argument that anticompetitive labor-market effects would result).

(among other goals). Unionization, however, raised concerns under competition policy as a private association of competitors, which could exercise their collective market power against employers as well as consumers. Indeed, antitrust law emerged as a potent weapon to stifle union activity.

Through the early twentieth century, laborers were the perennial antitrust defendants, and this fueled a movement among progressive liberals to reorder these power dynamics and reshape the law.<sup>10</sup> In turn, many progressive economists and labor activists fought against, and successfully extinguished, the antitrust labor injunction, which had been used as a tool by the judiciary to constrain labor tactics to achieve better wages, hours, and working conditions. These economists and activists insisted that the use of antitrust law against labor was contingent upon a flawed understanding of economic reality and based on outdated economic thinking. Today, a similar critique is being levied against current antitrust jurisprudence. In other words, the historical contingency of antitrust law's relationship to laborers is increasingly apparent as laborers have moved from being defendants to now pursuing antitrust suits as plaintiffs.

Two groups of progressive economists initiated the movement for labor's antitrust exemption.<sup>11</sup> The moniker "institutionalist" was adopted in 1918; however, this mode of economic thinking emerged earlier with the progressive economics of John Commons, Richard Ely, Edwin Witte, and others.<sup>12</sup> By the turn of the century, these progressive economists supported the trade union movement through their economic scholarship and legislative activism—they embraced trade unionism. But, after the First World War, a fracturing became apparent within this progressive liberal group—a new cohort pushed for greater state involvement

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<sup>10</sup> The term progressive liberal here refers to a general categorization of reformers who believed that rising inequality—of income, wealth, and opportunity—required greater state intervention to protect the marginalized or least powerful of its constituent members. For an authoritative account of the term progressive as placed within the development of the historical literature on the time period under consideration here, see generally Laura Kalman, *In Defense of Progressive Legal Historiography*, 36 *LAW & HIST. REV.* 4 (2018).

<sup>11</sup> See MALCOLM RUTHERFORD, *THE INSTITUTIONALIST MOVEMENT IN AMERICAN ECONOMICS, 1918–1947: SCIENCE AND SOCIAL CONTROL* 48 (2013).

<sup>12</sup> *Id.* at 1. See also generally EDWIN E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932); JOHN R. COMMONS, DAVID J. SAPOSS, HELEN L. SUMNER, E.B. MITTELMAN, H.E. HOAGLAND, JOHN B. ANDREWS & SELIG PERLMAN, *HISTORY OF LABOUR IN THE UNITED STATES, VOL. I* (1918); DAVID A. MOSS, *SOCIALIZING SECURITY: PROGRESSIVE-ERA ECONOMISTS AND THE ORIGINS OF AMERICAN SOCIAL POLICY* (1995).

in and protection of laborers as an interest group.<sup>13</sup> This new cohort of institutionalists, such as Walton Hamilton, Wesley Mitchell, and (later) Thurman Arnold, advanced a more interventionist view of the liberal state and they came to reject the “collective laissez faire” of the trade unionists, which had emphasized voluntary, trade-specific organizations.<sup>14</sup> These progressive economists embraced a “pragmatic progressivism,” which supported labor unions but insisted upon more widespread industrial organization that traversed individual shops and required more expansive federal administrative oversight. Despite their differences, which were particularly acute in the field of antitrust law and labor disputes, trade unionists and pragmatic progressivists all remained committed to the overarching progressive liberal project, which may be observed in their generalizable belief in the efficiencies and imperfections of markets, the legitimacy of representative democracy, and the necessity of economic regulation to remedy those market imperfections and heed the demands of democratic protest. Both were deeply troubled by problems of labor market power and sought to institutionalize reforms to recalibrate bargaining power imbalances.

This Essay reconsiders what ideas united and divided this progressive liberal movement in law and economics as it pushed to renegotiate the relationship between antitrust law and labor disputes, culminating in an uneasy settlement in the early 1940s. The story is guided by the leading antitrust labor cases and responses those generated, from *Loewe v. Lawlor*<sup>15</sup> (*Danbury Hatters’ Case*) to *United States v. Hutcheson*,<sup>16</sup> wherein the Court interpreted the Norris-LaGuardia Act of 1932<sup>17</sup> to have created a nonstatutory antitrust immunity for organized labor.<sup>18</sup> Ultimately, this Essay argues that at the center of this story one finds Louis Brandeis, who advanced and then adapted a vision for interest group “associationalism” that has played an important, if underappreciated, role in shaping antitrust law. Brandeis relied on these institutionalists to provide social science data relevant to the cases at hand—and, even though we recover those ideas from his dissenting opinions, by the early 1940s the Roosevelt

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<sup>13</sup> Cf. RUTHERFORD, *supra* note 11, at 39.

<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> 208 U.S. 274 (1908).

<sup>16</sup> 312 U.S. 219 (1941).

<sup>17</sup> 29 U.S.C. §§ 101–115.

<sup>18</sup> *Hutcheson*, 312 U.S. at 231–32.

Court had converted them into majority rulings, clarifying statutory interpretation and adapting an antimonopoly tradition that valued economic autonomy fit for the postwar era. Although recovering that history does not resolve debates over how antitrust law today should address labor market power, the struggle to liberate laborers from antitrust liability required a sustained movement in law and economics to overturn legal and economic orthodoxy and, thereby, restructure U.S. antitrust law. The rejection of economic and legal orthodoxy implicated more than antitrust law. Indeed, many of the pivotal cases that applied antitrust law to labor union activities hinged on structural issues that may be less familiar to some readers today. This Essay focuses on federal antitrust law and, as such, individual cases often turned on the reach of federal authority. Federal regulatory power under the Commerce Clause expanded across this time period, driven by social protest, new economic and legal thinking, and statutory interventions. That expanded national regulatory power, however, made it more difficult for judges to curtail the application of antitrust liability in activities that had a substantial effect on commerce.

This Essay proceeds through three parts. Part I introduces the ways in which competition policy—from the common law against conspiracies in restraint of trade to the early interpretations of the Sherman Antitrust Act of 1890<sup>19</sup>—influenced how laborers organized and protested. Widespread dissatisfaction with the Supreme Court’s antitrust jurisprudence, however, kept antitrust statutory reform at the forefront of national politics. Part II then explains how the plight of laborers fits within a larger set of legal and economic questions regarding antitrust reform. That Part argues that when the Court continued to enforce antitrust liability against labor unions through the 1920s—despite the passage of the Clayton Act’s<sup>20</sup> antitrust labor exemption—progressive liberals responded in two ways: by insisting that the rule of reason treatment should be applied to labor conspiracy cases to determine laborers’ procompetitive justifications, or by strengthening the statutory exemption and permanently removing such cases from the judiciary’s ambit. The seemingly intractable problem of creating a definition of market power that did not implicate some of laborers’ tactics pushed leaders in this progressive law

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<sup>19</sup> 15 U.S.C. §§ 1–7.

<sup>20</sup> Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53).

and economics movement to expand the statutory immunity to include a substantive protection for collective bargaining in the early 1930s. Part III explains that the expansion of the national government's interstate commerce power had the effect of expanding antitrust law's reach as well, which kept alive this question of rule of reason treatment for labor disputes even as the substantive exemption reached more collective bargaining activities. Ultimately, in 1941 the Supreme Court intervened by creating a nonstatutory exemption to protect laborers' substantive right to collectively bargain. The conclusion draws some lessons for the present.

I. THE LABOR INJUNCTION AND THE PROGRESSIVE ECONOMISTS:  
COMPETITION POLICY, CLASS CONFLICT, AND CLASSICAL  
ECONOMICS

A. How the Structure of the Law Shaped and Limited the Labor  
Movement

Competition policy played a constitutive role in the U.S. labor movement. Initially, the nineteenth century U.S. labor movement resembled Europe's in pursuing a more radical vision of social and political reform, but the repeated interventions by courts both striking down state-level protective legislation and enjoining labor strikes pushed the labor movement "to abandon its broad reform ambitions in favor of an anti-statist outlook."<sup>21</sup> On the one hand, broad-based judicial opposition to "class legislation"<sup>22</sup>—epitomized by the infamous string of cases culminating in *Lochner v. New York*<sup>23</sup> and informing an era of "substantive due

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<sup>21</sup> William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1111 (1989); see also CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 60–61 (1985); ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* 104–06 (2015); GEORGE GORHAM GROAT, *ATTITUDE OF AMERICAN COURTS IN LABOR CASES* 35–37 (1911), in 42 *STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW* (explaining how the American experience of labor law and the development of combinations of laborers and trade disputes paralleled England's experience with the issue).

<sup>22</sup> See, e.g., Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 77–78 (1985).

<sup>23</sup> 198 U.S. 45 (1905).



process”—foreclosed many of the possibilities for state-level protective labor legislation around the turn of the century.<sup>24</sup> And, on the other hand, injunctions issued at common law—against laborers—were rationalized as protecting employers’ property and the public interest in the “free flow of commerce.”<sup>25</sup> Those judicial interventions played an instrumental role in shaping the U.S. labor movement and in limiting the demands they would make on the state to protect and enhance their rights.<sup>26</sup>

Looking back from the vantage point of 1932, the labor economist Edwin Witte reflected: “[r]elief from injunctions [remains] organized labor’s foremost legislative demand and the principal objective of its non-partisan political campaigns.”<sup>27</sup> Witte’s book, which he dedicated to his teacher at the University of Wisconsin’s Economics Department, John Commons, provided an overview of case law, statutes, and legal theories, but even more so, it was a defense of organized labor coordinating to exert their market power.

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<sup>24</sup> See Laura Phillips Sawyer, *Contested Meanings of Freedom: Workingmen’s Wages, the Company Store System and the Godecharles v. Wigeman Decision*, 12 J. GILDED AGE & PROGRESSIVE ERA 285, 316 n.122 (2013); see also Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61.4 J. AM. HIST. 970, 979–80 (1975) (arguing that ideas of Jacksonian equal rights and post-Civil War free-labor ideology informed the Court’s approach to economic regulation); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 145 (1993) (explaining *Lochner*-era police powers jurisprudence as an effort to maintain neutrality rather than as an exercise in implementing a political preference for laissez-faire economics). For a list of state-level protective legislation upheld by courts, see Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 296–312 (1913), and Urofsky *supra* note 22, at 91 (1985). Given the number of economic regulations upheld, some historians have rejected the term “*Lochner* era.” See generally, e.g., WILLIAM NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022).

<sup>25</sup> *Danbury Hatters’ Case*, 208 U.S. at 293. On the tangled relationship between commerce doctrine and antitrust law, see MARK V. TUSHNET, *THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930 TO 1941*, at 1029–30, in 11 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (2022). Professor William Forbath estimated that over two thousand state and federal injunctions were issued against labor organizations between 1880 and 1920. See Forbath, *supra* note 21, at 1249–53.

<sup>26</sup> For an overview, see Forbath, *supra* note 21, at 1113 (“During the late nineteenth and early twentieth centuries, courts, legal ideology, and legal violence played a decisive part in shaping the consciousness and aspirations of organized labor in the United States.”). On labor organization and activism in this era, see generally ROSANNE CURRARINO, *THE LABOR QUESTION IN AMERICA: ECONOMIC DEMOCRACY IN THE GILDED AGE* (2011).

<sup>27</sup> WITTE, *supra* note 12, at vii.

As Witte explained, as early as 1842, courts had upheld the legality of labor unions<sup>28</sup> and many states had passed laws recognizing the legitimacy of unions.<sup>29</sup> However, labor unions' right to collectively exercise their market power ended as soon as it interfered with essential public services<sup>30</sup> or wartime<sup>31</sup> or evoked the conspiracy doctrine.<sup>32</sup> A conspiracy required an agreement among individuals as well as an unlawful purpose, and for laborers, the unlawful purpose that they were accused of conspiring to enact was, generally, interference with the interstate trade in a product market rather than the labor market itself.<sup>33</sup>

The doctrine of conspiracy also intersected with the common law "restraint of trade" doctrine, and both informed the passage of the Sherman Antitrust Act of 1890.<sup>34</sup> The federal antitrust law codified common law, but it additionally extended federal enforcement, created criminal penalties, and incentivized suits with treble damage awards.<sup>35</sup> As Justice Oliver Wendell Holmes Jr. explained: whereas the accusations of conspiracy might be overcome

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<sup>28</sup> See *Commonwealth v. Hunt*, 4 Met. 111, 129 (Mass. 1842). However, we note that anti-syndicalism laws, which were upheld by the courts, prohibited communist organizations such as the Industrial Workers of the World. See, e.g., *State v. Lowery*, 104 Wash. 520, 523 (1918).

