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Antitrust and Employer Restraints in Labor Markets*

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This Article argues that the Sherman Act regulates concerted employer activity in the labor market only if such activity restrains or attempts to restrain the product market. After discussing the legislative history of the Act, the Article examines and synthesizes two conflicting lines of cases. Finally, the Article suggests how courts should dispose of challenges to employer conduct and posits the basis for a unified theory of labor-antitrust law.

INTRODUCTION

The tension between federal antitrust law and national labor policy is both perplexing and inevitable. Antitrust law is premised on promoting competition, but national labor policy is premised on creating incentives in both labor and management for anticompetitive conduct. This clash of antithetical policies has frequently required courts to consider the extent to which the antitrust laws apply to labor union activity. From these cases has evolved an uneasy compromise between the conflicting premises of antitrust law and labor law: labor unions are exempt from the antitrust laws when their activities, which otherwise would be illegal under the antitrust laws, are undertaken to achieve goals approved by national labor policy; but union activity seeking to attain an objective that is not a legitimate labor objective and that is

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condemned by federal antitrust law is not protected.¹ When conflict arises between antitrust law and labor policy, one normally looks first at the extent to which the antitrust laws apply to labor union activity.

The conflict between antitrust law and national labor policy actually suggests another significant issue: whether federal antitrust laws apply to concerted employer restraints in labor markets, and if so, how they should be applied.² Concerted activity by firms to fix product prices is a *per se* violation of the Sherman Act. How should courts respond to concerted employer activity to fix wages and salaries, the price of labor? An agreement among sellers of goods to exchange price information when the intent or effect of the exchange is to stabilize the prices of those goods may violate the Sherman Act.³ How should courts respond to an agreement among employers to exchange information about wages paid their employees when the intent or the effect of the information exchange is to stabilize wage levels?

We discuss these questions and argue in favor of the following proposition: the Sherman Act does not regulate concerted employer conduct whose purpose or effect is to restrain only the labor market; instead, the Act regulates concerted employer conduct which is intended to restrain, or which actually has an unreasonable anticompetitive effect on, the product market (that is, the commercial market where firms sell their goods and services). Therefore, employer restraints in labor markets are illegal, if at all, because of their intended or actual product market consequences rather than because of their labor market consequences.

This Article develops that proposition in six parts. In Part I, we amplify the stated proposition and articulate some of the assumptions underlying our argument. In Part II, we examine the legislative history of the Sherman Act and find that the Act was not intended to promote labor market competition. We also search the legislative history of section 6 of the Clayton Act and find no contradictory intentions. In Part

1. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965). See generally Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980).

2. This article's discussion is limited to federal antitrust law. However, because many state antitrust statutes deliberately parallel the federal statutes, 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* 58 (1978), the discussion is also pertinent to state law.

3. 15 U.S.C. § 1 (1976) provides:

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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

III, we explore the policies of the Sherman Act and reach the following conclusion: even though promoting competition among employers in labor markets may be a desirable goal, the Sherman Act should not be used for this purpose.

In Parts IV and V, we consider the implementation of the Sherman Act in light of our earlier conclusions. Part IV examines this history through 1970. In particular, this Part discusses the Supreme Court's 1940 decision in *Apex Hosiery v. Leader*.⁴ We argue that this decision advances the proposition that the Sherman Act does not apply to labor market restraints absent unlawful product market consequences. Part V analyzes the Act's implementation in recent decisions. In this Part, we criticize a widely acclaimed line of cases originating with Judge Mansfield's 1970 opinion in *Cordova v. Bache & Co., Inc.*,⁵ which, we maintain, misstates the proper reach of the Sherman Act. We argue that a line of cases devolving independently from *Apex Hosiery* illustrates a better approach to analyzing employer restraints in labor markets.

Finally, in Part VI, we offer an analytical framework that synthesizes the two lines of cases developing after *Apex Hosiery*. We also examine the circumstances in which employer restraints in labor markets are likely to be challenged, and we use our synthesis to suggest how courts should dispose of these challenges. As a concluding comment, we posit the basis for a unified theory of labor-antitrust law.

I

PROPOSITION: THE SHERMAN ACT CONCERNS ONLY COMPETITION IN THE PRODUCT MARKETS

Section 1 of the Sherman Act⁶ provides that "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." This section reflects Congress' judgment that "competition is the best method of allocating resources in a free market."⁷ Promoting efficient allocation of resources enhances consumer welfare, because "ultimately competition will not only produce lower prices, but also better goods and services."⁸

In *Chicago Board of Trade v. United States*,⁹ Justice Brandeis observed that the broad language of section 1, if applied literally, would

4. 310 U.S. 469 (1940).

5. 321 F. Supp. 600 (S.D.N.Y. 1970).

6. 15 U.S.C. § 1 (Supp. IV 1980).

7. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

8. *Id.*

9. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

invalidate every contract.¹⁰ Congress plainly did not intend such a massive dislocation of common law principles. Accordingly, the Supreme Court has long adhered to the so-called "Rule of Reason," which requires a court evaluating the legality of a restraint under section 1 to determine "whether the challenge agreement is one that promotes competition or one that suppresses competition."¹¹ As it has evolved, the Rule of Reason consists of two complementary analytical categories. Restraints "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality" are illegal *per se*.¹² Restraints that are not illegal *per se* "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."¹³ This latter category of analysis "is often thought to require an ad hoc balancing of the anticompetitive and procompetitive effects of the challenged behavior"¹⁴ in a "definable product market."¹⁵ The purpose of both categories of analysis is to allow courts "to form a judgment about the competitive significance of the restraint."¹⁶

In applying the Rule of Reason, courts have long held that section 1 is violated not only by agreements among sellers of goods to stabilize prices but also by agreements to exchange price information with the intent or the effect of stabilizing the prices of the goods involved.¹⁷ By analogy to these principles, one might argue that agreements among employers to fix wages or to exchange wage information when the purpose or effect of the exchange is to stabilize the price of labor are equally unlawful.¹⁸ This analogy, however, is valid only if the Sher-

10. *Id.* at 238.

11. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 691. See generally L. SULLIVAN, *ANTITRUST* (1977).

12. 435 U.S. at 692.

13. *Id.*

14. Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 597 n.3 (1982).

15. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir.), *cert. denied*, 447 U.S. 924 (1980).

16. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 692.

17. *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978); *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410-11 (1921).

18. Employers are not "sellers" of labor; hence, the analogy to price fixing through exchange of price information among sellers of goods is imperfect. However, combinations among buyers of goods that restrain trade are also illegal. *E.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (agreement of sugar beet refiners to fix purchase price for beets states a claim under § 1 of Sherman Act); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1159 (5th Cir. 1979) (refusing to recognize distinction between monopsony and monopoly for passing-on purposes); *National Macaroni Mfrs. Ass'n v. Federal Trade Comm'n*, 345 F.2d 421, 426 (7th Cir. 1965) (where manufacturers of macaroni products allegedly fixed the kinds and proportions of ingredients to be used in the product for the purpose of fixing the price of the

man Act is concerned with promoting labor market competition by proscribing concerted activity that has as its purpose or effect restraint of the labor market.

It is only recently that the possibility of applying the antitrust laws to employer restraints in labor markets has received any significant attention.¹⁹ At least two lawsuits have been brought by employees charging that employers have unlawfully used wage survey data to depress wages in violation of the Sherman Act.²⁰ Obviously concerned about possible antitrust liability, employers are displaying increased sensitivity to the implications of exchanging wage and salary information.²¹

ingredients, court concludes "where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material they violate the rule against price-fixing agreements . . .") Therefore, the imperfection in the analogy does not weaken it.

19. Cf. Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. 519 (1982) (criticizing the fact that courts have not applied the Sherman Act to labor market restraints, and therefore have not struck down any postemployment noncompetition restraints under the Sherman Act).

20. In Boston, Massachusetts, a coalition of women office workers recently sued a group of Boston area employers charging that the companies, all of whom participated in a wage survey, illegally used the wage survey to create a low ceiling on wages paid to clerical workers in violation of federal and state antitrust laws. A settlement was reached in the suit on August 2, 1982, pursuant to which the employer group agreed to change some of its survey practices to preserve confidentiality of participants, and not to include "any graphic displays of individual compensation rates," job categories for which there are fewer than ten employees, and industry-by-industry breakdowns. In the *Matter of the Boston Survey Group*, Mass. Super. Ct. No. 56341, Aug. 2, 1982, reported in *Daily Lab. Rep. (BNA)*, August 13, 1982. In 1976, a complaint was filed against a survey organization in California, but this suit was also settled prior to trial. *Deborah Goodspeed, et al. v. Federated Employers of the Bay Area*, No. 1685 (N.D. Cal., filed Aug. 10, 1976). Although these suits were brought against employers, such a lawsuit could conceivably be brought against a potential employer. One who has been denied employment might charge that wage surveys were used to stabilize wages at a level above that which would prevail in a competitive market and that this reduced the availability of employment opportunities.

Also, in 1979, a consent Final Judgment was entered prohibiting four mutual savings banks from exchanging information concerning deposit accounts, assets, liabilities, income, investments, and salaries of officers and employees. *United States v. The Philadelphia Savings Fund Soc'y*, Trade Cas. (CCH) ¶ 62,917 (E.D. Pa. 1979).

21. One group of employers whose survey practices could conceivably be alleged to violate the antitrust laws is law firms. Many firms share with other firms information concerning the salaries they pay their associates. In fact, one management consulting firm surveys law firms and compiles information on law firm earnings, billable hours recorded, fees charged, firm income and expenses (including salaries and benefits provided to associates and staff). In the 1982 survey, 530 firms supplied information, and the consulting company sells a copy of the survey results for \$185. *Nat'l L.J.*, June 28, 1982, at 2, col. 3. The Justice Department stated its intention not to challenge a proposed survey of non-lawyer employee salaries and benefits paid by Maryland law firms, but the Department's intention was explicitly conditioned on the fact that the survey would not seek information regarding future plans of the participants with respect to salaries and benefits offered and that individual salary or benefit schedules would not be revealed. *United States Department of Justice, Antitrust Division, Business Review Letter to Robert A. Summers & Associates*, AT 202-633-2016 (August 5, 1981). Nevertheless, because of concern about possible antitrust liability, some firms are reviewing these practices. See Galante, *Associates Get Tough on Salaries*, *Nat'l L.J.*, April 26, 1982, at 10, col. 1.

Two articles recently argued that joint employer activities which restrain labor markets are actionable under section 1 of the Sherman Act.²² Two treatises have approved this conclusion;²³ however, one provided no support for its approval,²⁴ and the other accepted uncritically the analysis of Judge Mansfield in *Cordova v. Bache*.²⁵

The proposition urged in this Article challenges other published views on this question. We believe that the analogy upon which these views are premised is flawed; labor market competition—viewed separately from product market consequences of labor market restraints—is not the Sherman Act's concern. Because our proposition is novel and

22. Scheinholtz & Kettering, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347 (1983); Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127 (1982). Altman concluded that "both labor organizations and unionized employees may raise legally sufficient Sherman Act challenges to employers' conduct that has an overall negative impact on the competitive structure of either product or labor markets." Altman, *supra*, at 129. Part of the basis for this conclusion is the related conclusion that "claims against blacklisting [of employees] and wage-fixing" should be actionable under § 1 of the Sherman Act. *Id.* at 141. Scheinholtz and Kettering were less certain of their conclusion: "for antitrust purposes, there is nothing special about the labor market, at least as regards joint employer activity that is anti-competitive in that market. Even though § 6 of the Clayton Act, literally read, removes the labor market completely from the reach of the antitrust laws, that is proably [sic] not true." Scheinholtz & Kettering, *supra*, at 352-53. One commentator recently reached a conclusion consistent with the proposition urged in this Article. Hoffman, *Labor and Antitrust Policy-Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1, 51 (1983) ("The Sherman Act should not be applied to a combination of employers formed for the purpose of strengthening their bargaining power vis-a-vis a union and having a primary effect on the labor market"). The Justice Department has yet to take a definitive position on this question. On the one hand, it has suggested that firm-imposed restraints on wages might violate the antitrust laws, while on the other it has indicated that such an arrangement might violate the antitrust laws if there were a concomitant effect on prices (i.e., a product market effect). Compare United States Department of Justice, Antitrust Division, Business Review Letter to Associated Builders and Contractors, Inc., AT202-633-2007 (December 10, 1980) (Department declined to state that it would not challenge under the Sherman Act implementation of a wage-averaging plan proposed by Department of Labor, pursuant to which contractors participating in federally approved apprenticeship programs would compute arithmetic average of individual contractors' journeyman rates of pay in various skilled occupations and then would be required to pay at least that amount); Department of Justice, Antitrust Division, Business Review Letter to American Hospital Association, et al., AT 202-739-2014 (June 12, 1978) (Department declined to say whether it would take antitrust action on proposed "Voluntary Cost Containment Program"), with United States Department of Justice, Antitrust Division, Business Review Letter to California Autobody Association, AT 202-633-2014 (Nov. 3, 1978) (Department declined to state whether it would challenge under the antitrust laws a proposal by the Association to determine by survey the prevailing wage rates at auto body repair shops in California, since the "proposal could have the effect of stabilizing the body shop labor rates of competing body shops at or about the prevailing rate determined by the survey," and since the antitrust laws prohibit "certain joint actions by sellers that have a stabilizing effect on prices") (emphasis added).