<sup>29</sup> For a list of state laws recognizing unions as lawful organizations, see *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 386 n.1 (1922).

<sup>30</sup> See *Gottlieb v. Matckin*, 117 Misc. 128, 128 (N.Y. Sup. Ct. 1921) (prohibiting a strike among milk-wagon drivers); *Wilson v. New*, 243 U.S. 332, 335 (1917) (affirming a congressional act regulating railroad worker's wages in order to end a strike); *People v. United Mine Workers of Am.*, 201 P. 54, 56 (Colo. 1921) (holding that coal mining is affected with a public interest). Additionally, we should include strikes that interfered with railroads, particularly those under receivership, as falling under railroad legislation but having similar injunctive relief effects. See generally *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894). For an overview of railroad legislation, union strikes, and injunctive relief issued by the courts, see generally C.J. Primm, *Labor Unions and the Anti-Trust Law: A Review of Decisions*, 18 J. POL. ECON. 129 (1910).

<sup>31</sup> See *Rosenwasser Bros., Inc. v. Pepper*, 104 Misc. 457, 475 (N.Y. Sup. Ct. 1918) (holding that labor organizations in war industries must forego strikes during times of war).

<sup>32</sup> Cf. *Arthur v. Oakes*, 63 F. 310 (7th Cir. 1894).

<sup>33</sup> Witte attributes this to Justice Holmes' "just-cause" theory. See WITTE, *supra* note 12, at 51; see also Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894) ("Acts which would be privileged if done by one person for a certain purpose may be held unlawful if done for the same purpose in combination."); *Vegeahn v. Guntner*, 167 Mass. 92, 104 (1896) (Holmes, J., dissenting).

<sup>34</sup> On the passage of the Sherman Act, see generally WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965).

<sup>35</sup> Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

by demonstrating “the merit of the particular benefit” to the defendants (barring outright violence or threats thereof), the doctrine of restraint of trade applied more broadly to injury against the public.<sup>36</sup> Congress held the authority to enact the federal law through its constitutional power to regulate interstate commerce.<sup>37</sup> In turn, Justice Holmes argued that interference in the free flow of the commerce presented a prima facie case of illegality, which could be rebutted by demonstrating some “just cause” for the interference, thus rendering the interference *damnum absque injuria*.<sup>38</sup> (Today, we might rephrase that to say that it is a rebuttable presumption that a restraint of trade is illegal; some procompetitive benefit might be proven and thus legitimize the restraint.) The important point is that nineteenth century Commerce Clause doctrine structured the application of the Act.

Initially, the Supreme Court relied on a literalist interpretation of the Sherman Act striking down any contract, combination, or conspiracy that directly interfered with market mechanisms, without regard to a determination of the procompetitive benefits of the restraint.<sup>39</sup> However, as Commons lamented, this treatment was not applied equally to corporations and labor associations, both of which were reached by the Sherman Act.<sup>40</sup> Laborers

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<sup>36</sup> Holmes, *supra* note 33, at 8.

<sup>37</sup> U.S. CONST. art. I § 8, cl. 3.

<sup>38</sup> See WITTE, *supra* note 12, at 51. See also Herbert Hovenkamp, *Labor Conspiracies in American law, 1880-1930*, 66 TEX. L. REV. 919, 934 (1988).

<sup>39</sup> In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327–28 (1897), and *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 566 (1898), the Court declined to read the Sherman Act as a codification of the common law’s prohibition of unreasonable restraints of trade. In *Trans-Missouri*, Justice Peckham ruled for a 5-4 majority that the common railroad practice of entering into traffic-sharing and price agreements with competitors was illegal, even if it was necessary to prevent ruinous competition. *Trans-Missouri*, 166 U.S. at 337. The Sherman Act, Peckham asserted, allowed indirect restraints of trade, such as the purchase of one railroad by another, but it prohibited all “direct” restraints, such as price-fixing contracts, whether reasonable or not. *Id.* at 313. Ironically, Peckham said he did this to save “small dealers and worthy men” from combinations of capital. *Id.* at 323. The rulings, however, forbade other cooperative methods short of outright consolidation. In *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the Court extended this logic to holding companies as well. See also RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW* (1996). Peritz summarized the conventional interpretation of the Court’s early antitrust rulings: “A Literalist reading of the Sherman Act would outlaw not only price-fixing cartels but also partnership agreements and even simple contracts for the sale of goods.” *Id.* at 27.

<sup>40</sup> Section 7 of the Sherman Act (and later § 1 of the Clayton Act) provides that:

were treated as an association capable of coordinating a conspiracy among competitors, whereas corporations were treated as a single entity and shielded from federal antitrust scrutiny by that era's ideology of dual federalism. For example, it was easy for the Court to apply antitrust law to striking dock workers, who disrupted the flow of interstate commerce;<sup>41</sup> however, the Court refused to question the propriety of a manufacturing monopoly because it was, according to the Court, not commerce.<sup>42</sup> Lacking a labor exemption from federal antitrust law,<sup>43</sup> the Supreme Court held that the act must apply to labor organizations if their actions disrupted interstate commerce, and the categorical prohibitions against restraints that interfered with the price mechanism applied accordingly.<sup>44</sup> However, at the same time, the Court refused to apply the Sherman Act to the sugar trust because, the Court explained, sugar refining took place entirely within a single state (Pennsylvania).<sup>45</sup> Thus, even if it was destined for interstate commerce, the Act would not interfere with Pennsylvania's authority to regulate manufacturing within its borders. The ruling—*E.C. Knight*<sup>46</sup>—has been explained by “revisionist” legal historians as an effort by Chief Justice Melville Fuller to preserve nineteenth century regulatory powers of the states over corporations chartered within their borders.<sup>47</sup> Yet, regardless of the doctrinal constraints that influenced the Court, it would be difficult to overstate the violence—literal and legal—that surrounded laborers

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The word “person”, or “persons”, wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 7.

<sup>41</sup> See, e.g., *In re Debs*, 158 U.S. 564, 597–600 (1895).

<sup>42</sup> See *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895), *overruled by* *Mandeville Island Farms v. Am. Crystal Sugar Co.* 334 U.S. 219 (1948).

<sup>43</sup> Senator Sherman had proposed an amendment to exempt labor unions, but the amendment was not included in the final bill. 21 CONG. REC. S2457 (daily ed. Mar. 21, 1890) (statement of Sen. Sherman).

<sup>44</sup> The earliest antitrust cases involving laborers concerned railroad strikes. See generally, e.g., *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 F. 994 (E.D. La. 1893); *Blindell v. Hagan*, 54 F. 40 (E.D. La. 1893). Both cases responded to the 1892 New Orleans general strike of dock workers to enact a closed shop rule, which the courts interpreted as a combination undertaken to restrain interstate and foreign trade.

<sup>45</sup> See *E.C. Knight Co.*, 156 U.S. at 17.

<sup>46</sup> 156 U.S. 1 (1895).

<sup>47</sup> See Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 334 (1979). On revisionist historiography, see generally Kalman, *supra* note 10.

during this time period, the scale of agitation by workers, or the judiciary's role in structuring the law so as to cow laborers.<sup>48</sup>

In 1908, the Court infamously applied the Sherman Act against the Danbury Hatters' labor union (formally known as the United Hatters of North America, an affiliate of the American Federation of Labor) and held its individual leaders liable for treble damages.<sup>49</sup> The workers had attempted to implement a "closed shop" policy, to put union labels on the hats, and to gain worker participation in some management decisions. According to the Court, they had succeeded in seventy of eighty-two hat factories in the United States; however, H.H. Roelofs & Company remained a holdout.<sup>50</sup> In turn, the laborers launched a strike against the employer and a secondary boycott against "any dealer or dealers who should handle [Roelofs'] products."<sup>51</sup> In this private suit against the union organizers, the Court found that the hatters' strike and boycott constituted an illegal conspiracy to restrain interstate commerce in their employer's wares.

In the wake of the *Danbury Hatters' Case*, the *American Federationist*, an American Federation of Labor (AFL) publication, called out the inconsistent treatment of labor versus employer tactics. Whereas a labor boycott was treated as an outright "conspiracy . . . punishable by heavy penalties," simultaneously courts allowed "employers to use the blacklist as freely as they please."<sup>52</sup> Ultimately, late nineteenth century labor organizations, such as the Knights of Labor and the AFL, did not seek emancipation from the wage-labor system, but rather they demanded equal rights and enhanced bargaining power as based on a "liberal, *laissez-faire* language of protest and reform."<sup>53</sup> Rather than simply being free *from* undue coercion and exploitation, the

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<sup>48</sup> On violence against laborers, see GOUREVITCH, *supra* note 21, at 99 n.11. On other coercive tactics against laborers, see TOMLINS, *supra* note 21, at 12–20, 48–51.

<sup>49</sup> *Danbury Hatters' Case*, 208 U.S. at 292 (1908) (applying treble damages against the individual labor organizers for restraint of trade); *see also* Hitchman Coal & Coke Co. v. Mitchell, 202 F. 512, 554 (N.D.W.V. 1912), *rev'd*, 214 F. 685, 714–16 (4th Cir. 1914) (reversing the holding that the union itself was an unlawful combination). *See also generally* DANIEL ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995).

<sup>50</sup> *Danbury Hatters' Case*, 208 U.S. at 289 n.1 (1908) (item 17 lists H.H. Roelofs & Company).

<sup>51</sup> *Id.* at 290 n.1 (item 19).

<sup>52</sup> Margaret A. Schaffner, *Effect of the Recent Boycott Decisions*, 36 ANNALS AM. ACAD. POL. & SOC. SCI. 277, 284–85 (1910) (quoting 15 AM. FEDERATIONIST (1908)); *see also* COMMONS ET AL., *supra* note 12, at 531 (explaining how a Supreme Court decision effectively "legalised 'blacklisting' of employés by employers").

<sup>53</sup> Forbath, *supra* note 21, at 1124 (emphasis added).

labor movement demanded greater protections *to* organize and assert their market power.<sup>54</sup> Doing so required some intervention against the judiciary's use of injunctions—especially under the new antitrust law—against laborers.

#### B. Labor Organizations, Self-Regulation, and the State: Early Approaches in Progressive Law and Economics

U.S. laborers found an important ally in a group of progressive economists, who lambasted the judiciary's use of injunctions against laborers, rejected legal orthodoxy's formalism, and offered an economic defense of labor organizations. This group largely centered at the University of Wisconsin. In 1903, Charles Van Hise became president of the University of Wisconsin through the help of Governor Robert La Follette, Sr., the famous Republican-*cum*-Progressive politician, who famously opposed “vast corporate combinations.”<sup>55</sup> In turn, Van Hise supported a notably progressive economics department at Wisconsin headed by Richard Ely and John Commons, the founders of the American Association for Labor Legislation.<sup>56</sup> This group of progressive liberal economists coalesced around their rejection of both the coercive power of the state *against* laborers as well as the neoclassical economics that supported those interventions.<sup>57</sup> For these scholars, antitrust law relied on an outdated social science of human relations—not just economic thinking—and they sought to replace that older, individualistic, neoclassical reasoning with a deductive science that viewed collective groups as a naturally occurring phenomenon that the law must embrace—not penalize and attack. These scholars and activists supported voluntary trade unionism as a legitimate and necessary form of economic and social organization, a collective *laissez-faire*, which could counter the growing market power of employers.

These progressive economists—such as Ely, Commons, Witte, E.R.A. Seligman, and others—embraced marginalist economics, which replaced the older classical economics of the labor theory of value. Marginalism posited that value—or price—was derived

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<sup>54</sup> CURRARINO, *supra* note 26, at 86–113.

<sup>55</sup> THE AMERICAN RADICAL 161 (Mari Jo Buhle et al. eds., 1994).

<sup>56</sup> See Robert S. Maxwell, *La Follette and the Progressive Machine in Wisconsin*, 48 IND. UNIV. PRESS 55, 58 (1952); see also MOSS, *supra* note 12, at 4–5.

<sup>57</sup> COMMONS ET AL., *supra* note 12, at 530–31 (explaining that the significant aspect of the *Danbury Hatters' Case* was the application of treble damages to the labor organizers).

from the subjective value assigned by purchasers, whereas the labor theory of value had posited that prices are determined by the labor inputs.<sup>58</sup> However, one of the leading marginalists of the era was also a committed neoclassical economist: John Bates Clark. Writing in 1907, J.B. Clark (who must be distinguished from his son, the progressive institutional economist John Maurice Clark) explained that the concept of marginalism instructed that, in competitive markets, prices would be driven to their marginal costs—or marginal revenue would equal marginal costs.<sup>59</sup> As a corollary, laborers earned only the marginal product of their labor,<sup>60</sup> and labor unions interfered with market mechanisms by raising wages and thus, diminishing overall social wealth. As one may note, not all marginalists were progressives; however, all progressive economists embraced the marginalist theory of value, and the empiricism that went with it. J.B. Clark rejected labor unions,<sup>61</sup> whereas his son embraced them.

The Wisconsin progressive economists pioneered industry-specific studies, which emphasized how embedded social customs dictated employee-employer working rules and increasingly limited labor cohesion, which redounded to the benefit of employers, allowing them to collect more than their fair share of returns.<sup>62</sup> They focused on variation across industrial sectors—coupled with the judiciary’s use of injunctions against organized laborers and the state’s use of troops to quell strikes that interfered with interstate commerce—and guided the labor movement toward embracing voluntary trade unionism during the formative era of American antitrust law.<sup>63</sup>

However, the first fissures in this progressive movement in U.S. economics began to emerge before the election of 1912, when

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<sup>58</sup> See JOHN R. COMMONS, *THE DISTRIBUTION OF WEALTH* 4–8 (1893).

<sup>59</sup> See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 197 (1991). In a similar vein, economist Francis A. Walker, writing in 1875, suggested that the value of wages is determined not by the amount of previously invested capital but by workers’ current productivity. “A decade later, Walker began developing his own theory of wages, suggesting that optimal wages should equal the workers’ productivity, and that many workers were in fact paid far less than they produced for their employers.” *Id.*

<sup>60</sup> JOHN BATES CLARK, *THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS* 161–67 (1914).

<sup>61</sup> See generally John Bates Clark, *Monopoly and the Struggles of Classes*, 18 *POL. SCI. Q.* 599 (1903).

<sup>62</sup> See generally JOHN COMMONS, *INSTITUTIONAL ECONOMICS* (1934).

<sup>63</sup> Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943*, 11 *L. & HIST. REV.* 59, 65 (1993) (citing John R. Commons, *Karl Marx and Samuel Gompers*, 41 *POL. SCI. Q.* 281, 285 (1926)). Ernst used the similar term “craft unionism.” *Id.*

antitrust reform and tariff policy took center stage in national electoral politics.<sup>64</sup> While Commons' and his students' embrace of trade unionism has been termed "collective laissez faire" or "industrial pluralism," other progressives believed that the state, rather than voluntary associations, should play a positive role in shaping and promoting a more equitable vision of industrial capitalism for workers.<sup>65</sup> In the decade between the *Danbury Hatters' Case* and World War I, the initial fracturing of this progressive group could be seen in their divergent analysis of the most pressing political economy questions of their day—namely, to what should we attribute the rise of trusts and combinations: efficiency or anticompetitive abuses? And, the follow-up question: How should the state govern them?

Progressives now split between those who embraced the inevitability of large-scale firms and endorsed a new program to regulate them and those who rejected that inevitability—positing that trusts and combinations had attained market power through anticompetitive tactics—and insisted that antitrust law should dismantle those combines. As an illustration of the former, Van Hise, though an engineer by training, wrote one of the most important books on industrial organization and antitrust policy for the time period, *Concentration and Control*.<sup>66</sup> Van Hise believed that many industries gained efficiencies through economies of scale and scope and those efficiencies were passed on to consumers, such as in the case of high fixed cost industries like steel production.<sup>67</sup> Such corporations posed a problem only in so far as their market power could be used to the detriment of the public interest or translated into undue political power.<sup>68</sup> Like Theodore

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<sup>64</sup> Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY, at 10 (Jon Butler ed., Oxford Univ. Press 2019).

<sup>65</sup> See Ernst, *supra* note 63, at 65–68.

<sup>66</sup> See generally CHARLES RICHARD VAN HISE, CONCENTRATION AND CONTROL: A SOLUTION OF THE TRUST PROBLEM IN THE UNITED STATES (1912) (advocating the creation of a commission to enforce regulated competition). For commentary on Van Hise's work, see *Van Hise on the Trusts: Nation Must Control Without Bridling Industrial Genius*, N.Y. TIMES, Oct. 14, 1912; THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS; LOUIS D. BRANDEIS; JAMES M. LANDIS; ALFRED E. KAHN 128, 139 (1984).

<sup>67</sup> Charles Richard Van Hise, President of the University of Wisconsin, Co-operation in Industry, Address at the Annual Meeting of the National Lumber Manufacturers Association 1, 2 (May 31, 1916).

<sup>68</sup> *Id.*



Roosevelt's 1912 Progressive Party platform,<sup>69</sup> Van Hise was committed to trust busting in that he believed that the federal regulation and control of certain large-scale industries would benefit the public, such as in telephone and telegraph lines.<sup>70</sup> Expert commissions could judge whether certain monopolistic industries required greater government oversight—not by breaking them apart and ruining the efficiencies they had created, but rather by regulating them through expert commissions.<sup>71</sup> Laborers might be folded into such a regulatory scheme.<sup>72</sup>

Yet, on the other hand, not all progressives agreed on the efficiencies of large-scale business or endorsed the commission idea for maintaining and regulating them. Unlike Van Hise, many of the most influential progressives of this era remained committed to what came to be known as “associationalism” (a variant of the industrial pluralism or trade unionism posited by Commons and Ely)—which entailed the state propping up voluntary associations of proprietors, laborers, or farmers to enhance organizational efficiencies as well as to protect those members' market share or power.<sup>73</sup> For those progressives, maintaining (if not enhancing) economic autonomy played a crucial role in promoting both economic opportunity and efficiency, and—equally important—decentralized political power in a liberal democracy. In other words, labor associations protected democratic values and embedded customs as well as economic autonomy and efficiency, even if antitrust law only focused on the very last of those effects.

Contrary to the associational view, Van Hise—and later Wesley Mitchell and Secretary of Commerce Herbert Hoover—embraced large-scale businesses for their efficiencies, and yet, they also insisted that the state should closely monitor how large-scale firms exercised their market power in order to stem anti-competitive conduct that might detrimentally effect competitors or consumers.<sup>74</sup> The economic autonomy aspect of associationalism seemed to matter less to them—critically—when it interfered

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<sup>69</sup> For example, see Theodore Roosevelt, *The Trusts, the People, and the Square Deal*, 99 OUTLOOK, Nov. 18, 1911, at 649.

<sup>70</sup> Van Hise, *supra* note 67, at 6–7.

<sup>71</sup> *Id.*

<sup>72</sup> See Theodore Roosevelt, *Nationalism and Special Privilege*, 97 OUTLOOK 145, 145–47 (Jan. 28, 1911).

<sup>73</sup> GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 117 n.3 (2009).

<sup>74</sup> Van Hise, *supra* note 67, at 7–8.

with the pursuit of market efficiency. Nevertheless, economic autonomy and its relationship to efficiency arguments remained critical to a group of progressive liberals, such as Commons, Ely, and Brandeis.

## II. THE ANTITRUST LABOR EXEMPTION: LOUIS BRANDEIS, INSTITUTIONAL ECONOMICS, AND “ASSOCIATIONALISM”

### A. Brandeis and the Institutionalists: Organization, Autonomy, and Power

The presidential election of 1912 is often portrayed as a pivotal moment for antitrust policy, and historians have identified it as initiating a significant shift toward a liberal-rights legal regime that continued to mature through the twentieth century.<sup>75</sup> In that four-way race between Woodrow Wilson, William Howard Taft, Theodore Roosevelt, and Eugene Debs, each candidate promised a different form of antitrust policy for the United States.<sup>76</sup> Ultimately, Woodrow Wilson won the election, to some extent as the result of his promise to “regulate competition” by prosecuting monopolies versus Roosevelt’s promise to “regulate[ ] monopoly” by bringing them under administrative supervision, but also because Roosevelt pulled voters from Taft by splitting the Republican Party ticket.<sup>77</sup>

Wilson employed Brandeis as a campaign advisor on antitrust reform.<sup>78</sup> Brandeis advocated dismantling monopolies to protect the independence and economic autonomy of independent proprietors, farmers, and laborers.<sup>79</sup> He believed this antimonopoly tradition was essential to maintaining liberal-democratic capitalism, which, he argued, required some level of decentralized economic power.<sup>80</sup> And that vision of economic autonomy was critical to market efficiency by maintaining competitive markets.<sup>81</sup> A Boston lawyer and activist, he famously decried the “curse of bigness”<sup>82</sup>

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<sup>75</sup> SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 1–2 (2009).

<sup>76</sup> See Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2026–27 (2015).

<sup>77</sup> See MILKIS, *supra* note 75, at 204–05, 270.

<sup>78</sup> See BERK, *supra* note 73, at 40.

<sup>79</sup> See *id.* at 42–43.

<sup>80</sup> See *id.* at 43–44.

<sup>81</sup> See *id.* at 66.

<sup>82</sup> See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 162 (1914).

and testified before Congress on the perils of corporate consolidations.<sup>83</sup> These, he said, created undue economic power and introduced market inefficiencies. That market power could be used to raise prices and collect supracompetitive profits; it could also be translated into undue political influence and imbue corporations with a corrupting influence within a liberal democracy.<sup>84</sup> That said, despite his notoriety for disclaiming bigness, Brandeis also recognized the efficiencies of scale.<sup>85</sup> While Wilson tempered Brandeis's language in his presidential campaign, Brandeis emerged as the historical figure most closely identified with the progressive Democratic politics of antitrust reform in product *and* labor markets, and his vision was one of associations countering the market power of industrial corporate capitalism.<sup>86</sup>

In addition to popularizing the antimonopolization provisions of the Sherman Act, perhaps Brandeis's most meaningful, and lasting, contributions to antitrust jurisprudence came through his gradual extension of the rule of reason to a variety of associational practices and vertical restraints, which had been met with categorical condemnation.<sup>87</sup> The commonality across this area of antitrust jurisprudence was the development of the rule of reason—a burden-shifting framework for evaluating the context, intent, market effects of various types of associational business conduct.

In terms of labor market reforms, for Brandeis it was obvious that both protective legislation and antitrust reforms were necessary to mitigate the imbalance in market power between employer and employee. The problem was that the Supreme Court had intervened to strike down certain protective legislation<sup>88</sup>—though certainly not all such laws<sup>89</sup>—and it had erroneously used the antitrust laws to enjoin legitimate efforts at union collective

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<sup>83</sup> See BERK, *supra* note 73, at 121.

<sup>84</sup> See BRANDEIS, *supra* note 82, at 188.

<sup>85</sup> See BERK, *supra* note 73, at 47.

<sup>86</sup> See generally LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890–1940 (2018).

<sup>87</sup> *Id.* Consider these examples, which are attributable to Brandeis's efforts to expand the rule of reason to treatment: *United States v. Colgate & Co.*, 250 U.S. 300 (1919), *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), and *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563 (1925).