23. L. SULLIVAN, *supra* note 11, at 728 (1977); 1 P. AREEDA & D. TURNER, *supra* note 2, at 202 (1978).

24. See L. SULLIVAN, *supra* note 11, at 728 (isolated statement that "employers alone could not agree, for example, on the wages they would pay their employees").

25. See 1 P. AREEDA & D. TURNER, *supra* note 2, at 202 ("employers agreeing on trade restrictions in the labor market are subject to the same antitrust sanctions as usual when collective bargaining is not involved").

no doubt controversial, we begin with an explanation of some underlying assumptions.

At the outset, it is necessary to distinguish between a "product market" and a "labor market." As an abstract matter, the distinction is simple. The product market is the market in which firms sell their goods and services to consumers (i.e., those who will use the product); the labor market is the market in which firms purchase the services of workers. Viewed from the perspective of a firm, the labor market is a resource market. The firm may use many kinds of raw materials to create a product; these "input" materials are purchased in various resource markets. Labor is but one of the firm's resources, and it is purchased in the labor market. By the same token, the product market where the firm sells its finished product may be another firm's resource market. For example, a steel producer sells its product to an automobile manufacturer, who uses the steel to produce an automobile: the steel producer's product market is the automobile manufacturer's resource market. The labor market is one of the firm's resource markets, but from the laborer's perspective, the labor market is the employee's "product market." In this article, we define markets from the firm's perspective. Hence, the labor market is the market in which firms purchase and laborers sell services. In reality, the boundaries between product markets and labor markets are sometimes blurred,²⁶ but these complexities can be deferred for later consideration.

Firms that compete in the same product market have incentives to restrain that market by fixing product price. Assuming output to be predictable or itself subject to being fixed, firms within a single industry can increase industry profits if they can control price. These profit increases can then be shared by the cooperating firms. The tendency toward price stabilization is so obvious and the consequences to consumers are so severe that courts early on held price fixing among competitors in a product market to be a *per se* violation of section 1 of the Sherman Act.²⁷

Just as firms have incentives to stabilize the prices of their products, firms have incentives to stabilize resource costs, including the

26. For example, sometimes the labor being sold appears to be the product. In the professional sports cases, the labor of the players is inseparable from the product, namely, the "game," which is being sold to the consumer. The rendering of professional services by, for example, lawyers and physicians raises a similar question. See *infra* notes 309-21 and accompanying text.

An extremely important "blurring" of the boundaries between product markets and labor markets devolves from the simple realization that a labor market restraint inevitably has some kind of effect on a product market. This fact must be accounted for in any theory of labor-antitrust, and this Article will refer to and discuss it frequently.

27. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

wages, salaries, and fringe benefits of their employees.²⁸ Employers in labor-intensive industries who compete in the same product market have an incentive to fix wages, since by fixing a significant portion of product cost they can stabilize indirectly the prices of their products. Employers need not be product market competitors, however, to want to fix wages. Any firm which can reduce a production cost gains some advantage. It may be greater profits; it may be a greater capability to cut price so as to gain an advantage over product market competitors; or it may be a greater capability to reduce price from a noncompetitive level to a lower level where the firm can be competitive in the product market. In short, employers that compete in the labor market, regardless whether they compete in the product market, have incentives to stabilize wages.²⁹

When a group of employers unilaterally restrains the labor market, the persons most directly affected are employees.³⁰ Thus, employees are the most likely plaintiffs in lawsuits challenging multi-employer restraints in labor markets.³¹ The employee's principal grievance is likely to be a wage reduction he believes he has suffered, an injury that results directly from the restraint in the labor market. Thus, at a minimum, an employee-plaintiff is likely to attack the labor market restraint as a violation of the Sherman Act. The employee might allege that an employer has engaged in concerted activity with other employers to stabilize wages and that this activity has caused the employee's wages to be depressed. This allegation would typically be directed at a group of employers that compete for a particular supply of labor. Whether the employers compete in a product market is irrelevant to this allegation. In claiming an antitrust injury arising from depressed wages, this allegation depends on the assumption that the Sherman Act is concerned with the effects of labor market restraints in labor markets, without regard to whether the labor market restraint is intended to af-

28. Hereafter, wages, salaries, and fringe benefits will be referred to collectively as "wages."

29. See *infra* notes 352-77 and accompanying text for a discussion of the ways firms achieve wage stabilization.

30. Where employees are unionized, a union might conceivably claim that it has been damaged by the multi-employer restraint, perhaps by losing dues in a situation where dues are tied to wages and an employee is blacklisted pursuant to a multi-employer conspiracy. However, the union's injury is derived from the more direct injury to the employee. In such a situation, it is highly improbable that the union has standing to assert an antitrust claim, even if the injury were within the scope of the Sherman Act. See *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 913 (1983) (unions lack standing to challenge alleged agreement by multi-employer association and its members to enter into business relationships only with nonunion contractors and subcontractors); Altman, *supra* note 22, at 164-69.

31. Unions are unlikely to possess standing in their status as a union. See *supra* note 30. Moreover, under current law, unions cannot sue in a representative capacity for damages on behalf of their members. Altman, *supra* note 22, at 165.

fect, or actually does affect, a product market. If this assumption is false, as we argue, the employee would fail to state a claim upon which relief could be granted.

Nevertheless, the employee might claim that the concerted employer activity has anticompetitive purposes or effects in product markets. For example, an employee-plaintiff might allege that labor costs are a component of prices charged by competitors in the product market for their goods and services, that fixing labor costs enables the competitors in the product market to stabilize prices, and that this is anticompetitive conduct condemned by the Sherman Act. Unlike a claim that attacks only the labor market aspects of a restraint, this allegation would be aimed at concerted actions by employers who compete in the product market. An allegation that the concerted activity is among employers competing for a particular supply of labor and that this activity restrains competition in the labor market is not essential to the product market claim. A plaintiff making the product market allegation need not establish that the Sherman Act is concerned with promoting competition among employers in labor markets. Rather, such a plaintiff undertakes to establish that the labor market restraint has a purpose to affect, or causes an anticompetitive effect in, the product market.³² This allegation states a claim under the Sherman Act.

Stating a claim and proving it are, of course, two different things. Rarely, if ever, would it be more attractive to the employee to attack the employer's conduct as an unlawful product market restraint than to attack the conduct as an illegal restraint in the labor market. This is because labor cost is only one element of price. Establishing that a firm's cost-fixing conduct restrained the product market is a very difficult task.

In an economic sense, any change in the cost of producing a product can be said to have some influence upon that product's price. If price is defined as the cost of production plus a reasonable profit, then decreasing the cost of one input to the product will permit the firm either to decrease price without decreasing profit or to increase profit without increasing price. Thus, if employers conspire to prevent wages from rising above a certain level, employers can either decrease prices

32. In addition to these two types of claims, both of which are based on § 1 of the Sherman Act, it is conceivable that an employee might also challenge concerted employer activity under § 2. For example, in a situation where the employer is participating in a labor market restraint with other firms who are its competitors in the labor market but who do not compete with the employer in its product market, the employee might allege that the employer used the restraint data to set its wages at a level that assisted the employer in monopolizing or attempting to monopolize its own product market in violation of § 2. In this instance, the purpose or effect which makes the challenged practice illegal is obviously the effect in the firm's product market. Therefore, this article will limit its attention to claims asserted under § 1 because it is these claims which arise the question of whether the Sherman Act applies to restraints in labor markets.

without decreasing profits or increase profits without increasing prices. A change in a production cost may not result in a price change, but it has a relationship to, and can be said to affect, price.

It does not follow, however, that all effects on price resulting from a restraint in the labor market are undesirable or anticompetitive. If the price of a product is reduced because wages, a cost of production, have been decreased, the result favors the consumer. Similarly, concerted employer conduct designed to stabilize wages might prevent increases in overall costs that would have occurred but for the concerted activity and that would have caused the price of the good to increase. If rising labor costs are restrained, the consumer may benefit from a stable or more slowly increasing price.

Fixing the cost of labor might even enhance product market competition. For example, suppose that firm A in city X and firm B in city Y compete in the same product market, but city X and city Y, from which firms A and B hire their workers, are in different labor markets. If the cost of labor in firm A's market is increasing while firm B's cost of labor is stable, firm A's production cost will increase while firm B's will not. If firm A conspires with other firms in city X that compete with firm A for a supply of labor to fix the cost of that labor, this labor market restraint will allow firm A to maintain current prices and thus remain competitive with firm B, which does not face the same increase in labor cost. In the product market in which firms A and B sell their goods, the labor market restraint in which firm A conspires actually enhances competition.

Thus, any attempt to prove a link between employer conduct that has the intent or effect of stabilizing wages and unlawful product market effects burdens the employee with a difficult, and perhaps impossible, task.³³ Moreover, though the question is not settled, an employee-plaintiff may lack standing to assert an antitrust claim if he has to plead an unlawful product market effect to state the claim.³⁴ From the employee's point of view, it would be preferable if, to prevail on his Sherman Act claim, he need only establish that the purpose or effect of the concerted employer activity is to restrain the labor market. In short, the scope of the Sherman Act is of crucial significance to employee plaintiffs who challenge multi-employer activity restraining labor markets under the Sherman Act.

For various reasons, it may also be good public policy to promote competition among employers in the same labor market. Joint employer activity to stabilize wages, under traditional economic analysis, results in inefficiencies in labor markets and a consequent misallocation

33. See *infra* notes 367-75 and accompanying text.

34. See *infra* notes 343-51 and accompanying text.

of resources.³⁵ Since price is a function of production costs and labor is one such cost, inefficient labor markets can result in inefficient product markets. Eliminating all market inefficiencies, wherever they are found, may be a worthy goal.

Whatever merit these may be to pursuing efficiency in all sectors of the economy, the Sherman Act is not the appropriate device for promoting efficiency in labor markets; it is a blunt tool that cannot be used effectively for that purpose. Moreover, the circumstances surrounding the enactment of the Sherman Act and the history of its implementation demonstrate that the Act is concerned with product market competition, not with labor market competition. Therefore, it is not merely inappropriate to use the Sherman Act to promote efficiency in labor markets; it is also contrary to the Act's purpose.

Simply because the Sherman Act does not concern itself with labor market competition, however, one cannot argue that all labor market restraints are legal. One must subject labor market restraints alleged to have either a purpose to affect, or an anticompetitive effect in, a product market to the normal substantive tests for antitrust liability under the Sherman Act. If a labor market restraint has an unreasonable anticompetitive effect in a product market, or if it can be shown that firms have implemented a labor market restraint with the intent of fixing product price, the restraint is invalid under ordinary Sherman Act principles.

Attempts to evaluate the legality of employer-imposed restraints on labor market competition without analysis of the product market significance of the restraints ignore both the legislative history and policies of the Sherman Act. We now examine the Act's history.