<sup>88</sup> There is an immense literature on the so-called *Lochner* or liberty-of-contract era, most of which attempts to explain why the Court and particular justices created the substantive due process doctrine and used it to strike down protective legislation. For a review of that literature and its various schools of thought, see generally Kalman, *supra* note 10.

<sup>89</sup> See Novak, *supra* note 24, at 105.

bargaining. Brandeis believed that these outcomes were based on flawed economic reasoning due to a fundamental misunderstanding of economic realities. Rather than rely on presumptions based on models of perfect competition, Brandeis insisted that contextualizing real-world economic data revealed the true imbalances in market power faced by laborers and thus justified such protective legislation. For example, as a litigator, in 1907, Brandeis had pioneered what became known as the Brandeis brief, which employed social science data to defend Oregon's protective legislation against attacks that female working hours regulations constituted "class legislation" and thus, violated due process protections.<sup>90</sup> Brandeis, working closely with his sister-in-law Josephine Goldmark, took the physical differences between men and women as a given, as a natural starting point for evaluating types of associations and determining the legitimacy of the laws governing them.<sup>91</sup> For Brandeis, as was true for Commons and Witte, social science data revealed two things: that legal formalism failed to account for divergent needs and responsibilities within a society; and that the states' police powers offered sufficient latitude to protect, and empower, groups when they found their bargaining power diminished relative to their employers.

Associations provided a mode of economic and political organization for laborers as well as independent proprietors and farmer organizations that might rival the economic power of large-scale firms; however, these associations raised red flags in antitrust law because they coordinated collaboration among competitors.<sup>92</sup> Labor organizers and their supporters turned to the antitrust exemption to secure their existing right to organize and to immunize future activities. Brandeis influenced the drafting the Clayton Act, which, in part, was intended to remedy the historic, persistent, and growing imbalance in the bargaining power between employers and employees by removing antitrust law as a roadblock to certain union action. In addition to prohibiting specific business methods—such as tying, anticompetitive mergers, and

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<sup>90</sup> See *Muller v. Oregon*, 208 U.S. 412, 418–23 (1908).

<sup>91</sup> BERK, *supra* note 73, at 46.

<sup>92</sup> On independent proprietor associations, see generally PHILLIPS SAWYER, *supra* note 86. On farmer associations, see generally VICTORIA SAKER WOESTE, *THE FARMER'S BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865–1945* (1998).

interlocking directorates<sup>93</sup>—it also provided that labor “is not a commodity or article of commerce” and it immunized labor organizations from antitrust liability; however, it required that laborers carry out “lawfully” their “legitimate objects,” leaving room for judicial interpretation.<sup>94</sup> Brandeis worked to codify the Wisconsin progressives’ idea of trade unionism into a prospective law that would recalibrate market power among groups, which included but was not limited to laborers.

For many progressive economists, however, the Clayton Act appeared to be yet another symbol reifying the *status quo ante*, and during this age of the “associational state,”<sup>95</sup> World War I had shone a bright light on the new possibilities of government-led managed competition.<sup>96</sup> An outgrowth of frustration and optimism, a new school of economic thought developed from the existing critiques of neoclassical economics and the new potentiality for administrative interventions.<sup>97</sup> The term “institutionalist” first emerged from a conference of several progressive economists at the American Economic Association directly following the First World War.<sup>98</sup> Walton Hamilton is credited with coining the term, though he was involved in an ongoing conversation regarding the direction of the discipline of economics and economic theory.<sup>99</sup> In

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<sup>93</sup> Section 2 of the Clayton Act prohibits price discrimination, § 7 prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly,” and § 8 prohibits any person from being a director of two or more competing corporations if a merger of those companies would violate the law. 15 U.S.C. §§ 14, 18, 19.

<sup>94</sup> 15 U.S.C. § 17 (1914). Section 6 of the Clayton Act states that human labor “is not a commodity or article of commerce” and provides antitrust immunity for labor organizations “lawfully carrying out” their “legitimate objects thereof.” Section 20 of the Act provides that courts may not issue an injunction against labor organizations when such disputes concern “terms or conditions of employment.” 29 U.S.C. § 52 (1914). See AREEDA & HOVENKAMP, *supra* note 5, at § 255b.

<sup>95</sup> See generally BRIAN BALOGH, *THE ASSOCIATIONAL STATE: AMERICAN GOVERNANCE IN THE TWENTIETH CENTURY* (2015).

<sup>96</sup> For an overview, see generally PHILLIPS SAWYER, *supra* note 86, and ROBERT D. CUFF, *THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I* (1973). Professor Robert Cuff argued that “[t]he [War Industries Board] and its administrative program were a bundle of paradoxes where decentralization vied with centralization, competition with combination, individualism with integration, freedom with coercion.” *Id.* at 149.

<sup>97</sup> See NOVAK, *supra* note 24, at 187–88.

<sup>98</sup> See *Program of the Thirty-First Annual Meeting*, 9 AM. ECON. REV. 1, 1 (1919).

<sup>99</sup> See Geoffrey M. Hodgson, ‘Institution’ by Walton H. Hamilton, 1 J. INST. ECON. 233, 233–34 (2005).

his talk, he laid out a new agenda not only for economic theory but also for economic regulation.<sup>100</sup>

Hamilton's paper, which appeared in the *American Economic Review* the following year, surveyed the state of the discipline and called for revisions to better prepare for the forthcoming postwar economic adjustments.<sup>101</sup> He argued that the current preoccupation with subjective-value theory had led the discipline away from critical theory and toward nothing more than status quo apologists.<sup>102</sup> Economics had come to neglect the institutions—derived from custom, habit, and embedded legal institutions—that ordered economic relationships.<sup>103</sup> Although neoclassical economics was not wholly laissez-faire, according to Hamilton, economists of that school rarely investigated prevailing organizational or institutional arrangements and, instead, adhered to static versions of economic competition.<sup>104</sup> The world had changed, and was continuing to change, with industrialization, Hamilton and many other progressive economists argued, bringing new social problems and greater demand for control of powerful economic interests.<sup>105</sup> Institutional economics, he offered, was “concerned with industry in relation to human well-being,” not merely legal formalism or economic efficiency.<sup>106</sup>

Rather than seeking out “economics statics” and equilibriums to explain the “immutable” laws of industrial economies, Hamilton envisioned administrative agencies capable of identifying the “economic dynamics” that created and distributed value.<sup>107</sup> As a member of the War Labor Policies Board, he saw partnership between business, government, and social science that improved distribution and mitigated conflicts. New administrative bodies might collaborate with firms and business groups so as to gather information and help shape business policies through “conscious

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<sup>100</sup> Professor Malcolm Rutherford referred to Hamilton's “work on law and economics, industrial organization, and the social control of industry [as] one of the most important lines of institutionalist work.” RUTHERFORD, *supra* note 11, at 12.

<sup>101</sup> See generally Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309 (1919). The discussants were well-positioned to focus on the postwar adjustments: W.W. Stewart (War Industries Board), L.H. Haney (Federal Trade Commission), and B.M. Anderson, Jr. (National Bank of Commerce).

<sup>102</sup> See *id.* at 316.

<sup>103</sup> *Id.* at 311.

<sup>104</sup> *Id.* at 313.

<sup>105</sup> *Id.* at 312–13.

<sup>106</sup> Hamilton, *supra* note 101, at 311.

<sup>107</sup> *Id.* at 313–15.

control.”<sup>108</sup> Hamilton saw U.S. competition as cutthroat and detrimental to stable development and human flourishing. In response, his life’s work was dedicated to the pursuit of developing economic models and supporting legal reforms that employed the new science of management economics for a public purpose. He was particularly concerned with business-government collaborations that might raise wages and improve working conditions.<sup>109</sup> Through the 1920s, Hamilton continued to develop his vision for social control by administrative agencies and new managerial systems.<sup>110</sup> An important characteristic of the institutionalists was their insistence on deliberative, participatory management structures to improve intra- and inter-firm governance.<sup>111</sup>

Despite statutory changes and wartime experiences, a majority of the Supreme Court fell back on its older, classical interpretation of antitrust law as applied to labor disputes. In 1921, the Supreme Court interpreted the Clayton Act’s statutory exemption narrowly, and, as a result, the law protected only organized laborers’ direct strikes and boycotts, not secondary boycotts.<sup>112</sup> In that case, the Duplex Printing Press Company, a Michigan firm, sought an injunction against a machinist union. The union had secured an agreement with the majority of major printing press manufacturers to establish certain labor standards across the industry and, critically, across state lines. Duplex was a holdout, and the union retaliated with a range of both peaceful and threatening boycott tactics aimed at companies doing business with

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<sup>108</sup> *Id.* at 316.

<sup>109</sup> *See generally* WALTON HAMILTON & STACY MAY, *THE CONTROL OF WAGES* (1923).

<sup>110</sup> *See generally id.*; WALTON H. HAMILTON & HELEN R. WRIGHT, *THE CASE OF BITUMINOUS COAL* (1926). In these publications, Hamilton proposed a new system of industrial organization. He acknowledged the efficiency and cost benefits of economies of scale and scope and then argued that such large-scale corporations should not be dissolved but rather they should be reorganized so as to give laborers preferred stock and decision-making authority. Consumers would also be given shares based on their consumption. Managers and technocrats would be given nonvoting common stock. Those ideas were not put into policy, though the consumer representation clauses were added to the Bituminous Coal Conservation Act of 1935.

<sup>111</sup> *See generally, e.g.*, JOHN MAURICE CLARK, *SOCIAL CONTROL OF BUSINESS* (1926); Sumner H. Slichter, *The Organization and Control of Economic Activity*, in *THE TREND OF ECONOMICS* 303 (Rexford Guy Tugwell ed., 1924); DEXTER MERRIAM KEEZER & STACY MAY, *PUBLIC CONTROL OF BUSINESS: A STUDY OF ANTITRUST LAW ENFORCEMENT, PUBLIC INTEREST REGULATION, AND GOVERNMENT PARTICIPATION IN BUSINESS* (1930); Morris A. Copeland, *Some Phases of Institutional Value Theory* (1921) (Ph.D. dissertation, University of Chicago). Professor John Maurice Clark self-identified as an institutionalist, though much of his work employed the methods of neoclassical economics.

<sup>112</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 477–78 (1921).

Duplex.<sup>113</sup> Their protests extended to refusing to work on products made by Duplex, including the delivery of presses in New York.

While § 6 of the Clayton Act created a labor exemption, § 20 empowered private parties to seek an injunction against threatened property loss or damage by violation of the antitrust laws<sup>114</sup>—the two sections of the act now appeared in conflict as Duplex Printing requested the court to intervene against the union.<sup>115</sup> While the Court of Appeals refused to issue the injunction, the Supreme Court reversed, holding that *only* disputes “between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment” were protected from injunctive relief.<sup>116</sup> Anything outside of those “lawful” activities could be enjoined by a court; however, this narrow interpretation of lawful activity stripped laborers of much of their ability to use their own market power against employers, throwing them back into the unsavory classification of anticompetitive cartel.

The Court’s majority feared, and refuted, the exact thing Brandeis had hoped the revised antitrust laws might do—if the secondary boycott were exempted, the majority explained, then the antitrust laws “would confer upon voluntary associations of individuals formed within the states a control over commerce among the states that is denied to the governments of the states themselves.”<sup>117</sup> The majority highlighted the “extreme and harmful consequences” of the appellate court’s interpretation and pointed out that, ultimately, secondary boycotts harmed the “general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the antitrust laws.”<sup>118</sup>

For Justice Brandeis, who dissented in *Duplex Printing*, the majority’s logic belied not only the congressional intent behind the Clayton Act’s labor exemption but also the purpose and methodology of competition policy more generally. Justice Brandeis, who was joined by Justices Holmes and Clarke, provided a short

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<sup>113</sup> See *id.* at 463 (listing union tactics employed).

<sup>114</sup> Compare 15 U.S.C. § 17, with 29 U.S.C. § 52.

<sup>115</sup> *Duplex Printing*, 254 U.S. at 467–73.

<sup>116</sup> *Id.* at 470 (quoting 29 U.S.C. § 52).

<sup>117</sup> *Id.* at 473.

<sup>118</sup> *Id.* at 477–78.



recitation on antitrust adjudication, stressing that as “a better realization of the facts of industrial life” arose, many courts adapted their approach to the legality of strikes and recognized the collective self-interest exercised by union members striking for better wages or reduced hours.<sup>119</sup> By the 1920s, “when centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised.”<sup>120</sup> Those new facts, Justice Brandeis continued, changed public opinion regarding combinations of laborers. Striking or refusing to work would be considered “*damnum absque injuria*” unless “a judge considered [it] socially or economically harmful and therefore branded [it] as malicious and unlawful.”<sup>121</sup> That doctrine of malicious conspiracy came to be viewed as a reflection of “the social and economic ideas of judges, which thus became translated into law, [and] were prejudicial to a position of equality between workingman and employer.”<sup>122</sup> Thus, not only were laborers unable to effectively organize against labor market power, Justice Brandeis argued, but the Court was intervening in ways that appeared to prioritize the Justices’ personal beliefs or policy preferences over statutory intent.<sup>123</sup>

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<sup>119</sup> *Id.* at 481.

<sup>120</sup> *Duplex Printing*, 254 U.S. at 482.

<sup>121</sup> *Id.* at 485 (citing, inter alia, Lord Bowen in *Mogul S.S. Co. v. MacGregor*, [1892] A.C. 25).

<sup>122</sup> *Id.*

<sup>123</sup> Progressives of various types often portrayed their opposition—especially on the Court—as anti-labor and pro-business. That critique has informed the approach of progressive legal historiography, from Professor Charles Beard’s interpretation of the Constitution as enshrining the capitalist class interests, to Professor Max Lerner’s description of the early twentieth century Court as representing capitalist classes, to Professor Laura Kalman’s very recent defense of that historiographical approach to understanding the Gilded Age and Progressive Era. See Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 669, 671–72 (1933); Kalman, *supra* note 10, at 1022–27; CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 16 (1913). See also generally MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016). That mode of interpretation might be contrasted to the “revisionists” who, since the 1970s, have emphasized the ideological underpinnings and doctrinal lineages that shaped and limited the judiciary’s response to new forms of economic organization and regulation. See generally McCurdy, *supra* note 24; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985). And yet still others view the entire controversy as misguided, holding that the focus on the *Lochner* era obscures the true characterization of the era, which was a steady, if perhaps sometimes winding, march toward a modern administrative regulatory state. See NOVAK, *supra* note 24.

This “great confusion”<sup>124</sup> in case-by-case adjudication on labor conspiracy had required statutory intervention, Justice Brandeis explained. The Clayton Act had been “designed to equalize before the law the position of workingmen and employer as industrial combatants”<sup>125</sup> by removing “the element of *injuria* from the damages thereby inflicted.”<sup>126</sup> Furthermore, the text included not only “employers and employees” but also “persons employed and persons seeking employment,” showing that Congress had concerned itself with a greater range of employment relations.<sup>127</sup> Simply put, this was “organized competition”<sup>128</sup>—Duplex’s refusal to unionize had caused other major printing press producers to threaten to terminate their union contracts, the machinist union responded in kind by refusing to work on Duplex products.

Scarcely a year later, the Supreme Court narrowed the reach of the Commerce Clause in a headline-grabbing clash between coal miners and owners in western Arkansas. In *United Mine Workers v. Coronado Coal Co.*<sup>129</sup> (*Coronado I*), Chief Justice William Howard Taft dismissed antitrust charges brought against union miners who had resisted a mine operators’ efforts to implement an “open shop” policy, contrary to union contracts.<sup>130</sup> Chief Justice Taft, the Republican incumbent who had lost the election of 1912 to Wilson, recounted in great detail the employers’ underhanded and provocative tactics as well as the union members’ responses.<sup>131</sup> With regards to antitrust law, the mine owners sought damages for the destruction of the mine and accompanying structures, and argued that because the coal had been intended for interstate sale, antitrust liability should apply both to the union and its individual representatives.<sup>132</sup> A reluctant Chief Justice Taft refused, in part.<sup>133</sup> While the Court held that the union could be sued under antitrust law, it did not apply liability in this case. The Court relied on *E.C. Knight* and *Hammer*

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<sup>124</sup> *Duplex Printing*, 254 U.S. at 485. On the “great confusion,” Justice Brandeis cited A.V. Dicey, *The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century*, 17 HARV. L. REV. 511, 532 (1904).

<sup>125</sup> *Id.* at 484.

<sup>126</sup> *Id.* at 486.

<sup>127</sup> *Id.* at 488.

<sup>128</sup> *Id.* at 486.

<sup>129</sup> 259 U.S. 344 (1922).

<sup>130</sup> See Stanley I. Kutler, *Chief Justice Taft, Judicial Unanimity, and Labor: The Coronado Case*, 24 HISTORIAN 68, 68–72 (1961).

<sup>131</sup> See *Coronado I*, 259 U.S. at 393–94.

<sup>132</sup> *Id.* at 392–95.

<sup>133</sup> Cf. Kutler, *supra* note 130, at 73.

*v. Dagenhart*,<sup>134</sup> which had struck down a federal child labor law because it regulated manufacturing rather than interstate commerce, and held that despite the “outrages, felonies, and murders” that took place at the Coronado Mine, “coal mining [was] not interstate commerce.”<sup>135</sup> Chief Justice Taft’s opinion echoed Justice Brandeis’s unpublished dissent, which he had prematurely prepared and which had come to the same conclusion with regards to the question of interstate commerce.<sup>136</sup> The Court went further, stating that the amount of coal mined at Coronado was not likely to “have a substantial effect on prices of coal in interstate commerce.”<sup>137</sup> And so it was remanded with new jury instructions.

Legal historian Stanley Kutler has argued that, according to Chief Justice Taft’s papers, he had wanted to apply antitrust liability to the miners in this case. In order to carry a unanimous Court, however, Chief Justice Taft agreed with Justice Brandeis that the Commerce Clause doctrine might restrict the application of antitrust law.<sup>138</sup> The compromise reached between Chief Justice Taft and Justice Brandeis secured a unanimous Court opinion, adhered to existing precedent, and carved out an antitrust exemption for local union activity; however, it also reified a Commerce Clause doctrine that was increasingly rejected by progressive liberals. Many progressives argued that technological advancements of industrialization rendered dual federalism a mode of governance better relegated to the previous century, and that the modern era required a broad reading of the Commerce Clause to empower the federal government to regulate pertinent issues of the day, such as child labor, and effectively immunize labor from antitrust law.<sup>139</sup>

The problem, of course, was that the broader the Commerce Clause, the more likely that antitrust liability would attach. On remand, the jury acquitted the miners in *Coronado Coal Co. v.*

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<sup>134</sup> 247 U.S. 251 (1918).

<sup>135</sup> *Coronado I*, 259 U.S. at 413, 407. Another critical part of this ruling was that labor unions were suable as an unincorporated association, citing *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897). *Id.* at 391–92. However, the Court did not find liability due to the local nature of the acts. *Id.* at 408–11.

<sup>136</sup> ALEXANDER M. BICKEL, UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 84–97 (1957).

<sup>137</sup> *Coronado I*, 259 U.S. at 412.

<sup>138</sup> Kutler, *supra* note 130 at 72–74.

<sup>139</sup> See, e.g., Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in CORPORATIONS AND AMERICAN DEMOCRACY 109 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

*United Mine Workers*<sup>140</sup> (*Coronado II*) and the mine operators appealed all the way back to the Supreme Court. This time, however, the mine owners had obtained new testimony from a disgruntled union miner and a local doctor who testified that the initial strike and subsequent destruction of property, in fact, had been intended to disrupt interstate shipments of nonunion coal.<sup>141</sup> Additionally, new expert testimony revised the mine's capacity—from five thousand tons per week to five thousand tons per day—thus negating the *Coronado I* holding that such a local strike was “an indirect and remote obstruction to that commerce.”<sup>142</sup> Subsequently, a unanimous Court held that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of states other than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines.<sup>143</sup>

For progressive liberals, Justice Brandeis defended many of these types of organizational arrangements as necessary to bolster the bargaining power of union laborers—“not maliciously, but in self-defense”—and he insisted that such associations should be judged by the rule of reason (if not exempt from judicial scrutiny).<sup>144</sup> He defended associations of independent proprietors, farmers, and laborers as often—though not always—providing procompetitive benefits,<sup>145</sup> such as gathering and disseminating industry-specific information, creating voluntary rules to facilitate fair trade practices, and even creating cooperatives that could pool buying power and marketing efforts.<sup>146</sup> Although a

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<sup>140</sup> 268 U.S. 295 (1925).

<sup>141</sup> *Id.* at 301.

<sup>142</sup> *Id.* at 310.

<sup>143</sup> *Id.* The case was eventually settled. See EDWARD BERMAN, LABOR AND THE SHERMAN ACT 128 (1930).

<sup>144</sup> *Duplex Printing*, 254 U.S. at 480; see also *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 263–74 (1917) (Brandeis, J., dissenting) (arguing that the Court majority had erroneously preserved “yellow dog contracts,” which forbade union membership, and insisting that union membership was a legitimate method by which laborers might counter the bargaining power of employers).

<sup>145</sup> See *Duplex Printing*, 254 U.S. at 482 n.7 (Brandeis, J., dissenting).

<sup>146</sup> *Bedford Cut Stone Co. v. Journeymen Cutters' Ass'n.*, 274 U.S. 37, 57–59 (1927) (Brandeis, J., dissenting). For Republican Party efforts in a similar vein, see Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an “Associative State,” 1921–1928*, 61 J. AM. HIST. 116, 139–40 (1974). Hoover was less interested in economic and political decentralization—the effects that Justice Brandeis sought. Instead, Hoover supported trade associations as a conduit to greater market efficiencies.

great deal of attention has focused on Justice Brandeis declaiming the curse of bigness, in labor cases he suggested that the rule of reason should be deployed to investigate the relevant facts involved in the dispute and, ultimately, to determine if the restraint at issue was reasonable in so far as it might be ancillary to a legitimate agreement; whereby, union organization might enhance market competition by empowering those most threatened by the shifting headwinds of modern industrial capitalism.<sup>147</sup>

As Justice Brandeis lamented in his last major labor dissent, *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*,<sup>148</sup> the Court had long ago created the rule of reason<sup>149</sup> and then used it to “permit capitalists to combine”<sup>150</sup> through mergers and acquisitions, listing the examples of *United States v. U.S. Steel Corp.*<sup>151</sup> and *United States v. United Shoe Machinery Co.*<sup>152</sup> In *Bedford Cut Stone*, the majority held that union laborers could not collectively refuse to work on nonunion products that had been transported through interstate commerce, noting that “*Duplex Co. v. Deering* . . . might serve as an opinion in this case.”<sup>153</sup> But, in truth, Justice George Sutherland’s majority opinion did not apply the logic of dual federalism from *Duplex Printing*; instead, the Court held that the true test was whether the restraint interfered with the “natural flow in interstate commerce.”<sup>154</sup> For Justice Brandeis, however, this ruling “reminds [one] of involuntary servitude” because it required work on goods that laborers believed curtailed their own market power.<sup>155</sup> When coupled with the text of the Clayton Act, Justice Brandeis concluded:

It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that

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<sup>147</sup> See *Bedford Cut Stone*, 274 U.S. at 58.

<sup>148</sup> 274 U.S. 37 (1927).

<sup>149</sup> *Id.* at 56; see also *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911).

<sup>150</sup> *Bedford Cut Stone*, 274 U.S. at 65.

<sup>151</sup> 251 U.S. 417 (1920).

<sup>152</sup> 247 U.S. 32 (1918).

<sup>153</sup> *Bedford Cut Stone*, 274 U.S. at 49; see also Edwin E. Witte, *The Journeymen Stonecutters' Decision and Other Recent Decisions Against Organized Labor*, 17 AM. LAB. LEGIS. REV. 139, 140 (1927).