35. In the language of economists, a firm will continue to employ additional units of labor (or any other factor of production) so long as the extra revenue received from the sale of the extra output produced by the extra unit of the labor (the marginal revenue product of labor) exceeds the extra cost necessary to acquire the extra unit of labor (the marginal cost of labor). Equilibrium in the labor market occurs when the marginal revenue product of a unit of labor is equal to its marginal cost. When the firm is a perfect competitor in the labor market, the marginal cost of labor equals the wage rate, so that in equilibrium, it can be said that the marginal revenue product of labor, the marginal cost of labor, and the wage rate are equivalent. If the firm is a monopsonist in the labor market, the marginal cost of labor will exceed the wage rate, but the monopsonist will still equate the marginal revenue product of labor with its marginal cost. The effect of monopsony in the resource market is to reduce the wage rate: labor is paid a wage less than both its marginal revenue product and the value of its marginal product. When labor is paid a wage rate less than its marginal revenue product, a misallocation of resources occurs. See A. LEVENSON & B. SOLON, *ESSENTIAL PRICE THEORY* 240-45 (1971); J. KREPS, G. SOMERS, & R. PERLMAN, *CONTEMPORARY LABOR ECONOMICS: ISSUES, ANALYSIS, AND POLICIES* 268-72 (1974).

II

HISTORY OF THE SHERMAN ACT

A. *Section 1 of the Sherman Act*

Those who believe that the Sherman Act applies to employer-imposed restraints on labor market competition have premised their view on the argument that no *exemption* excepts such restraints from anti-trust scrutiny, ignoring the question of whether such conduct is within the *scope* of the Act in the first place.³⁶ However, the legislative history of the Sherman Act does not support the proposition that Congress intended the Sherman Act to be used to regulate employer competition in labor markets. Congress was concerned with restraints in product markets. This distinction is significant because the legitimate reach of the Sherman Act must be based, at least in part, on "the contemporary legal context in which Congress acted"³⁷ when the Sherman Act was passed.

The Sherman Act was an 1890 response to populist clamor over the rising influence of "trusts" and other large aggregations of capital after the Civil War.³⁸ Congress first began to concern itself with anti-trust legislation in 1888, when several antitrust bills were introduced in both houses.³⁹ Although the specific language in these bills varied, almost all of them were aimed at prohibiting restraints on competition in product markets.⁴⁰ The first significant action occurred in the Senate

36. See *infra* text accompanying notes 221-52.

37. Associated General Contractors of California, Inc., v. California State Council of Carpenters, 103 S. Ct. 897, 905 (1983).

38. W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54-70 (1965); 16 BUSINESS ORGANIZATIONS, J. Von Kalinowski, Antitrust Laws and Trade Regulation, § 2.02 (1971); 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS, 9-13 (1978). See generally H. THORELLI, THE FEDERAL ANTITRUST POLICY 54-163 (1955).

39. See Bills and Debate in Congress Relating to Trusts, S. Doc. No. 147, 57th Cong., 2d Sess. 3-68 (1903) [hereinafter S. Doc. No. 147].

40. Most of the bills introduced in the House of Representatives in 1888 were unambiguously directed at restraints on the marketing of goods and services. *E.g.*, H.R. 6117, 50th Cong., 1st Sess. (1888), reprinted in S. Doc. No. 147, *supra* note 39, at 41 (prohibiting certain contracts, etc., concerning the control of "the price of any article of merchandise or commerce, or of any article intended for sale, use, or consumption . . ."). H.R. 8036, 50th Cong., 1st Sess. (1888), reprinted in *id.* at 45 (prohibiting contracts, etc. "by which it shall be agreed that such pool, combination, [etc.] . . . shall control the quantity, number, or value which shall be mined, made, manufactured or sold of such article or product"); H.R. 9449, 50th Cong., 1st Sess. (1888), reprinted in *id.* at 49 (prohibiting combinations, etc. that "limit, or otherwise regulate or control, any business or branch of trade, or the quantity, number, amount, or value of any article of merchandise or of trade or commerce or product which shall be mined, manufactured, bought, sold, or shipped from one State or Territory to another . . ."). A number of other bills, including some in the Senate, prohibited "restrictions on trade" or "restraints on trade," in addition to prohibiting conduct that increased or reduced the price of variously described "merchandise," "commodities," "goods," "wares," or "products." Exactly what the drafters of these bills thought they were prohibiting when they proscribed "restraints on trade" or "restriction on trade" is unclear, see *infra* note 48, but even these bills emphasized product market competition. See, *e.g.*, H.R. 3440,

on July 10, 1888, when Senator John Sherman of Ohio introduced a resolution directing the Committee on Finance, of which he was a ranking member,⁴¹ to inquire into control of trusts. This resolution is significant because it evidences the "motivating spirit" of the federal antitrust statute whose name it bears.⁴² The resolution directed the Committee on Finance to report measures:

to set aside, control, restrain, or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, *made with a view, or which tend to prevent free and full competition in the production, manufacture, or sale of articles of domestic growth or production, or the sale of articles imported into the United States, or which, against public policy, are designed or tend to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life, with such penalties and provisions, and as to corporations, with such forfeitures, as will tend to preserve freedom of trade and production, the natural competition of increasing production, [and] the lowering of prices by such competition . . .*⁴³

The first two italicized phrases are the evils Sherman wished to prevent, and the third italicized phrase describes the benefits Sherman hoped to attain.⁴⁴ Both evils relate to concerted activity that impairs competition in the product market; the benefits he hoped to attain flow from the elimination of that impairment. The competition Sherman sought to promote was in "articles of domestic growth or production." For Sherman, "articles" were goods, the commodities provided by sellers to consumers. He did not intend that the term "articles" include "human beings," for he also referred to "necessary articles of human life" whose cost to consumers the trusts were increasing. Significantly, only twenty years earlier the Supreme Court had referred to the "proper meaning" of the term "articles of commerce" as "subjects of trade or barter offered in the market as something having an existence and value *independent of the parties to them.*"⁴⁵ Articles of commerce

50th Cong., 1st Sess. (1888); H.R. 9449, 50th Cong., 1st Sess. (1888) *reprinted in* S. Doc. No. 147, *supra* note 39, at 49. Only one bill, which was introduced in the House, clearly prohibited multi-employer restraints in labor markets. H.R. 6113, 50th Cong., 1st Sess. (1888), *reprinted in* S. Doc. No. 147, *supra* note 39, at 30 (prohibiting the conduct of "any person or corporation who shall enter into any combination, agreement, conspiracy, or understanding, expressed or implied, to raise, depress, or regulate the prices of any produce, manufactured article, merchandise of any kind, stocks, bonds, or labor . . .").

41. W. LETWIN, *supra* note 38, at 245.

42. H. THORELLI, *supra* note 38, at 168, 213. See Walker, *Who Wrote the Sherman Law?* 73 CENT. L.J. 257, 258 (1911).

43. Senate Resolution Directing the Committee on Finance to Inquire Into Control of Trusts in Connection With Revenue Bills, 50th Cong., 1st Sess. (1888); 19 CONG. REC. 6041 (1888); 1 E. KINTNER, *supra* note 38, at 54-55 (emphasis added).

44. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. OF L. AND ECON. 7, 15 n.11 (1966).

45. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868) (emphasis added).

were "commodities to be shipped, or forwarded from one State to another, and then put up for sale."⁴⁶ Sherman undoubtedly continued to use the term "article" in this sense in the antitrust bill which he introduced on August 14, 1888.⁴⁷ Thus, from the very beginning, Sherman's focus was upon the product market, the market where goods and services are sold.⁴⁸

The Fiftieth Congress adjourned without enacting antitrust legis-

46. *Id.*

47. 21 CONG. REC. 2456 (1890), reprinted in S. DOC. NO. 147, *supra* note 39, at 91, and in 1 E. KINTNER, *supra* note 38, at 63-64. S. 3445 declared unlawful "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States, and all arrangements [etc.] . . . designed, or which tend, to advance the cost of the consumers of any such articles"

48. On a few occasions, Sherman also explained the object of the bill as codifying "old and well-recognized principles of the common law" that prevailed in England and the United States. *E.g., id.*, reprinted in S. DOC. NO. 147, *supra* note 39, at 91, and in 1 E. KINTNER, *supra* note 38, at 69, 114; 20 CONG. REC. 1167 (1889), reprinted in 1 E. KINTNER, *supra* note 38, at 69. That the Sherman act was intended to invalidate restraints "deemed illegal at common law" is a theme that found its way into a number of decisions interpreting the Sherman Act. *E.g., Apex Hosiery v. Leader*, 310 U.S. 469, 498 (1940), and cases cited in *id.* at 498 n.19; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). This is, perhaps, regrettable, since Sherman and his colleagues no doubt misunderstood the then prevailing common law on monopoly and restraints of trade, which in 1890 was rather weak. See W. LETWIN, *supra* note 38, at 19-52, 77-81.

In *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), the Court observed that a combination of employees "was not considered an illegal restraint of trade at common law when the Sherman Act was adopted." *Id.* at 502. This fact, plus the enactment of § 6 of the Clayton Act, made it "seem plain" to the Court that "restraints on the sale of the employee's services to the employer . . . are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." *Id.* at 503. The Court referred to the English law on employee combinations, observing that "[t]he experience in the United States has paralleled that in England." *Id.* at 502 n.23. Interestingly, by 1890, the law of England did not prohibit employer restraints in labor markets. Under the Combination Act of 1800, 38 Geo. III, ch. 106 (1800), employers as well as workers were prohibited from combining. W. LETWIN, *supra* note 38, at 47. The Benthamites persuaded Parliament in 1824 to give combinations of workers and masters immunity from all statutory and common-law prohibitions against organizing but workmen made such "uninhibited use" of the immunity that Parliament restored common law prohibitions in 1825. *Id.*, at 47-48. In 1855, the Queen's Bench in *Hilton v. Eckersley*, 119 Eng. Rpt. 781 (1855), refused to enforce an agreement between eighteen cotton mill owners to fix wages and working hours by majority vote. Relying on precedents that declared unlawful combinations of laborers to increase wages, Crompton, J. stated: "Combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages were equally illegal." *Id.* at 784. Lord Campbell, C.J., concurred, stating "there must be complete reciprocity between liberty to the masters and liberty to the men." *Id.* at 789. The result in this case, however, was rendered obsolete by the Combination Act of 1875, 38 & 39 Vict., ch. 86, which legalized all combinations of workers and masters to settle labor disputes and to negotiate hours and conditions of labor. W. LETWIN, *supra* note 38, at 49. Pursuant to § 3 of that Statute, "[a]n agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy. . . ." Thus, the Combination Act of 1875 legalized the multiemployer agreement fixing wages and hours held unlawful in *Hilton v. Eckersley*, and it was this law which was in force in 1890 when the Sherman Act was passed.

lation. When the Fifty-first Congress convened, Sherman introduced the first Senate bill, which was nearly identical to the one he had introduced in the previous Congress.⁴⁹ S.1 was the antitrust bill eventually passed by Congress, but a number of other antitrust bills were introduced in the Fifty-first Congress. Again, most, if not all, of the bills were directed at product market restraints.⁵⁰

In the debate on S.1, Sherman maintained his focus on product market competition. He explained that the concerted activity with which he was concerned was the combination of corporations, partnerships, and individuals in "trusts," whose "sole object" was "to make competition impossible."⁵¹ He called for the dispersion of the power of trusts because of their ability to "control the market, raise or lower prices, as will best promote [their] selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist."⁵² All of these were product market effects. The object of his proposed legislation was, at its roots, to protect consumers, because his principal concern was with the damage monopoly could do to consumer welfare.⁵³ This damage was done to consumers in the markets where they purchased "articles of commerce." As Sherman explained, "[t]he original bill deals with a combination, agreement or contract to advance *the price of productions on hand*; it relates to actual commerce *in things tangible* passing from State to State"⁵⁴

If Sherman were equally concerned with the power that combinations could exert in the markets where they purchased the labor with which they manufactured their products, he certainly did not emphasize the problem. On one occasion, Sherman did refer to the ability of trusts to control the price of labor: he explained that a trust derives its power "to command the power of labor without fear of strikes" from

49. S. 1, 51st Cong., 1st Sess. (1889), *reprinted in* S. Doc. No. 147, *supra* note 39, at 69.

50. *See, e.g.*, S. 6, 51st Cong., 1st Sess. (1889), *reprinted in* S. Doc. No. 147, *supra* note 39, at 411 (prohibiting contracts, etc., which prevent or tend to prevent "full and free competition in the importation, transportation, manufacturing, or sale of any article of merchandise, or which shall have the effect of advancing the cost of any such article to the consumer . . ."); H.R. 91, 51st Cong., 1st Sess. (1889), *reprinted in* S. Doc. No. 147, *supra* note 39, at 417 (prohibiting certain contracts concerning "any commodity or article of merchandise"); H.R. 202, 51st Cong., 1st Sess. (1889), *reprinted in* S. Doc. No. 147, *supra* note 39, at 421 (prohibiting certain contracts, etc., pertaining to "the manufacture or production of any article of commerce" and to "the price of any article or commodity of merchandise or commerce").

51. 21 CONG. REC. 2457 (1890), *reprinted in* S. Doc. No. 147, at 95, *supra* note 39, and in 1 E. KINTNER, *supra* note 38, at 117.

52. *Id.*

53. *See* Association of Gen. Contractors of California, Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 908-09 (1983); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Bork, *supra* note 44, at 16.

54. 21 CONG. REC. 2562 (1890), *reprinted in* S. Doc. No. 147, *supra* note 39, at 149, and in 1 E. KINTNER, *supra* note 38, at 162.

the fact that "in its field it allows no competitors."⁵⁵ This sketchy passage does not show that Sherman intended the legislation to apply to labor markets. Given Sherman's preoccupation with effects in commercial markets, he probably viewed the power of trusts to depress wages as an undesirable byproduct of the combination, and assumed that the ability of trusts to impose restraints on the labor market would be eliminated if the concentration of economic power in commercial markets was corrected. Thus, Sherman presumably saw federal anti-trust legislation as a solution for the depression of wages by trusts, not because his bill had any applicability to labor markets, but because his bill would promote competition in markets for goods and services.

Indeed, if Sherman desired that his bill be applied to labor markets, he would have had to reverse prevailing congressional and judicial attitudes concerning Congress' power to regulate commerce. In 1890, Congress' commerce power was perceived to be limited in two ways: first, as to reach—Congress could not regulate commerce within the boundaries of an individual State; and, second, as to nature—activities whose nature did not involve shipments of goods were simply not "commerce." Thus, in 1890, the activities of manufacturing, production, and mining were matters not subject to regulation by Congress.⁵⁶ Consistent with this narrow view, the employer-employee relationship was also thought in 1890 to be beyond Congress' regulatory power.⁵⁷ Thus, it is highly unlikely that either Sherman or Congress had any intent to attack employer restraints in labor markets with antitrust legislation since Congress was thought to have no power to do so.

Attributing this understanding to Sherman helps explain part of the disagreement between Sherman and Senator George, the principal critic of Sherman's bill. George argued that the bill might be used to destroy farmers' cooperatives and other organizations such as labor un-

55. *Id.* at 2457 reprinted in S. Doc. No. 147, *supra* note 39, at 95, and in 1 E. KINTNER, *supra* note 38, at 117.

56. *E.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895). See Bork, *supra* note 41, at 31; Stern, *The Commerce Clause and the National Economy 1933-1946*, 59 HARV. L. REV. 645, 648-49 (1946); H. VON HOLST, *THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA* 139 (1887).

57. This perception persisted well into the twentieth century. Congress did not even attempt to use the commerce power to regulate the employer-employee relationship until 1916, when it passed the Child Labor Act, which sought to ameliorate substandard working conditions by preventing interstate commerce in the products of child labor. Child Labor Act, ch. 432, 39 Stat. 675 (1916) (replaced by Fair Labor Standards Act, 29 U.S.C. § 212 (1976)). The Supreme Court struck down this attempt. *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) ("Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation.") It was not until 1937 that the Supreme Court upheld the validity of federal legislation regulating the employer-employee relationship under the commerce power. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

ions.⁵⁸ When George first made this argument, Sherman was probably astonished, for his response was, "That is a very extraordinary proposition."⁵⁹ Sherman probably did not understand how George thought Congress could regulate most of those groups, under the commerce power in the first place since their membership often was located within a single state. Earlier, Sherman had explained that his bill would reach only contracts for the importation or interstate transport of goods:

[Section 1] makes such agreements and combinations unlawful, and it goes as far as the Constitution permits Congress to go, because it only deals with two classes of matters: contracts which affect the importation of goods into the United States, which is foreign commerce, and contracts which affect the transportation and passage of goods from one State to another. The Congress of the United States can go no farther than that.⁶⁰

The first time after George's argument that Sherman spoke in defense of his bill, he expressed his belief that the bill would not reach *any* intrastate activity:

All the combinations at which this bill aims are combinations embracing persons and corporations of several States . . . This bill does not include combinations within a State . . .⁶¹

The next day, Senator Teller, after reiterating George's concern that the proposed law might be used to destroy trade unions, asked Senator Reagan, who had proposed his own bill as a substitute for S.1:

If . . . a class of laborers should combine to raise the price of their labor, and thus have a tendency to increase the price of the product, whether it was in a mill, or in a shop or on a farm, would it not fall within the inhibition of this bill, both the original [Sherman] bill and the amendment of [Senator Reagan]?⁶²

Senator Reagan replied that Mr. Teller was misled by reading a section of Reagan's bill in isolation. The bill's reach was limited to "matters involved in commerce with foreign nations and between the States."⁶³ Thus, he reasoned, his bill would not apply to labor groups: "I suggest

58. 20 CONG. REC. 1458 (1889), *reprinted in* 1 E. KINTNER, *supra* note 38 at 77-78.

59. *Id.*, *reprinted in* 1 E. KINTNER, *supra* note 38 at 79. Sherman also said: "There is nothing in the bill to prevent a refusal by anybody to buy anything. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessities of life." *Id.* A brief colloquy ensued, and finally Sherman asked George if he construed the bill to prohibit "an agreement among several people not to drink whiskey or brandy." When George in effect answered "yes," Sherman, perhaps by this time frustrated and disbelieving, asked no further questions. *Id.*

60. *Id.* at 1167, *reprinted in* 1 E. KINTNER, *supra* note 38 at 69.

61. 21 CONG. REC. 2460 (1890), *reprinted in* S. DOC. NO. 147, *supra* note 39, at 102, and in, 1 E. KINTNER, *supra* note 38, at 123.

62. *Id.* at 2561, *reprinted in* S. DOC. NO. 147, *supra* note 39, at 146, and in, 1 E. KINTNER, *supra* note 38, at 160.

63. *Id.* at 2561-62, *reprinted in* S. DOC. NO. 147, *supra* note 39, at 146-47, and in, 1 E. KINTNER, *supra* note 38 at 160-61.

that the Farmers' Alliance and the Knights of Labor would not come under that clause; but if they did, the way to prevent all such organizations is to strike down first the organizations which gave rise and necessity to this local labor association."⁶⁴ Reagan's answer did not fully respond, however, to a point made by George concerning both Sherman's and Reagan's bill. George had observed that "[t]he Knights of Labor . . . are an organization composed of citizens of the different States of the Union, probably of every State of the Union. The object of that organization . . . is to increase the price of their wages. Now, increasing the price of wages has a tendency, in the language of this bill, to increase the price of the product of their labor."⁶⁵ Thus, George wondered why the activities of the Knights of Labor would not be proscribed by the bills. Sherman, perhaps feeling pressed by the arguments made by Teller and George, offered his views:

Now, let us look at it. The bill . . . does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of the particular trade or occupation. It does not interfere with the Farmers' Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of production of their crops and to secure intelligent growth and to introduce new methods. No organizations in this country can be more beneficial in their character than Farmers' Alliances and farmers' associations. *They are not business combinations* . . . And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported.⁶⁶

Although Sherman's response was no doubt inadequate to mollify the bill's critics, it evidences his concern with product market competition, the kind of competition that "business combinations" restrain. Sherman did not believe his bill could be applied to labor, and he thought it unnecessary to state this expressly since his bill could not reach, consistent with congressional power, the employer-employee relationship. If, as drafted, his bill did reach some labor combinations, Sherman definitely did not intend this result. As far as Sherman was concerned, his bill had no applicability to labor market restraints, and plainly Sherman did not contemplate his bill being used to promote competition in labor markets.

64. *Id.* at 2562, reprinted in S. Doc. No. 147, *supra* note 39, at 147, and in, 1 E. KINTNER, *supra* note 38, at 161.

65. *Id.* at 2561, reprinted in S. Doc. No. 147, *supra* note 39, at 146, and in, 1 E. KINTNER, *supra* note 38, at 160.

66. *Id.* at 2562, reprinted in S. Doc. No. 147, *supra* note 39, at 148, and in, 1 E. KINTNER, *supra* note 38, at 162 (emphasis added).

Although George led the attack on Sherman's bill, George did not oppose the principle of antitrust legislation, for he had in fact introduced an antitrust bill of his own. Moreover, George's concern that the bill would injure labor organizations was not predicated on a broader view than Sherman's view of Congress' power under the commerce clause. Actually, of all the Senators, George had the most limited view of the commerce power because he thought that legislation under the commerce power had to serve commercial ends. In George's view, Sherman's bill did not regulate "commerce," but was instead directed at agreements entered into before or after the actual transportation between states and had no relationship to that "commerce."⁶⁷ Thus, George's attack upon Sherman's bill was actually a two-fold argument: (1) the bill was unconstitutional; (2) if it were construed to be constitutional, it would be used to destroy beneficial organizations.⁶⁸ George's argument, coupled with the fact that Sherman's bill was amended to exempt labor organizations and that this "labor proviso" was subsequently deleted from the bill prior to passage, has created doubt as to whether Congress intended the Sherman Act to apply to labor organizations.⁶⁹

It is not necessary to resolve this argument for the purpose of determining whether the Sherman Act applies to restraints on labor market competition, because Congress, even if it did intend to apply the Sherman Act to labor unions, did so because of what unions might do to injure competition *in the product market*. Thus, even if one concludes that the Sherman Act was intended to apply to labor organizations, it does not follow that the Sherman Act applies to restraints on labor market competition. George, the principal critic, realized that the reason labor would be subjected to a constitutional bill is that "increas-

67. *Id.* at 1768, 1770-71, reprinted in S. DOC. NO. 147, *supra* note 39, at 79-80, 83-85, and in, 1 E. KINTNER, *supra* note 38, at 101-02, 105-07; Bork, *supra* note 41, at 34 n.82; H. THORELLI, *supra* note 38, at 178. George stated at one point in the debates:

This power is claimed here, as I understand it, not because there is any actual commerce between States or citizens of States, but because the subjects to which this bill relates may afterwards become the subjects of interstate commerce.

20 CONG. REC. 1461 (1889), reprinted in 1 E. KINTNER, *supra* note 38, at 84.

After quoting extensively from Supreme Court cases such as *Veazie v. Moor*, 55 U.S. (14 How.) 567 (1852), and *Coe v. Errol*, 116 U.S. 517, (1886), George stated:

[I]f anything is settled in the constitutional law of this country it is that an article of commerce, an article of merchandise, does not become the subject of Congressional jurisdiction under the commercial clause of the Constitution until it has actually become the subject of interstate or foreign commerce, and that this does not begin, though it may be intended for that purpose, until transportation has actually commenced.

20 CONG. REC. 1461 (1889), reprinted in 1 E. KINTNER, *supra* note 38, at 86.

68. *See id.* at 1462 (1889), reprinted in 1 E. KINTNER, *supra* note 38, at 88.