<sup>154</sup> *Bedford Cut Stone*, 274 U.S. at 54.

<sup>155</sup> *Id.* at 65.

course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.<sup>156</sup>

Under the majority's shifting dual federalism, the Clayton Act's labor exemption, it appeared, was not much of an exemption at all. In fact, now it had been used to extinguish the rule of reason in cases of secondary boycotts.<sup>157</sup>

For economic institutionalists and legal realists, these majority decisions ignored the "economic realities pertaining to collective bargaining."<sup>158</sup> Because workers lacked sufficient economic strength to compel employers to accept union agreements, the tactics of refusal to work on nonunion goods or of the secondary boycott presented the means by which union laborers protected their own interests. Thus, Commons concluded that the preceding cases "really constitute[d] an interference with the right to bargain collectively."<sup>159</sup> And, by 1929, the federal antitrust laws had been predominantly used against laborers, as opposed to producer suits, with the Department of Justice bringing twenty-eight criminal prosecutions and injunctions.<sup>160</sup> In response, the American Federation of Labor redoubled efforts towards an anti-injunction bill.<sup>161</sup> Ultimately, Senator George Norris gathered several social scientists, including Felix Frankfurter, Herman Oliphant, Donald Richburg, Francis Sayre, and Edwin Witte, who had supported union efforts at legal reform and invited them to draft a new federal anti-injunction bill.<sup>162</sup> Rather than producing a new substantive law of industrial relations, the bill largely focused on codifying a procedural approach to the problem of industrial disputes.<sup>163</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> *See id.* at 63–65.

<sup>158</sup> JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 395 (4th ed. 1936).

<sup>159</sup> *Id.* at 396.

<sup>160</sup> *See generally* U.S. DEP'T OF JUST., *THE FEDERAL ANTITRUST LAWS WITH AMENDMENTS: LIST OF CASES INSTITUTED BY THE UNITED STATES AND CITATIONS OF CASES DECIDED THEREUNDER OR RELATING THERETO* (1928).

<sup>161</sup> *See* Matthew Woll, *Organized Labor Demands Repeal of the Sherman Act*, 147 *ANNALS AM. ACAD. POL. & SOC. SCI.* 186–88 (1930); WITTE, *supra* note 12, at 274–76.

<sup>162</sup> *See* WITTE, *supra* note 12, at 274 n.4.

<sup>163</sup> *See id.* at 277–79.

## B. The First New Deal's Associationalism

Two pieces of legislation reordered the market power dynamics between capital and labor. The ideas espoused in them preexisted Roosevelt's New Deal, as we have seen; however, these labor laws formed the basis of the New Deal policy package that reordered the social contract between employer and employee, and indeed even between citizen and state.<sup>164</sup> In 1932, three years into the Great Depression, Congress passed and President Herbert Hoover signed the Norris-LaGuardia Act, which prohibited yellow-dog contracts<sup>165</sup> and restricted the federal judiciary's use of injunctions against labor strikes, pickets, or boycotts.<sup>166</sup> Similar to the Clayton Act, the act applied specifically to labor disputes; however, it had a broader and more inclusive definition of a "labor dispute." The labor dispute might involve simply a controversy regarding the terms or conditions of employment, and it would apply to participants on the labor side "regardless of whether or not the disputants stand in the proximate relation of [the] employer and employee."<sup>167</sup> However, this transformation of laborers' market power to organize and countervail the power of their employers was incomplete until Congress passed the National Labor Relations Act of 1935, which empowered the National Labor Relations Board (NLRB) to intervene in labor disputes, moving "from mediation to majority rule."<sup>168</sup> It removed disputes from judicial scrutiny.

The First New Deal created opportunities for the state to empower existing associations, of laborers and of producers, and to use them to achieve macroeconomic goals.<sup>169</sup> On the labor side, the New Deal jettisoned the trade unionists' commitment to voluntary organization of the shopfloor and instead embraced collective

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<sup>164</sup> See generally DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, in 9 *THE OXFORD HISTORY OF THE UNITED STATES* (1999).

<sup>165</sup> Yellow-dog contracts "requir[e] as a condition of employment that workers sign individual agreements not to join a union while employed." COMMONS & ANDREWS, *supra* note 158, at 387.

<sup>166</sup> 29 U.S.C. §§ 101–115; see Ernst, *supra* note 63, at 78.

<sup>167</sup> AREEDA & HOVENKAMP, *supra* note 5, at § 255b n.9 (quoting 29 U.S.C. § 113(c)).

<sup>168</sup> Ernst, *supra* note 63, at 80 (citing TOMLINS, *supra* note 21, at 115).

<sup>169</sup> See generally ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1995).

bargaining units that could now be assembled and thereby protected by the state.<sup>170</sup> In the throes of the Great Depression, this elevated federal authority was intended to promote industrial stability, forestall future economic depression, and bolster consumer demand, according to leading labor and legal historians.<sup>171</sup>

### III. THE SECOND NEW DEAL AND THE RETURN OF ANTITRUST ENFORCEMENT

#### A. The First New Deal's Demise

Associations played a pivotal role in the organization and administration of the First New Deal. When it receded, however, it exposed what appeared to be a highly cartelized economy, raising antitrust red flags for enforcers. In terms of competition policy, the First New Deal embraced a coordinated economy largely managed by various associations, monitored by a revolving cast of Washington bureaucrats within the National Recovery Administration (NRA), and unmolested by antitrust enforcers at the Department of Justice and Federal Trade Commission.<sup>172</sup> The Brandeisian vision of associationalism had been transformed into a top-down, mandatory system of coordination, which center firms coopted for their benefit. The Second New Deal took a decidedly different approach. The shift between the First and the Second New Deals has been attributed to a variety of forces, including the internal disputes and disillusionment within the agencies, the NRA's failure to reflate prices, the faltering popularity of the agencies, and finally, the intervention by the Supreme Court's striking down the National Industrial Recovery Act (NIRA) as unconstitutional in May 1935.<sup>173</sup>

By December of the following year, the Department of Justice Antitrust Division had launched a renewed antitrust enforcement

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<sup>170</sup> See Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980*, at 122 (1989).

<sup>171</sup> Ernst, *supra* note 63, at 80; *cf.* TOMLINS, *supra* note 21, at 103–08; JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, VOLUME I (1933–1937)*, at 149–88 (1974); PETER H. IRONS, *THE NEW DEAL LAWYERS* 21–27 (1982).

<sup>172</sup> On the influence of institutional economics and trade-association approaches to managing competition through sector-level agreements, see generally PHILLIPS SAWYER, *supra* note 86; BERK, *supra* note 73, at 93–95, 110–11; HAWLEY, *supra* note 169, at 19–34 (on § 7a labor exemption).

<sup>173</sup> For an overview, see generally HAWLEY, *supra* note 169. See also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (striking down the NIRA).



campaign. One of the headline cases was against Socony-Vacuum Oil Company (one of the world's largest oil producers) and other U.S. oil refiners for conspiring to fix prices in violation of the Sherman Act.<sup>174</sup> The defendants responded that the New Deal agencies had requested their participation in a price stabilization plan and, additionally, that those regulators had tacitly approved their output-restricting scheme.<sup>175</sup> Solicitor General Robert Jackson argued otherwise: for the Department of Justice, the agreement itself was enough to warrant a categorical condemnation. Showings of tacit approval from the defunct NRA or the Department of the Interior, which the president authorized to oversee the petroleum industry's code of fair competition, or of intent to alleviate "so-called competitive abuses or evils" were immaterial—the refiners had no authority to make such an agreement.<sup>176</sup> The indictment drew from the Court's *United States v. Trenton Potteries Co.*<sup>177</sup> ruling, applying a categorical prohibition against cartel price-fixing, as well as *United States v. Trans-Missouri Freight Ass'n*,<sup>178</sup> a seminal anticartel ruling from 1897.<sup>179</sup>

It remained unclear, however, whether renewed anticartel policy on the product-market side would affect the exercise of labor organizations' new statutory rights, or how federal policies intended to bolster mass purchasing power would interact with labor unions' efforts to strengthen their own market power against employers. The economically painful and politically consequential Roosevelt Recession of 1937 pushed U.S. liberals "halt-ingly but decisively toward a revised notion of political economy"

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<sup>174</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (holding that a purchasing agreement among West Texas oil refiners to remove distressed oil from the market categorically violated the Sherman Act; the original indictment charged twenty-eight companies and fifty-seven individuals).

<sup>175</sup> *Id.* at 225–27 (rejecting that argument).

<sup>176</sup> *Id.* at 218. The Secretary of the Interior acted as the administration for the code and established a Petroleum Administration Board.

<sup>177</sup> 273 U.S. 392 (1927).

<sup>178</sup> 166 U.S. 290 (1897).

<sup>179</sup> The prosecution relied on *Trenton Potteries Co.*, 273 U.S. 392, which struck down an agreement among toilet producers controlling 82% of the national market to fix prices. See *Socony-Vacuum*, 310 U.S. at 212. *Trans-Missouri* is cited in *Socony-Vacuum*, 310 U.S. at 224 n.59.

that embraced “moderate Keynesianism and an expanding welfare state.”<sup>180</sup> Indeed, economist John Maynard Keynes had famously written an open letter to Roosevelt urging him to cease output restrictions, reinstate competition, and boost aggregate demand through federal loan expenditures.<sup>181</sup> For historians, who have emphasized the role of antitrust policy debates as informing a “new [U.S.] creed,” the adoption of Keynesian economics revised the very notion of the liberal state, setting it on a narrower path to reflation and stability.<sup>182</sup>

#### B. Thurman Arnold and the Department of Justice Cases Against Labor

Despite the gains made by laborers through the Great Depression, labor yet again found itself caught in the crosshairs of shifting federal policy. At the center of this renewed antitrust enforcement stood the indefatigable Thurman Arnold, who led the Antitrust Division between March 1938 and January 1943. Arnold was a progressive Democrat and an ardent New Dealer, but, as became clear when he joined the Department of Justice, he was an unabashed trustbuster who viewed himself as something of a crusader against concentrations of power. As a Yale professor, Arnold had critically disabused the public of antitrust law’s utility as much more than a reified symbol—a folklore—of capitalism, which preserved underlying power relationships and uneconomic practices.<sup>183</sup> That critique lent itself to progressive liberals’ search for new symbols, statutes, and doctrines that might meet the socioeconomic challenges of the times.<sup>184</sup> He seemed like a promising choice for the appointment. And yet, despite his commitment to the New Deal project and his seeming

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<sup>180</sup> See Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 *J. AM. HIST.* 557, 557–58 (1993). On President Roosevelt’s embrace of Keynesian spending in April 1938 and his subsequent message to Congress on the problem of economic concentration, see generally Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 *BUS. HIST. REV.* 1 (1982).

<sup>181</sup> John Maynard Keynes, *An Open Letter to President Roosevelt*, *N.Y. TIMES*, Dec. 31, 1933.

<sup>182</sup> ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 110, 107, 116–17 (1995).