69. Although the matter is not free from all doubt, a substantial case can be made that the Fifty-first Congress did not intend for the Sherman Act to apply to farmer and labor organizations. *See* H. THORELLI, *supra* note 38, at 231-32; E. BERMAN, *LABOR AND THE SHERMAN ACT* 11-54 (1930).

ing the price of wages has a tendency, in the language of this bill, *to increase the price of the product of their labor.*"⁷⁰ In other words, George reasoned that labor unions can have an effect in the product market, and *for that reason* their activities would be condemned by the proposed antitrust legislation, if it were deemed constitutional.⁷¹

B. Section 6 of the Clayton Act

Although there was no compelling indication that the Congress which enacted the Sherman Act intended it to apply to labor organizations or to labor market restraints generally, courts sometimes held that concerted activities involving employees violated section 1.⁷² In 1908, the Supreme Court held in *Loewe v. Lawlor*⁷³ that the Sherman Act was applicable to labor unions. Arguably, the Court so held because the activity of the union had the purpose of restraining the product market, as the Court itself stated thirty years later.⁷⁴ Regrettably, the Court did not explain the decision in those terms.⁷⁵ Rather, the Court broadly stated that the Act applied to labor combinations, a proposition which, if applied literally, would prohibit all joint employee activity. The threat to labor from this decision and others which followed it⁷⁶ caused Congress in 1914 to enact section 6 of the Clayton Act to make clear what it thought had been clear when the Sherman Act was passed.⁷⁷ In section 6, Congress declared that "the labor of a human

70. 21 CONG. REC. 2561 (1890), *reprinted in* S. DOC. NO. 147, *supra* note 39, at 146, and in, 1 E. KINTNER, *supra* note 38, at 160.

71. That this was George's logic is evident from the antitrust bill which he introduced in the Fifty-first Congress. See S. 6, 51st Cong., 1st Sess. (1889), *reprinted in* S. DOC. NO. 147, *supra* note 39, at 411. Section 1 of S. 6 prohibited all contracts, etc. preventing or tending to prevent "full and free competition in the importation, transportation, manufacturing, or sale of any article of merchandise, or which shall have the effect of advancing the cost of any such article to the consumer." This provision by its terms did not proscribe employer restraints in labor markets, since labor is not an "article of merchandise" and employers would not restrain a labor market for the purpose of "advancing the cost of any such article to the consumer." George inserted a proviso in § 1 of S. 6 excluding "arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor, or of increasing their wages" presumably because he thought the activities of these organizations could inhibit competition in the product market. The same point can be made with regard to other bills introduced in the Fifty-first Congress, first session. See, e.g., H.R. 91, *reprinted in* SEN. DOC. NO. 147, *supra* note 39, at 417.

72. See E. BERMAN, *supra* note 69, at 57-76.

73. 208 U.S. 274 (1908).

74. *Apex Hosiery v. Leader*, 310 U.S. 469, 495 (1940).

75. The Court did not give a fair reading to the legislative history and otherwise failed to understand the nature of the issue before it. See Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 31-32; E. BERMAN, *supra* note 69, at 77-87.

76. See E. BERMAN, *supra* note 66, at 87-98.

77. The bill which ultimately became the Clayton Act was introduced in the House on April 14, 1914. H.R. 15657, 63rd Cong., 2d Sess. (1914), *reprinted in* 1 E. KINTER, *supra* note 38, at 1080-88. The House Committee on the Judiciary explained that the purpose of § 7, which would later be amended and become § 6, was "to make clear certain questions about which doubt has

being is not an article of commerce" and that

[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.⁷⁸

The thrust of the debate has led some to conclude that section 6 was designed only to provide a limited exemption from the Sherman Act for labor union activity. It is true that most of the debate on section 6 in both houses of Congress focused on the need to free labor from court decisions making labor organizations subject to the antitrust laws.⁷⁹ To the extent that there was controversy in the Congress, it concerned whether the language in the proposed bill was sufficiently strong to ensure that labor would not be subjected to the antitrust laws.⁸⁰ Throughout the debate, members of both the House and the Senate repeatedly stated that it was not the intent of the drafters of the Sherman Act to apply antitrust principles to labor groups.⁸¹ Even the

arisen," namely, whether labor and other types of organizations are within the scope of the Sherman Act. REPORT OF THE HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 627, pt. 1, 63rd Cong., 2d Sess. 14 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1095. As reported from the committee, the scope of the exception was limited to protecting specified organizations, including labor. What is now the first sentence of § 6 was added later. *See infra* notes 86 and accompanying text.

Several antitrust bills that included provisions specifically exempting labor from the Sherman Act were introduced in various sessions of the Congress prior to 1914. Although one of these bills passed the House, none of them ever became law. *See* E. BERMAN, *supra* note 69, at 84-86.

78. 15 U.S.C. § 17 (Supp. IV 1980).

79. Rep. Sherwood and Sen. Ashurst each placed in the Record a list of 101 cases in which courts had applied the Sherman Act to labor. 51 CONG. REC. 9173-74 (1914) *reprinted in* 1 E. KINTNER, *supra* note 38, at 1278-81; *id.* at 13665-66, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1778-80.

80. *E.g.*, REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY (Minority Views), H.R. REP. NO. 627, pt. 3, 63rd Cong., 2d Sess. 9-11 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1158-59.

81. 51 CONG. REC. 9170 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1271 (Rep. Bryan); *id.* at 9171-72, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1272-74 (Rep. Sherwood); *id.* at 9245-46, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1330-33 (Rep. MacDonald); *id.* at 9161, *reprinted in* 1 E. KINTNER, *supra* note 38, at (Rep. McGillicuddy); *id.* at 9540, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1509 (Rep. Webb); *id.* at 9540, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1510 (Rep. Henry); *id.* at 9543, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1517 (Rep. Bartlett); *id.* at 9547, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1525 (Rep. Towner); *id.* at 9549, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1530 (Rep. Johnson); *id.* at 9551, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1533 (Rep. Hensley); *id.* at 9554, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1541 (Rep. Barkley); *feisid.* at 9565, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1566 Rep. Lewis); *id.* at 13663, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1772 Sen. Ashurst); *Id.* at 13848, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1800 (Sen. Culberson); *id.* at 13844, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1791 (Sen. Thompson); *id.* at 13967, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1885 (Sen. Hollis); *id.* at 13969, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1889-90

title of section 6 in the United States Code, "Antitrust laws not applicable to labor organizations,"⁸² suggests that section 6 was drafted only to provide a limited exemption from the Sherman Act for labor union activity. Unquestionably, section 6 does at least this much. National labor policy, as it has developed, gives unions certain protections not given to employers, so that the resulting balance of power will make collective bargaining effective. That section 6 immunizes from the antitrust laws legitimate union activity and multi-employer activity incidental to collective bargaining is beyond question.

Still, even if it were true that the text of section 6 provides an exemption from the Sherman Act only for labor organizations, it would not follow that promoting labor market competition is a goal of the Sherman Act. When adopted, the Sherman Act was intended to promote only product market competition. However, courts had permitted the Act to be used as a weapon against unions without requiring employer-plaintiffs to demonstrate that the challenged conduct of unions had anticompetitive effects in product markets. It was this perversion of congressional intent that required legislative correction. Thus, it is understandable that Congress focused on providing an exemption for labor organizations. In short, Congress' failure in 1914 to include an exemption for employer activities affecting labor is meaningless if no one at that time thought that the Sherman Act prohibited such employer activities.

In any event, section 6 does not function solely to immunize activities of labor organizations. First, as a matter of ordinary language, the opening sentence of the section, which declares that "the labor of a human being" is not an "article of commerce," excludes the selling and buying of labor from the scope of the Sherman Act. The Sherman Act applies to the sale and exchange of goods and services in the product market. In the first sentence of section 6, Congress stated that the labor of a human being is not one of those products sold and exchanged to which the Sherman Act applies.⁸³

(Sen. Hughes). *But see id.* at 13908, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1838 (Sen. Pomerene).

82. *See* 15 U.S.C. § 17 (Supp. IV 1980).

83. Another way to phrase this proposition is as follows: the buying and selling of labor is not Sherman Act "commerce." In response to this specific proposition, it should be noted that litigants have sometimes defended against applying the Sherman Act to various business activities on the ground that, for one reason or another, the activities are not § 1 "commerce." This defense, when asserted, has not fared well in the Supreme Court. *E.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-88 (1975). Moreover, claims that challenged conduct is within an implied exemption to the Act have not been viewed with favor. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357-58 (1963). However, none of the cases in which an antitrust exemption was refused rested on *explicit statutory language* stating that the challenged activities are outside the scope of the Sherman Act. *E.g.*, *Export Trade Act*, 15 U.S.C. § 62 (Supp. IV 1980);

Second, there are several indications in the legislative history of section 6 that the plain language means what it says. Some members of Congress apparently perceived a distinction between product markets and labor markets, intending the Sherman Act to apply to the former but not to the latter. For example, Senator Jones, somewhat prophetically urging the enactment of labor legislation, emphasized that the labor legislation should apply to the labor market, and the Sherman Act should be left to apply to the commercial market, as it had always been intended:

Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . . we should treat labor and its relations to interstate trade as really an independent proposition . . . we must define the rights of labor so far as it affects commerce . . . we should separate it and legislate for it, of course in its relation to interstate trade and commerce, but not treat it . . . as an article of commerce, because it is not an article of commerce. It is no part of commerce. It is not a commodity at all.⁸⁴

Jones' belief that labor is neither a "commodity" nor an "article of commerce," a belief shared by others in the House and Senate,⁸⁵ is

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (Supp. IV 1980); Clayton Act, 15 U.S.C. § 17 (Supp. IV 1980). Because of § 6, the buying and selling of labor stands on a different footing than other activities for which an "implied exception" from the Sherman Act has been sought.

84. 51 CONG. REC. 14019 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1942-43. *See also id.* at 14013, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1931 (Jones, stating that "Trade and commerce are made up of articles or commodities; not of labor, but the products of labor").

85. In debate in the House on § 6, Congressman Kelly stated that the bill recognized "the fundamental difference between human labor and the products of labor." 51 CONG. REC. 9086 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1221. Congressman MacDonald agreed that "[h]uman labor is not a commodity . . ." *Id.* at 2149, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1339. Congressman Crosser recognized the same distinction:

The evil that the bill is intended to correct is the monopoly of the natural resources . . . But no man has any natural or moral right of ownership in another man's body or his power to labor, and therefore no man has any right to say that another shall or shall not work or to say that he shall not consult with his fellows about working or refusing to work or in regard to the terms of employment so long as the conference is free from violence. The same right as to his labor, whether manual or mental, must be conceded to the individual employer or if a corporation be the employer, then the officials of such corporation have the right to consult with one another or with like officials of some or all other corporations in regard to the terms upon which they will do their work. This, however, is an entirely different thing from permitting a monopoly of the resources of the earth.

Id. at 9556, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1545. Congressman Lewis referred to the error committed by some:

of considering labor as a commodity But there is this distinction between labor and a barrel of oil, a commodity; Labor is never in truth a commodity; . . . While a barrel of oil is not only a commodity in the market, it is a commodity before the courts; it is a commodity before the legislature. The legal attribute of a commodity is property The rules that are rationally applicable to property can seldom be justly applied to the man.

Id. at 9566, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1566. Congressman Murdock stated "I

particularly striking in light of the fact that only fifteen years earlier most proposals for antitrust legislation, including Sherman's, had sought to prohibit restraints on competition in "commodities," "articles of commerce," or similarly described *tangible* things. Jones' statement, then, can be read as reaffirming Congress' intention that the Sherman Act apply to restraints on product market competition.

Particularly significant are the statements of Senator Cummins, who was the author of what eventually became the first sentence of section 6.⁸⁶ In Senate debate, Senator Cummins stated:

We have been debating this bill, and I have heard the subject debated a thousand times upon the hypothesis that the labor of a human being is of the same quality and order as a bale of cotton, a barrel of flour, or a bushel of corn. I repudiate the parallel and the comparison. It is because we have been in the habit of thinking of labor as a commodity that we have fallen into many mistakes which now impair and mar, I think, both legislation and judicial opinion. The labor of a human being, whether it be of the mind or of the hand, is not a commodity Labor is not a commodity; it is not an article of commerce; and when the Constitution of the United States gave to Congress the authority to regulate commerce among the States, it did not give it the right to regulate labor, the disposition of the energy of the human being.⁸⁷

In the same speech, he explained that a contract among manufacturers to fix product price

believe, in the first instance, that labor is not a commodity." *Id.* at 9568, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1572. Senator Borah interpreted court decisions he discussed to "clearly recognize the distinction between a commodity and labor." *Id.* at 13924, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1874. Senator Thomas said that "labor is not a commodity, and, not being a commodity, should not be made subject to the provisions of the antitrust law." *Id.* at 14022, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1950. Senator Kern stated "I think the time has come when there should be a strong legislative declaration to the effect that the labor of a human being is not a commodity or an article of commerce . . ." *Id.* at 14587, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2372. Senator Pittman said that the part of Senator Cummins' amendment "which describes labor and differentiates it from a commodity is very excellent." *Id.*, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2372.

86. Sen. Cummins proposed a substitute for § 7 at the end of the Senate debates on August 19, 1914. 51 CONG. REC. 13983 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1920. The amendment, which included the phrase "the labor of a human being is not a commodity or an article of commerce," was allowed to lie on the table, *id.*, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1920, and it was again offered to the Senate as a substitute for § 7 on September 1, 1914. *Id.* at 14546-47, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2365. The amendment was debated and rejected on September 2, 1914. *Id.* at 14585-90, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2366-78. Immediately thereafter, Senator Culberson proposed an amendment to insert into § 7 only the words "the labor of a human being is not a commodity or article of commerce." The amendment was agreed to without a roll call. *Id.* at 14590-91, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2378-79. While the "Culberson amendment" became the first sentence of § 6, those words were written by Senator Cummins. Indeed, Senator Cummins said during the debate on his amendment that if his amendment failed, he would move the inclusion of the "Culberson amendment." *Id.* at 14586, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2368. Culberson apparently beat Cummins to the punch.

87. 51 CONG. REC. 13979-80 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1912.

would be a violation of the antitrust law before a single act was performed That contract has to do with commodities, with the subjects of commerce, with articles that are transported from place to place and bought and sold in the markets of the world.⁸⁸

Cummins shared the prevailing belief that Congress' commerce power was limited, but in a colloquy with Senator McCumber he left no doubt that he viewed the sale of labor to an employer as a transaction fundamentally different from the ordinary sale of a good:

Mr. McCUMBER. Mr. President, may I ask the Senator from Iowa if any court has ever held or ever intimated that the sale by a man of his labor is a commercial act?

Mr. CUMMINS. No; I think no court has ever so held.

Mr. McCUMBER. Does the Senator really think there is danger of a court ever holding that the mere hiring of a man to an employer is an act of commerce?

Mr. CUMMINS. There are a great many opinions which contain discussions of the subject and which will be found to embrace a course of reasoning which, if carried to its logical end, would put labor precisely where you put a bale of cotton or a bushel of wheat; but those reasons have never found expression in any decision. It never has been so decided. I confess that I have shared the apprehension that some students of the subject have—that the courts may do that in the future.⁸⁹

Cummins, realizing courts might decide one day that the employer-employee relationship is "in commerce," intended to exclude "the sale of a man of his labor" and "the hiring of a man to an employer" from the definition of the "commerce" regulated by the Sherman Act.

Attributing such an intent to Cummins is consistent with the language of Supreme Court decisions with which Cummins was no doubt well acquainted. Section 1 of the Sherman Act prohibits contracts, etc. "in restraint of trade or commerce;" if labor or any other item is not an "article of commerce," transactions involving that item are obviously not "commerce."⁹⁰ In *Paul v. Virginia*,⁹¹ the Court held that "[insur-

88. *Id.* at 13980, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1913.

89. *Id.* at 14018-19, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1942.

90. Although "trade" and "commerce" are disjunctive, there is no basis for concluding that "restraint of trade" has a meaning independent of "restraint of commerce." As used in 1890, the terms "trade" and "commerce" were largely synonymous, H. THORELLI, *supra* note 38, at 222, and there is no reason to believe that they are used in different senses in § 1. See *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (in § 1, "it may be that the words 'trade and commerce' are there to be regarded as synonymous"). In *Apex Hosiery*, the Court stated that the words "or commerce among the several states" did not refer to a different kind of restraint to be prohibited by the Sherman Act but merely constituted "the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes." *Apex Hosiery v. Leader*, 310 U.S. 469, 495 (1940).

But even if "trade" and "commerce" are assumed to have separate meanings, § 6 still would exempt all matters involving labor. Reading § 1 in the disjunctive, it prohibits contracts, etc., "in restraint of trade" and "in restraint of commerce." Section 6 of the Clayton Act provides that "the labor of a human being is not a commodity or article of commerce." "Commodity" is the ana-

ance] contracts are not articles of commerce" and "are not commodities."⁹² Until overruled by the Supreme Court in 1944,⁹³ this holding, which is nearly identical to the first sentence of section 6, precluded the application of the Sherman Act to conspiracies fixing insurance rates.⁹⁴ It is entirely possible that Senator Cummins, a lawyer who demonstrated his familiarity with judicial decisions in his speeches in the Senate, obtained the inspiration for his amendment from *Paul v. Virginia* and those cases following it. One case which quoted extensively from *Paul v. Virginia*, holding that a tax on insurance was not a tax on interstate commerce, was decided in 1913, shortly before the debates on the Clayton Act.⁹⁵

From the proposition that "the labor of a human being" is neither a "commodity" nor "an article of commerce,"⁹⁶ Cummins reasoned that an organization of laborers could not itself be a restraint of trade or commerce within the meaning of the Sherman Act.⁹⁷ However, he felt that labor organizations, or individuals within those organizations, could engage in activity that restrained commerce:

Mark you, I am not now considering what the individual members of a labor organization may do. I am not considering how they may impede commerce in the execution of the objects of their organization.⁹⁸

In recognizing that labor organizations were not restraints of trade or commerce but that they could have effects in "commerce," Cummins stated the essence of the distinction between labor markets and product markets. Cummins concluded his last speech before the vote on his amendment as follows:

Recapitulating, my substitute recognizes the high quality of labor, distinguishes the power, whether mental or physical, of the human being to render service to his fellow men from the commodity which may be produced through that service.⁹⁹

logue of "restraint of trade," since commodities are traded; "article of commerce" is the analogue of "restraint of commerce," since "articles of commerce" move in "commerce." If labor is not a commodity to be "traded," labor cannot be the object of restraint of trade. Similarly, if labor is not an article of commerce, transactions involving that item are obviously not "commerce." When analyzed in this way, one must still conclude that § 6 of the Clayton Act was intended to remove as fully as possible matters involving labor from the reach of the Sherman Act.

91. 75 U.S. (8 Wall.) 168 (1863).

92. *Id.* at 183.

93. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

94. *United States v. South-Eastern Underwriters Ass'n*, 51 F. Supp. 712, 714 (N.D. Ga. 1943), *rev'd*, 322 U.S. 533 (1944).

95. *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 502-04 (1913).

96. 51 CONG. REC. 13980 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1912.

97. *Id.* at 13979, 13980, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1910-11, 1912.

98. *Id.* at 13979, *reprinted in* 1 E. KINTNER, *supra* note 38, at 1911. He made the same point earlier in the debate. *Id.* at 13969, *reprinted in* 1 E. KINTNER, *supra* note 38 at 1891 ("I am not saying, of course, that the members of a labor union can not do something that will restrain trade").

99. *Id.* at 14596, *reprinted in* 1 E. KINTNER, *supra* note 38, at 2369.

In short, the author of the first sentence of section 6 intended that labor organizations be exempt from the Sherman Act. But he sought to secure this objective by declaring that labor—the work performed by human beings—is not subject to the Sherman Act.

Third, even if the first sentence of section 6 had not been enacted, the second sentence of section 6 standing alone was thought by some to be broad enough to exclude the sale of labor to an employer from the reach of the Sherman Act. In the Senate Committee on the Judiciary report on a draft of section 6 *without* the first sentence which Cummins later proposed, the Committee expressed its view that section 6 meant that “labor is not, and ought not to be regarded as a commodity within the purview of the antitrust laws.”¹⁰⁰ In the Committee’s view, this abbreviated version of section 6, limited in that it referred only to “organizations,” was still broad enough to mean that labor matters generally are not within the scope of the antitrust laws. This reinforces the proposition that Congress intended to apply the Sherman Act only to restraints in product markets.

To summarize, in the first two decades after the Sherman Act was passed, courts supported the use of the Act to frustrate efforts of labor organizations to improve labor conditions. Congress enacted section 6 of the Clayton Act to rectify this unintended use of the federal antitrust law. In the context of rapidly developing national labor policies, section 6 has had its greatest legal significance in the collective bargaining setting. If one focuses on this application of section 6, however, it is easy to overlook the original purposes for which section 6 was enacted. What Congress did in 1914, rather than providing support for an argument that the Sherman Act was designed to promote competition in labor markets, provides evidence that Congress perceived a distinction between labor markets and product markets and that Congress intended the Sherman Act to reach the latter but not the former.

Furthermore, the conflicting policies of national labor law and antitrust law would make antitrust law a crude tool for cultivating competition among employers in labor markets. We now examine the policy of the Sherman Act.

III

POLICY OF THE SHERMAN ACT

On many occasions, the Supreme Court has stated that competition is the premise on which the Sherman Act is based. In *Northern Pacific Railway v. United States*,¹⁰¹ the Court described the Act as a

100. S. REP. NO. 698, 63rd Cong., 2d Sess., 46 (1914), *reprinted in* 1 E. KINTNER, *supra* note 38, at 1748.

101. 356 U.S. 1 (1958).

"comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."¹⁰² More recently, in *National Society of Professional Engineers v. United States*,¹⁰³ the Court explained that the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but also better goods and services Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."¹⁰⁴ The question addressed in this Article could be phrased this way: does the pro-competition premise of the Sherman Act apply to all activities of firms, or does it not apply to some activities of firms, such as employers' activities in labor markets?

As a threshold matter, it is worth noting that the premise on which the Sherman Act is based is not the premise underlying national labor policy. Indeed, "the congressional policy favoring collective bargaining" under the National Labor Relations Act¹⁰⁵ demonstrates that federal policy in the market for labor is not premised on "unrestrained interaction of competitive forces"¹⁰⁶ or a "free opportunity to select among alternative offers."¹⁰⁷ Collective bargaining seeks to improve the lot of labor through conscious creation of "a system of bilateral monopoly" in which the power of business is balanced by the power of labor.¹⁰⁸ The very existence of collective bargaining depends, in many instances, upon limiting competition among employers and creating "significant anti-competitive incentives in both labor and management."¹⁰⁹ In addition, the Supreme Court recognized more than forty years ago that federal legislation "setting up minimum wage and hour standards" demonstrates that "combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to public policy."¹¹⁰

Although national labor policy requires restrictions upon competi-

102. *Id.* at 4.

103. 435 U.S. 679 (1978).

104. *Id.* at 695. See *Association of Gen. Contractors of California, Inc., v. California State Council of Carpenters*, 103 S. Ct. 897, 908-09 (1983) ("The Sherman Act was enacted to assure customers the benefits of price competition").

105. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

106. *Northern Pac. Ry. v. United States*, 356 U.S. at 4.

107. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 695.