<sup>183</sup> See generally THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

<sup>184</sup> See Thurman Arnold to Harold J. Laski, Jan. 9, 1936, in *VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD* 217–18 (Gene M. Gressley ed., 1977); see also WARREN J. SAMUELS, *ESSAYS IN THE HISTORY OF HETERODOX POLITICAL ECONOMY* 285–86 (1992).

irreverence toward the law, he also firmly believed that antitrust law must play a necessary, if perhaps insufficient, role in maintaining market competition.<sup>185</sup>

Looking back at his time at the Department of Justice, Arnold recounted, “I was convinced that national planning was impossible without strict enforcement of the antitrust laws, because without those laws we would wind up in a system of domestic and international cartels.”<sup>186</sup> Indeed, Arnold’s vision for a revived and strengthened antitrust enforcement program proved amenable to the Keynesian focus on federal programs aimed at boosting aggregate demand through consumer purchasing power. In tandem with those (still nascent) macroeconomic policy goals, Arnold deployed the microeconomics of antitrust law to protect—or reinstate—the idea of market competition producing reasonable prices, as opposed to that price deemed reasonable by the machinations of cartels or monopolists, or associates for that matter. While Arnold vastly expanded the Antitrust Division’s funding, personnel, use of consent decrees, and criminal investigations, his persistent and clearest message upon taking office was that he would attack concentrations of economic power wherever he found them.<sup>187</sup>

Rolling back the vestiges of the First New Deal’s coordinated economy took center stage and had the appearance of disavowing Brandeis’s associationalism. Like Brandeis, Arnold was not a neoclassicist, but he did adhere to the idea that market competition was an important symbol in U.S. political economy and a necessary mechanism to preserve economic opportunity, which in turn, fostered autonomy, innovation, and progress. According to Arnold, his anticartel prosecutions would protect small independent business, lower barriers to entry, encourage production, im-

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<sup>185</sup> Thurman Arnold to Rexford G. Tugwell, May 26, 1967, in *VOLTAIRE AND THE COWBOY*, *supra* note 184, at 471.

<sup>186</sup> *Id.* On the problem of international cartels, see Laura Phillips-Sawyer, *Jurisdiction Beyond Our Borders: United States v. Alcoa and the Extraterritorial Reach of American Antitrust, 1909–1945*, in *ANTIMONOPOLY AND AMERICAN DEMOCRACY* (Daniel A. Crane & William Novak eds., forthcoming 2023).

<sup>187</sup> See Gene M. Gressley, *Introduction*, in *VOLTAIRE AND THE COWBOY*, *supra* note 184, at 47.

prove efficiencies, and finally, guard against political corruption.<sup>188</sup> However, these suits also revived the most contentious element of antitrust law, especially for the New Deal Democratic coalition—namely, antitrust labor prosecution.<sup>189</sup>

Arnold professed to be a union supporter;<sup>190</sup> yet, he also viewed them as potentially yet another “bottleneck of business” that might impede economic recovery or stymie technological progress.<sup>191</sup> Under Arnold’s guidance, the Antitrust Division “instigated 215 investigations and brought 93 suits.”<sup>192</sup> And he took umbrage against those news outlets that criticized his approach to trust busting, whether it was against the *United States v. Socony-Vacuum Oil Co.*<sup>193</sup> case, the *American Medical Ass’n v. United States*<sup>194</sup> case, or his several labor indictments.<sup>195</sup> According to legal historian Daniel Ernst, Arnold brought 107 indictments against labor organizations, three-quarters of which targeted the construction industry.<sup>196</sup> Unreasonable restraints included exercising market power in concert with other groups to

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<sup>188</sup> Thurman Arnold, *Labor Against Itself*, COSMOPOLITAN MAG. (Nov. 1943), Univ. of Wyo., Am. Heritage Ctr., Thurman Wesley Arnold Papers, Accession Number 627, Box 81, Folder 2. In a nod to Justice Brandeis, Arnold wrote to Hutcheson:

Such practices go beyond even the dissenting opinions of the Supreme Court of the United States, which recognize a broader scope for the legitimate activities of labor unions than the majority opinions. In our anxiety to be fair to labor, we are not subjecting to criminal prosecution practices which can be justified even under the dissenting opinions of the United States Supreme Court.

*Government Lists Punishable Acts of Labor Unions*, N.Y. TIMES, Nov. 23, 1939, at 1.

<sup>189</sup> Arnold seemed to believe that he could take on cases deemed “too hot” by political actors because “I have no political ambitions whatever and therefore this kind of pressure cannot be put upon me.” Thurman Arnold to Dorothy Thompson, Nov. 27, 1939, in VOLTAIRE AND THE COWBOY, *supra* note 184, at 296.

<sup>190</sup> Thurman W. Arnold, U.S. Assistant Att’y Gen., Statement Before the Temporary National Economic Committee with Respect to the Application of Antitrust Laws to Labor Unions 164–65 (Feb. 13, 1941), in TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATIONS OF CONCENTRATION OF ECONOMIC POWER: FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE (1941).

<sup>191</sup> THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS 42, 58 (1940); *see also* Maria Ponomarenko, *The Department of Justice and the Limits of the New Deal State, 1933–1945* (2010) (Ph.D. dissertation, Stanford University).

<sup>192</sup> GRESSLEY, *supra* note 187, at 47 (citing ARNOLD, *supra* note 191, at 277).

<sup>193</sup> 310 U.S. 150 (1940).

<sup>194</sup> 317 U.S. 519 (1943).

<sup>195</sup> On the *Socony-Vacuum* case, *see* Thurman Arnold to Jerome Frank, May 27, 1938, in VOLTAIRE AND THE COWBOY, *supra* note 184, at 270–71. On the *AMA* case, *see* Thurman Arnold to Eugene Meyer, Aug. 5, 1938, in VOLTAIRE AND THE COWBOY, *supra* note 184, at 273, and Thurman Arnold to Hamilton Owens, Sept. 30, 1938, in VOLTAIRE AND THE COWBOY, *supra* note 184, at 274–75.

<sup>196</sup> *See* Ernst, *supra* note 63, at 94.

effectively block labor-saving technologies or, critically, to quash a competing labor organization. It was the latter, intervening in a building-trades jurisdictional dispute, that gained him notoriety and ultimately, ouster-by-promotion from the Department.<sup>197</sup>

The rupture of the AFL-CIO union in 1937 helped spur a wave of jurisdictional disputes between rival unions and their affiliates, wherein a strike or boycott was called in order to compel an employer to contract with one union rather than another.<sup>198</sup> These jurisdictional disputes revealed both the strength and the limitations of the new administrative approach—codified in the NLRA—to mitigating the spillovers from such industrial disputes. The Court had affirmed the NLRB’s authority, granted by the Commerce Clause, to intervene in industrial disputes, mandate and monitor union elections, and certify results.<sup>199</sup> The Court referred back to the *Coronado* cases, which had required a substantial effect on interstate commerce for antitrust standing.<sup>200</sup> However, the NLRB lacked the statutory grant to prevent subsequent strikes or violence. Of course, now the problem for laborers changed—the NLRB victory meant that steel production facilities qualified as interstate commerce, however, labor’s victory in the first *Coronado* case had depended upon the Sherman Act *not* reaching mining. Here, Arnold seems to have seen an opportunity to use the antitrust laws to intervene in several ongoing interunion jurisdictional disputes, which also involved secondary boycotts to compel businesses to comply with union demands to deal with one union over another—one of the most contentious areas of antitrust labor prosecutions.

To illustrate, in early November 1938 a federal grand jury returned an indictment against four union officials of a carpenters’ union, including William “Big Bill” Hutcheson, who had led a strike against their employer—Anheuser-Busch brewery. The strike was a result of a flare-up in a “25-year-old jurisdictional dispute between the carpenters and machinists unions over the installation of certain types of equipment” at the brewery.<sup>201</sup> Now, the carpenters refused to work until the brewery ceased to work with the machinists, an AFL group.<sup>202</sup> What became known as the

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<sup>197</sup> SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 109 (2005).

<sup>198</sup> Louis L. Jaffe, *Inter-Union Disputes in Search of a Forum*, 49 YALE L.J. 424, 444–54 (1940).

<sup>199</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 39–40 (1937).

<sup>200</sup> See *id.*

<sup>201</sup> *Trust Jury Indicts Carpenters’ Heads*, N.Y. TIMES, Nov. 4, 1939, at 10.

<sup>202</sup> See *id.*

*Hutcheson* case proceeded headlong against the laborers, which “r[a]ng with reminiscence” of previous suits, like *Duplex Printing*, which struck at the heart of labor’s organizational capabilities.<sup>203</sup>

Criticism of Arnold abounded,<sup>204</sup> but it was his decision to employ antitrust indictments in union jurisdictional disputes that earned him the greatest scorn.<sup>205</sup> Law professor Louis Jaffe commented that Arnold’s indictments were “a dangerous response to a situation that has become exasperating to the point of madness.”<sup>206</sup> Dangerous, he said, because laborers believed that the judiciary would fall back on its bias against labor.

The criticisms seem to have shaken Arnold, who professed to Solicitor General Robert Jackson that he had contemplated resigning over the public controversy and the lack of institutional support from Attorney General Frank Murphy.<sup>207</sup> But, on the point of doctrine and his own intentions behind the *Hutcheson* indictment, Arnold stated that he thought it would be an opportunity for the Court to institutionalize Justice Brandeis’s dissent in *Bedford Cut Stone*, where he accepted the more expansive interpretation of interstate commerce and focused solely on determining the reasonableness of the restraint.<sup>208</sup>

### C. Labor’s Liberation from Antitrust Law

In two antitrust labor injunction cases, the Roosevelt Court<sup>209</sup> significantly reinterpreted the antitrust laws beyond simply granting a jurisdictional mandate over interstate commerce and that gave the statutes their substantive interpretation that hinged on both intent and purpose as well as market power.

<sup>203</sup> Jaffe, *supra* note 198, at 424; see also Max Lerner, *Trust-Buster’s White Paper*, NEW REPUBLIC, Sept. 16, 1940, at 390.

<sup>204</sup> See, e.g., Henry Hazlitt, *This “Folklore” of Capitalism: A Dissenting Opinion on Thurman Arnold’s Dismissal of Law and Economics as a “Theology”*, N.Y. TIMES, Feb. 13, 1938, at 88; James Burnham, *Capitalism, American Style*, 4 PARTISAN REVIEW 50, 50–53 (1938); Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 689 (1938).

<sup>205</sup> For example, see Henry Epstein, *Arnold View Disputed*, N.Y. TIMES, Nov. 26, 1939, at 8E. See also Edwin E. Witte, *A Critique of Mr. Arnold’s Proposed Antilabor Amendments to the Antitrust Laws*, 32 AM. ECON. REV. 449, 452–54 (1942).

<sup>206</sup> Jaffe, *supra* note 198, at 424.

<sup>207</sup> *Thurman Arnold to Robert H. Jackson, Jan. 23, 1940*, in VOLTAIRE AND THE COWBOY, *supra* note 184, at 301–02.

<sup>208</sup> Arnold told Jackson that his *Hutcheson* indictment was “based on the dissenting opinion” in the *Bedford Cut Stone* case. *Id.*; see also *Bedford Cut Stone*, 274 U.S. 37, 58 (Brandeis, J., dissenting).

<sup>209</sup> Roosevelt’s appointments included Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy. See Phillips Sawyer, *supra* note 64, at 13 n.63.

Brandeis had recently retired from the Court in early 1939; however, his voice echoed through these opinions.

The first case, *Apex Hosiery v. Leader*,<sup>210</sup> involved a private action for antitrust damages against a local union for holding a sit-down strike, which had taken over the Apex Hosiery Company in order to compel unionization within that firm. The laborers seized the plant, changed the locks, and destroyed machinery.<sup>211</sup> Although 80% of the product was intended for interstate trade, Justice Harlan Fiske Stone, writing for the Court, held that the Sherman Act would not condemn the conduct—simply put, this was not a conspiracy with the intent or effect to *unreasonably* control the market.<sup>212</sup> While the Court considered it “settled” that the antitrust laws would apply to laborers, Justice Stone continued with a historical exposition of antitrust law, complete with copious footnotes, moving from its origins in common law to the Court’s adoption of the rule of reason.<sup>213</sup> The rule of reason permitted restraints that were deemed ancillary to a legitimate business purpose, and the Court applied it to non-labor associations. Although the Court had not explicitly applied it to industrial disputes a similar logic of direct or indirect effects pervaded recent antitrust labor cases.<sup>214</sup> For Justice Stone, the actions taken were primarily intended to strengthen labor’s local bargaining power, not to restrain interstate trade, and thus, fell outside of the Sherman Act’s ambit.<sup>215</sup>

The following year, in *Hutcheson*, Justice Felix Frankfurter, writing for the Court, explicitly rejected Thurman Arnold’s use of antitrust law against laborers, and thereby initiated an important settlement between antitrust law and organized labor.<sup>216</sup> In *Hutcheson*, the Department of Justice had brought a *criminal* indictment under the Sherman Act, § 1, against a group of carpenters who were involved in a jurisdictional dispute with a rival machinist union over contracts with Anheuser-Busch in St. Louis, Missouri. The carpenters had refused to submit to arbitration as

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<sup>210</sup> 310 U.S. 469 (1940).