108. Winter, *supra* note 75, at 16, 18 n.18.

109. *Id.*

110. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.24 (1940). In certain industries, such as textile manufacturing and vegetable canning, a minimum wage may fix most wage levels directly because most employees are paid no more than the minimum wage. In other industries, a minimum wage sets wage levels indirectly because of the need to maintain the same relation between minimum wage jobs and jobs requiring higher skills.

tion in labor markets, it does not necessarily follow that employers should be free to engage in connected anticompetitive concerted market activities directed against labor. Indeed, some might argue that, notwithstanding the anticompetitive premise of national labor policy, employers should compete to pay higher wages and thereby improve the lot of labor, at least where labor is unorganized and consequently unable to demand a higher wage based on increased bargaining power.¹¹¹ Therefore, the pro-competition premise of the Sherman Act is viewed as applying to employers' activities generally, including what they do in labor markets, and this premise is overcome only when Congress explicitly approves practices that restrict competition among employers.¹¹² Such a specific exemption exists, under this argument, in section 6 of the Clayton Act,¹¹³ which is then read as exempting only joint employer activities incidental to bargaining with labor organizations.¹¹⁴

Several problems arise with the foregoing argument. First, despite the expansive language of section 1 of the Sherman Act, not all concerted activities involving commercial transactions are within its coverage.¹¹⁵ As demonstrated in Part II, this indicates that the premise on which the argument is based—that the Sherman Act applies to all activities of firms, including their activities as employers in labor markets—is incorrect. Second, whatever may be the merit of a policy of

111. For example, one can begin with the assumption that the principal—and perhaps sole—purpose of federal antitrust law is to promote economic efficiency. See R. BORK, *THE ANTITRUST PARADOX* 61-66 (1978), R. POSNER, *ANTITRUST LAW* (1976). In this situation, one might conclude that promoting competition among employers for the services of employees is desirable. Wage fixing will cause some labor to drift into lower valued employment, thereby wasting valuable resources. However, claiming that the Sherman Act was intended to promote efficiency in *all* economic relationships regardless of their nature attributes too broad a purpose to the Sherman Act, and the Act has never been so construed. See *supra* text accompanying notes 38-64; Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?* 125 U. PA. L. REV. 1191, 1213 (1977); Sullivan, *Economics and More Humanistic Discipline: What Are the Sources of Wisdom for Antitrust?* 125 U. PA. L. REV. 1214, 1218-23 (1977); MCI Communications Corp. v. American Tel. & Tel. Co., 702 F.2d 1081, 1177 (7th Cir. 1982) (Wood, J., dissenting).

112. It is this kind of policy argument which could be asserted in defense of decisions such as *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970). See *infra* notes 221-52 and accompanying text.

113. Clayton Act § 6, 15 U.S.C. § 17 (1976).

114. See Altman, *supra* note 22, at 142-50. Such a limited reading of the scope of § 6 was criticized earlier in this Article. See *supra* notes 72-100 and accompanying text.

115. E.g., *Allied Int'l, Inv. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981) (union's politically motivated refusal to handle cargoes of ships engaged in trade with Soviet Union is not a restraint of trade in violation of Sherman Act); *Missouri v. National Org. for Women*, 620 F.2d 1301, 1312 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (convention boycott of states which had not ratified Equal Rights Amendment "beyond the scope and intent of the Sherman Act"); *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1271 (E.D. Pa. 1978) (concerted effort of defendants to obtain township order closing down plaintiff's business "is simply not the kind [of conduct] that the Sherman Act was designed to regulate").

promoting employer competition in labor markets, no court has ever announced it as a goal of federal *antitrust* policy. There is no federally articulated policy that wages should be as high as possible comparable to the clearly articulated policy that prices should be as low as possible.

In fact, articulated national policies exist that both restrict employer competition in labor markets and actively encourage wage uniformity. If it is federal policy that employers should compete to pay higher wages, that policy is well hidden. For example, the Davis-Bacon Act¹¹⁶ requires that contractors working on federal buildings or other public works projects agree to pay their "laborers and mechanics" no less than "wages that are determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" The required prevailing wage is determined by a wage survey conducted by the government.¹¹⁷ Similar requirements are imposed on contractors providing goods or services to the federal government.¹¹⁸ These provisions restrict free competition among employers in the market for labor and are intended to promote wage uniformity.¹¹⁹

Another illustration of the federal policy favoring wage uniformity

116. 40 U.S.C. § 276a (Supp. IV 1980).

117. 29 C.F.R. § 1.3 (1983). On May 28, 1982, the Secretary of Labor promulgated new rules regarding the procedures for predetermination of wage rates. The new rules did not eliminate the wage survey conducted by the Government. *Id.* In any event, on July 22, 1982, the United States District Court for the District of Columbia enjoined implementation of the new regulations. Building & Constr. Trades Dep't, AFL-CIO v. Donovan, 543 F. Supp. 1282, 1292 (D.D.C. 1982).

118. The Walsh-Healy Act, 41 U.S.C. § 35 (Supp. IV 1980) requires that contractors providing materials or supplies in excess of \$10,000 to the government agree to pay "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality" where the materials or supplies are to be manufactured or furnished. The purpose of this provision is "to make certain that the United States, in contracts for materials for its own use, [does] not patronize firms paying [wages] lower than those generally being paid in the industry." *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 520 n.1 (D.C. Cir. 1964).

The Service Contract Labor Standards Act, 41 U.S.C. § 351 (Supp. IV 1980) requires any contractor furnishing services in excess of \$2,500 to the government to pay wages and provide fringe benefits "in accordance with the prevailing rates for such employees in the locality." If any such employees are covered by a collective bargaining agreement, the contractor must pay those rates, including "prospective [wage/fringe benefit] increases." 41 U.S.C. § 351(a)(1), (a)(2). This Act, like the Walsh-Healy Act, is "designed to ensure that service employees working on government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors." *International Ass'n of Machinists v. Hodgson*, 515 F.2d 373, 375 (D.C. Cir. 1975). To check compliance with both the Walsh-Healy and Service Contract Acts, the government conducts wage surveys. *Wirtz v. Baldor Elec. Co.*, 337 F.2d at 522; *International Ass'n of Machinists v. Hodgson*, 515 F.2d at 376.

119. *E.g.*, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.24 (1940); *International Union of Operating Eng'rs, Local 627 v. Arthur*, 355 F. Supp. 7, 8 (W.D. Okla.), *aff'd*, 480 F.2d 603 (10th Cir. 1973). These statutes prevent contractors from securing bids on federal projects by basing their bids on unreasonably low wages for labor. To this extent, the statutes establish a floor below which wages cannot fall, much like a minimum wage. Yet, in mandating that wages paid by government contractors shall not fall below this floor, Congress has reinforced the prevailing

is the Federal Pay Comparability Act of 1970.¹²⁰ Under that statute, pay rates for federal employees are to "be comparable with private enterprise pay rates for the same levels of work."¹²¹ Implementing this requirement involves the use of elaborate wage surveys.¹²² The federal pay rate is set at the average shown by the survey, so that federal pay rates have "the least impact—more or less neutral—in the labor market."¹²³ Similar requirements of pay comparability are imposed on recipients of federal job training funds,¹²⁴ where the wages to be paid are also based on detailed wage surveys.¹²⁵

Other federal statutes also tend to limit employer competition in the labor market, although the effect is less obvious. For example, seniority systems tend to preclude the free movement of labor and to make labor less responsive to wage differentials. Bona fide seniority systems are sanctioned by federal anti-discrimination legislation.¹²⁶ Vesting requirements of pension plans may have a similar effect, and these requirements are also sanctioned by federal law.¹²⁷ Denying unemployment benefits to persons who quit their jobs simply because of low pay may also tend to restrict competition in the labor market.¹²⁸

In short, a wide variety of federal and state laws eliminates or restricts employer competition in the labor market. The premise of the Sherman Act is open and free competition, but there is no articulated federal policy that there should be open and free competition among employers in labor markets. Where Congress has spoken, it has said that wages should be uniform at some level above a minimum rate. Thus, until Congress expresses some other intent, the articulated goals of the Sherman Act do not represent public policy in the labor market. Public policy in the labor market is defined by an entirely different body of law and, at least for the present, is based on fundamentally

"tacit" wage, whatever its level may be. Thus, these statutes encourage wage uniformity, rather than creating a climate in which employers will be encouraged to bid up the price of labor.

120. 5 U.S.C. § 5301 (Supp. IV 1980).

121. 5 U.S.C. § 5301(a)(3) (Supp. IV 1980).

122. Stelluto, *Federal Pay Comparability: Facts to Temper the Debate*, MONTHLY LAB. REV. 18 (June 1979). With respect to prevailing rate employees, which includes employees of almost all Executive agencies and the armed forces, the statute requires wage surveys. 5 U.S.C. § 5343(c) (1976). See *Rogers v. Laird*, 319 F. Supp. 1, 2 (E.D. Va. 1970).

123. Stelluto, *supra* note 122, at 20; *American Fed'n of Gov't Employees, AFL-CIO v. Campbell*, 659 F.2d 157, 158 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981) ("The wage surveys are intended to aid the Government in keeping wages for federal employees roughly in line with wages paid to comparably classified employees in the private sector").

124. 29 U.S.C. §§ 826(a)(1)(b), 917(3) (Supp. IV 1980).

125. Greene, *Geographic Wage Indexing for CETA and Medicare*, MONTHLY LAB. REV. 15 (Sept. 1980).

126. 42 U.S.C. § 2000e-2(h) (Supp. IV 1980).

127. 29 U.S.C. § 1053 (Supp. IV 1980).

128. Most unemployment compensation plans deny benefits under these circumstances. See Annot. 95 A.L.R.3d 449 (1979); Annot., 88 A.L.R.3d 274 (1978).

different assumptions.¹²⁹

This is the way it should be; labor market policy should be left to the labor laws. If the free-market premise of the Sherman Act were applied indiscriminately to the labor market, the result would be disruption of national labor policies developed under the assumption that the principles of the Sherman Act do not apply to the labor market. For example, if the antitrust laws apply in the labor market, could a laid-off new employee challenge a seniority system as an unlawful exclusive dealing agreement? A system providing for recall in order of seniority is an agreement to hire one person rather than another, regardless of their respective merits. It is, therefore, very similar to an agreement to deal in a single product without regard to the merits of another.

The possible disruptions are almost endless. Are pension plan vesting requirements illegal tying arrangements? By having a vesting requirement, an employer essentially imposes on employees a requirement to deal only with that employer to obtain the benefits of the pension plan. In principle, this arrangement is similar to conditioning the loan of money on the purchase of goods from the lender, a practice held potentially illegal in *Fortner Enterprises, Inc. v. United States Steel Corp.*¹³⁰ Could a non-union employee claim that a federal contractor's practice of paying prevailing wages is illegal price-fixing?

Even if these questions could be answered, the application of alien antitrust principles to the labor market would confound long-established principles designed to protect and regulate labor.¹³¹ There is no federal policy generally favoring competition in the labor market; in fact, to the extent an articulated federal policy exists, it favors anti-competitive combinations of employees and, incidentally, collective bargaining of employers. Moreover, there is no articulated federal policy favoring competition among employers in labor markets. Perhaps employers should be encouraged to compete for the services of labor, but the articulated federal policies identifiable in this area do not encourage such competition. The Sherman Act's broad pro-competitive premise, if applied generally to employer activities in labor markets,

129. That distinction was recognized, albeit somewhat prophetically, by Senator Jones in the debate over the provision which became § 6 of the Clayton Act. See *supra* text accompanying note 84.

130. 394 U.S. 495 (1969).

131. One might attempt to argue, for example, that the foregoing examples do not involve a combination between two or more actors, but instead involve an intra-enterprise conspiracy. See L. SULLIVAN, *supra* note 11, at 323-29. Stretching this doctrine might provide a vehicle for exempting these examples from antitrust scrutiny if the Sherman Act were deemed applicable to labor market restraints. However, manipulating this exception far from its intended field of operation merely provides an additional justification for confining the Sherman Act to regulation of product markets.

would call into question the legality of some agreements generally thought to be legitimate and desirable. For these reasons, antitrust laws should not be applied to promote competition among employers in labor markets.¹³²

IV

IMPLEMENTATION OF THE SHERMAN ACT FROM 1914 TO 1970

From 1914 until 1970, two Supreme Court decisions and a series of circuit court decisions considered the scope of the Sherman Act. Throughout this period, no one seriously suggested that the Sherman Act applies to employer restraints in labor markets absent some showing of the restraint's product market significance.