<sup>211</sup> *Id.* at 482.

<sup>212</sup> *Id.* at 503.

<sup>213</sup> *Id.* at 489.

<sup>214</sup> *Id.* at 510–11 (first citing *Coronado I*, 259 U.S. 344; then citing *Coronado II*, 268 U.S. 295; and then citing *United Leather Workers’ Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924)).

<sup>215</sup> See David F. Cavers, *Labor v. The Sherman Act*, 8 U. CHI. L. REV. 246, 249–50 (1941).

<sup>216</sup> *Hutcheson*, 312 U.S. at 237.

stipulated in their employment contract and had carried out a strike against the firm and its products.

Now, the Court returned to a jurisdictional approach to delimit antitrust prosecutions against laborers and it relied on interpreting the Norris-LaGuardia Act to require that the Court re-investigate congressional intent behind the Clayton Act's enumerated acts found in § 20.<sup>217</sup> The Court held that the Norris-LaGuardia Act's anti-injunction provisions must also extend to laborers involved in a secondary boycott.<sup>218</sup> Justice Frankfurter revived Justice Brandeis's dissent in *Duplex Printing* and, in doing so, sealed a victory for both laborers as well as Justice Brandeis's associational vision for antitrust law, though it worked through a nonstatutory exemption rather than a rule of reason analysis. Under *Duplex Printing*, which had "restricted the scope of § 20 [of the Clayton Act] to trade union activities directed against an employer by his own employees," this was clearly a violation.<sup>219</sup> However, as Justice Frankfurter explained "both . . . powerful judicial dissents and informed lay opinion" had urged Congress to reconsider that holding and, in its place, enact the Norris-LaGuardia Act of 1932, which "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation."<sup>220</sup> And, if such an action could not be enjoined by a court, then it certainly would not create criminal liability.<sup>221</sup>

In keeping with the rationale that Justice Brandeis had presented in his *Duplex Printing* dissent, the *Hutcheson* majority found that the Clayton Act exemption actually included "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>222</sup> Rather than evaluating the reasonableness of the act, the *Hutcheson* ruling reread the antitrust laws to exempt such union activities entirely. The Court's message was clear:

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<sup>217</sup> See James M. Landis, *The Apex Case*, 26 CORNELL L.Q. 191, 206–07, 207 n.43 (1941).

<sup>218</sup> See *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 103 (1940).

<sup>219</sup> *Hutcheson*, 312 U.S. at 230.

<sup>220</sup> *Id.* at 231.

<sup>221</sup> *Id.* at 234–35. *But see Hutcheson*, 312 U.S. at 245 (Roberts, J., dissenting).

<sup>222</sup> *Hutcheson*, 312 U.S. at 234 (citing 29 U.S.C. § 113(e)).



Congress had intervened in order to remove this issue from the judiciary.

The logic behind *Hutcheson*—indeed, the vision of the liberal state that it espoused—expanded across the second half of the 20th century. Union membership expanded in the postwar era and dramatically affected labor market power. Economic historians have argued that unionization helped to force large-scale manufacturing firms to share profits from productivity gains as well as from market power rents.<sup>223</sup> The famous “Treaty of Detroit” of 1950 marked another settlement between labor and capital—the United Auto Workers agreed to refrain from striking and surrendered some power over the shop floor in exchange for General Motors’ commitment to cost-of-living adjustments and some shared productivity gains.<sup>224</sup> Additionally, high top-bracket tax rates and federal minimum wage also pushed gains toward laborers.

As a legal and institutional matter, it was settled that contentious political issues, such as industrial disputes and interunion conflicts, should be addressed through a tripartite system of labor, capital, and government, but not the judiciary.<sup>225</sup> And, in private disputes, *Apex* had recognized labor unions as an economic unit legitimately pursuing its self-interest amidst a sea of similar units, where conflicts would inevitably arise. At the state level, these exemptions played a role in the creation of *Parker* immunity, which protected the regulatory prerogative of states to pass economic regulations even if in conflict with the federal antitrust laws.<sup>226</sup> At the federal level, they have been shown to be flexible in incorporating different kinds of workers under the exemptions umbrella. Those gains have been extended through additional “nonstatutory” labor exemptions, which now may include parties that enter into agreements with labor unions.<sup>227</sup> And, currently, that associational vision continues to in-

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<sup>223</sup> Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (NBER Working Paper No. 13106, May 2007), 22–24. On the Treaty of Detroit, see NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 123 (2002).

<sup>224</sup> LICHTENSTEIN, *supra* note 223, at 122–23 (2002).

<sup>225</sup> See *Hutcheson*, 312 U.S. at 231.

<sup>226</sup> See generally *Parker v. Brown*, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (clarifying that under federal antitrust law, the state regulations must be clearly expressed in state law and actively supervised by the state).

<sup>227</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).

fluence progressive liberal programs intended to widen the meaning of the antitrust labor exemption extending it to independent contractors and other “gig economy workers.”<sup>228</sup>

#### D. Vestiges of Brandeis’s Associationalism

Despite these exemptions, exercises of union power still remained in tension with antitrust law’s focus on market power and market-oriented effects. Twenty-five years later, in *Local Union No. 189 v. Jewel Tea Co.*,<sup>229</sup> the Court upheld a meat-cutter union’s “unilateral demand for the same contract [from] other employers in the industry,” allowing the union to demand that the Jewel Tea grocery store adhere to union-negotiated multi-employer operating hours even as applied to pre-packaged meat sales.<sup>230</sup> But, like Arnold had earlier, pragmatic progressives remained watchful. Justice William O. Douglas, who had joined the majority in *Apex*, dissented in *Jewel Tea*, arguing that “Jewel has been coerced by the unions.”<sup>231</sup> Justice Douglas found “nothing procompetitive” in the agreement and, perhaps more troubling, noted that the union had facilitated a horizontal conspiracy among shop owners.<sup>232</sup>

Nevertheless, the economic autonomy aspect of the older arguments by Witte, and then by Brandeis, and even to a certain extent by Arnold, had been realized by way of group interests—namely, the statutory and nonstatutory exemptions afforded to labor organizations. The progressive law and economics movement could not solve the problem of labor market power, but it settled on a workable solution to governing imperfect market competition.

#### CONCLUSION: LABOR MARKET POWER AND THE FUTURE OF ANTITRUST LAW

A common thread running through this story is the rejection of legal and economic orthodoxy, which had deduced results from a priori reasoning. By drawing on empiricism and institutionalism, progressive liberal reformers provided antitrust justifica-

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<sup>228</sup> See DAVID MADLAND, THE FUTURE OF WORKER VOICE AND POWER 31 (2016).

<sup>229</sup> 381 U.S. 676 (1965).

<sup>230</sup> *Id.* at 691.

<sup>231</sup> *Id.* at 736 (William, J., dissenting).

<sup>232</sup> *Id.*

tions for laborers' collective bargaining rights and the concomitant exercises of their market power. Nevertheless, they were not able to fully articulate a definition of market power that did not implicate some labor union activities, such as in secondary boycotts and interunion jurisdictional disputes. Ultimately, that problem proved intractable and required congressional intervention to define the substantive rights of laborers and remove certain "lawful" activities from the Court's antitrust ambit, which occurred first with the Clayton Act and then again with the Norris-LaGuardia Act. Great Depression-era legislation enhanced laborers' substantive bargaining power and, although operating through separate legal channels, helped rein in some abuses of corporate power by empowering the countervailing forces of organized labor.<sup>233</sup> Nevertheless, even after the settlement in *Hutcheson*, labor disputes continued to spill over into the courts on antitrust grounds, and, as we saw in *Jewel Tea*, progressive jurists continued to disagree over the proper boundaries of antitrust law as applied to labor disputes.

Antitrust law, like labor and employment law, is again in the process of responding to democratic demands to update the liberal social contract, and again, much of the impetus behind this current movement comes from progressive labor activists as well as their counterparts in the academy. Today's progressive assault on the reigning antitrust orthodoxy follows a similar pattern of the institutionalist and legal realists of the early twentieth century insofar as those earlier progressive movements embraced empiricism in order to challenge the abstraction and generality of antitrust formalism. Indeed, there is mounting evidence that monopsony power—or labor market power—can restrain trade by suppressing price competition in input markets, such as driving down wages, and should be evaluated in agencies' merger review.<sup>234</sup> Further, these input restraints are not limited to a monopsonist's unilateral conduct; they also include oligopsony wage suppression.<sup>235</sup>

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<sup>233</sup> On the "countervailing power" of labor and capital, see JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 110–14 (1952).

<sup>234</sup> See generally ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (2010); Marinescu & Hovenkamp, *supra* note 8 (arguing that anticompetitive effects of mergers in labor markets should be evaluated in merger review).

<sup>235</sup> *State of California v. eBay, Inc.*, 12-CV-05874 (N.D. Cal. Aug. 29, 2014), at \*8 (approving a settlement to end a "no poach" agreement between eBay and Intuit, two firms

Most recently, antitrust law has been described as “ossified” around a rigid application of the consumer welfare standard that makes anticompetitive actions increasingly difficult to successfully litigate against. While a correction to the excesses of 1960s structuralism may have been in order, antitrust law has created rules and tests that privilege defendants in rule of reason proceedings to the detriment of consumers and laborers.<sup>236</sup> Similarly, labor law has been described as “ossified” and unable to protect the very workers that it was set up to defend.<sup>237</sup> And, yet, many of the New Deal’s most important institutional structures remain in place—for example, NLRB and federal minimum wage law—ready to be revived for the present. Yet, we know that state-level “right-to-work” laws have diminished unionization and driven down wages.<sup>238</sup> Additionally, returns to capital far exceed those returns to labor.<sup>239</sup> Thus, reinvigorating that post-WWII settlement as to the countervailing forces of labor and capital may appear less compelling as an immediate solution to today’s problems of labor market—power harms. Antitrust law still possesses the requisite tools to intervene—against anticompetitive mergers that detrimentally impact labor markets,<sup>240</sup> against anticompetitive “no-poach” agreements among competitors in labor markets,<sup>241</sup> and against anticompetitive “no compete” agreements embedded in franchise agreements for low-skilled workers.<sup>242</sup> In each of these areas, the Court’s reigning interpretation of the consumer welfare standard as protecting consumers’ interest in low prices may fail to recognize the anticompetitive harms on input markets; however, mounting empirical evidence from progressive

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that do not compete in product markets but do compete on labor inputs). *See generally* Dep’t of Just. Antitrust Div. & Fed. Trade Comm’n, *Antitrust Guidance for Human Resources Professionals*, U.S. Dep’t of JUST. (Oct. 2016), <https://perma.cc/HB73-RXZC>.

<sup>236</sup> Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1877 (2020).

<sup>237</sup> Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1610 (2002).

<sup>238</sup> *See generally* Elise Gould & Will Kimball, “Right-to-Work” States Still Have Lower Wages, ECON. POL’Y INST. (Apr 22, 2015), <https://perma.cc/DYW6-EZKY>; DAVID WEIL, THE FISSURED WORKPLACE (2014).

<sup>239</sup> David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms* (MIT Working Paper, May 1, 2017).

<sup>240</sup> Marinescu & Hovenkamp, *supra* note 8, at 1042.

<sup>241</sup> *Id.*

<sup>242</sup> *See generally, e.g.*, *Deslandes v. McDonald’s USA, LLC*, No. 17-C-4857 (N.D. Ill. June 25, 2018). *See also generally* *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786 (S.D. Ill. 2018).

economists, activists, and jurists has demonstrated the economic harms wrought by the combination of labor market power and antitrust orthodoxy.<sup>243</sup>

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<sup>243</sup> See generally Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273 (2023).