A. *Anderson v. Shipowners Association of the Pacific Coast*

As explained earlier, the absence of any expression of congressional intent that the Sherman Act was intended to promote competition in labor markets rested in part on the perceived constitutional inability of Congress to regulate the employer-employee relationship. In the context of the rapid evolution of the scope of Congress' commerce power, the Supreme Court in 1926 decided *Anderson v. Shipowners Association of the Pacific Coast*.¹³³

Anderson, a sailor and a member of a sailor's union, sued the members of a shipowners association who maintained a hiring hall that prevented him from obtaining employment. Because the shipowners owned almost all of the merchant vessels operating out of ports on the Pacific coast, the association was able to control the manner in which sailors on the west coast obtained employment. Anyone seeking employment was compelled to register with an association office, receive a number, and wait "his" turn in order to obtain employment. This requirement prevented well qualified and well-known sailors from gaining employment at once.¹³⁴ The association also fixed the wages.¹³⁵

Anderson contended that he sought employment but was refused because he could not comply with one of the association's rules. He

132. Cf. Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981). After analyzing the application of antitrust laws to labor union activities, the authors conclude that the "preferable state of affairs, and the one intended, we believe, by the authors of our national labor policy, is to confine the regulation of labor conduct to the labor laws and the NLRB . . . [T]here is no legitimate purpose to be served by distorting our nation's labor policy by the intrusion of the alien influences of antitrust." *Id.*, at 514-15.

133. 272 U.S. 359 (1926).

134. *Id.* at 361-62.

135. *Id.* at 362.

charged the shipowners with forming an unlawful combination in violation of section 1 of the Sherman Act. The only issue on appeal was whether his complaint stated a claim,¹³⁶ and the Court held that it did.¹³⁷

It is beyond question that the restraint challenged in *Anderson* had potent effects in the labor market. However, since the case arose in a period when beliefs about the scope of Congress' commerce power were changing, the Court was preoccupied with deciding whether the restraint was "in commerce." The association argued, consistent with a number of precedents available to it,¹³⁸ that the employer-employee relationship was intrastate in character, and hence beyond the reach of the Sherman Act.¹³⁹ The Court's opinion confronted this question squarely:

If the restraint thus imposed [by the shipowners and operators] had related to the carriage of goods in intrastate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce and within the Commerce Clause no less than cargoes.¹⁴⁰

The Court rejected the association's argument in specific terms:

It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint.¹⁴¹

In essence, the court explained that regulating the employment relationship was not beyond Congress' commerce power because the asso-

136. *Id.* at 360, 362.

137. One fact not made clear by the opinion in *Anderson* is whether the hiring hall was instituted pursuant to a collective bargaining agreement between Anderson's union and the shipowners association. If there was such an agreement, the hiring hall, as a legitimate subject of bargaining, would lose its character as an employer-imposed restraint. Also, when workers combine or when labor "combines" via collective bargaining with employers in restraining the labor market to improve working conditions, the combination and the concomitant restraint are protected by § 6 of the Clayton Act. *See supra* note 1 and accompanying text.

138. *Industrial Ass'n of San Francisco v. United States*, 268 U.S. 64, 82 (1925); *United Leather Workers v. Herbert & Meisel Trunk Co.*, 265 U.S. 457, 471 (1924); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 407-08 (1922); *Hammer v. Dagenhart* 247 U.S. 251, 272 (1918); *Adair v. United States*, 208 U.S. 161, 178 (1908); *United States v. E.C. Knight*, 156 U.S. 1, 12 (1895).

139. Brief for Respondent at 18-22, *Anderson v. Shipowners Ass'n of the Pac. Coast*, 272 U.S. 363 (1926).

140. *Id.* at 362-63.

141. *Id.* at 363.

ciation's restraint of the employment relationship had a direct effect upon commerce, *i.e.* the product market.

This point was reiterated when the Court distinguished the association's authorities:

Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of [1] *seamen* for service on [2] *ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce*; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect and secondary.¹⁴²

According to the Court, "seamen" and "ships" were both instrumentalities of commerce, and the labor market restraint was "directed toward affecting," *inter alia*, the commercial activities of ships. Thus, the employers' labor market restraint ultimately had a product market effect, namely, impeding the commercial activities of ships. Presumably, this "direct and primary" effect in the product market permitted the use of the Sherman Act to attack the employers' labor market restraint. The link between the labor market restraint and the product market effect was attenuated, but this attenuation was irrelevant since the only issue was whether the complaint stated a claim.

One commentator has claimed that "[n]othing in the facts of *Anderson* as stated by the Court indicates any effect on competition in the shipping industry along the Pacific Coast."¹⁴³ This conclusion ignores the apparent meaning of the words "both" and "such commerce" in the quoted passage. Once it is understood that the central issue in *Anderson* was the scope of Congress' commerce power, these words assume special significance and the case itself loses most of its value as authority for the reach of the Sherman Act. Indeed, a contemporary analyst of *Anderson* explained the case this way: "the court . . . refused to allow an entrepreneur association to control 'any instrumentality of commerce,' whether material equipment or labor supply, to the detriment of interstate trade or commerce."¹⁴⁴

In fairness to all who have tried to understand *Anderson*, it should be noted that *Anderson* is a perplexing decision. It was decided in the face of precedent holding that the employer-employee relationship was

142. *Id.* at 364 (emphasis added).

143. Altman, *supra* note 22, at 139 n.74. Altman uses *Anderson* to support a reading of *Apex Hosiery v. Leader*, 310 U.S. 469 (1940) different from that urged in this article. See *infra* notes 169-92 and accompanying text.

144. Note, *Monopolies—Restraint of Trade—Combination to Control Supply of Labor*, 36 YALE L.J. 578, 579 (1927).

beyond Congress' commerce power.¹⁴⁵ Even viewed in the context of those holdings, the result and reasoning of *Anderson* are strained.¹⁴⁶ Since the Court was preoccupied with trying to extend Congress' commerce power without appearing inconsistent with its prior decisions, it is understandable that the Court failed to consider adequately the anti-trust implications of the case. This may be why *Anderson*, when viewed as an antitrust case, seems such an aberration.¹⁴⁷

Fortunately, fifteen years later, the Court used a dispute between an employer and a labor union to clarify its understanding of the scope of the Sherman Act.

B. *Apex Hosiery v. Leader*

In *Apex Hosiery v. Leader*,¹⁴⁸ the Court's first modern labor-anti-trust decision, the Court explained that the Sherman Act is concerned with product market restraints, not labor market restraints.¹⁴⁹

In an attempt to organize the employees of a hosiery factory, union workers forcibly took possession of the employer's plant and held a violent, protracted, sit-down strike. They destroyed machinery and deliberately blocked the employer's out-of-state shipments.¹⁵⁰ The employer claimed that the union's activities violated the Sherman Act,

145. See *supra* cases cited in note 138.

146. *Id.* at 578, 579 (observing inconsistency of *Anderson* with earlier Supreme Court precedent, and offering three possible explanations of the "different conclusion" in the case).

147. One court has also suggested that the precedential value of *Anderson* has been eroded because subsequent decisions have upheld the validity of hiring halls. *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 882 n.24 (1975).

148. 310 U.S. 469 (1940).

149. In an article discussing the applications of antitrust law to labor unions, Professor St. Antoine comments upon *Apex Hosiery*. St. Antoine, Connell, *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976). He states:

The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employees in combinations with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials. In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken.

Id. at 606 (emphasis added).

In a later article, Professor Leslie relies upon *Apex Hosiery* to articulate a framework for distinguishing lawful from unlawful union activity under the Sherman Act. Leslie, *supra* note 1. He argues that it is possible for unions to violate the antitrust laws if they do what firms do when firms violate the antitrust laws—fix prices, control outputs, or allocate customers. On the other hand, when unions seek to monopolize the labor supply and to standardize wages and working conditions, objectives that are legitimate under national labor policy as expressed in the Wagner Act, they are insulated from liability even though these labor market restraints affect prices and outputs. Thus, "unions are immunized from antitrust liability when they restrain the labor market, but they are subject to antitrust liability when they join with firms to restrain the commercial market." *Id.* at 1196-97. Leslie's point is consistent with the first thesis of this article; the Sherman Act is not concerned with labor market competition.

150. 310 U.S. at 481-83.

and a jury trial resulted in a verdict for the employer.¹⁵¹ On appeal, the only question was whether the union's activities constituted a restraint of trade or commerce condemned by the Sherman Act.¹⁵²

The union argued that Congress intended to completely exclude labor organizations and their activities from the operation of the Sherman Act.¹⁵³ This argument urged the Court to adopt a needlessly broad principle. The Court had previously recognized that unions were capable of using their power in an unlawful manner to restrain product markets,¹⁵⁴ and a declaration that unions were not subject to the Sherman Act might legalize all such activities. Hence, the Court rejected the union's request for a blanket exclusion from the Act, but the Court justified this result by approving of its earlier decisions that the Act did apply to labor organizations.¹⁵⁵ This reasoning was curious, given the unabashed criticism of the Court's decisions in the legislative history of section 6 of the Clayton Act. Oddly enough, the Court managed to view the enactment of section 6 of the Clayton Act as support for its earlier decisions: because Congress purported to exempt labor from the Sherman Act by adopting section 6, it must have agreed that the Sherman Act did apply to labor organizations, and since the section 6 exemption was not a total one, the unions "to some extent not defined remain[ed] subject to [the Sherman Act]."¹⁵⁶

By employing this logic to reject the union's request for a total exclusion from the Sherman Act's coverage, the Court was left with the task of explaining to what extent unions were subject to the Act. To answer this question, the Court examined "three circumstances relating to the history and application of the Act which are of striking significance."¹⁵⁷ First, the Court explained that the drafters of the Sherman Act intended the statute to apply to product market restrictions, not to labor market restrictions:

[The Sherman Act] was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of

151. *Id.* at 480-81.

152. *Id.* at 483.

153. *Id.* at 487.

154. *Id.* at 505-06 (discussing *Loewe v. Lawlor*, 208 U.S. 274 (1908). *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

155. 310 U.S. at 487.

156. The Court reasoned that its holding in *Loewe v. Lawlor*, 208 U.S. at 274, that the Sherman Act applies to labor organizations, must have been a correct reading of congressional intent, since Congress had not passed an act excluding labor organizations from the Act in thirty-two years. 310 U.S. at 487. Citing § 6 of the Clayton Act, the Court stated: "Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it." *Id.* at 488.

157. *Id.* at 490.

the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.¹⁵⁸

Second, the Court said that the Sherman Act had never been applied in the absence of an effect in the product market:

[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services. . . .¹⁵⁹

Third, the Court said the Sherman Act had never been applied against labor unions where the effect of labor's conduct in the product market was not "substantial." Specifically, the Court explained that it had:

refused to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way.¹⁶⁰

Thus, the Court reasoned that the activities of labor unions are subject to scrutiny under the Sherman Act only when they have substantial effects upon "commercial competition in the marketing of goods and services." Essential to this conclusion was the Court's identification of the Sherman Act's purpose as promoting product market, not labor market, competition.¹⁶¹

Because of the cause-effect relationship between events in labor markets and conditions in product markets, the *Apex Hosiery* Court, having reasoned that labor union activities which have a "substantial effect" upon competition in the product market are subject to Sherman Act scrutiny, had to articulate some additional limiting principle on the vulnerability of labor organization to Sherman Act claims. This articulation was required by the fact that all successful union activity,

158. *Id.* at 492-93.

159. *Id.* at 495.

160. *Id.* at 495-97. There is language in *Apex Hosiery* that could be read to mean that employer practices directed against labor do not violate the Sherman Act:

Since the enactment of . . . § 6 of the Clayton Act . . . it would seem plain that restraints on the sale of an employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Id. at 502-03. Because this passage is in the context of a discussion of employee combinations, it should be assumed that these comments are limited to employee restraints, and do not apply to multi-employer restraints. See *Mackey v. National Football League*, 543 F.2d 606, 617 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

161. *Apex Hosiery*, 310 U.S. at 502-03.

whether a strike intended to persuade the employer to yield to higher wage demands or the successful negotiation of a wage package, has some effect, and often a substantial effect, on price competition. A work stoppage impairs to some extent the ability of an employer to compete in the product market; a wage agreement has some influence on price competition insofar as it eliminates "that part of the competition which is based on differences in [wage] standards."¹⁶²

Ironically, the Court found the additional limiting principle in section 6 of the Clayton Act, which had earlier been cited as authority for applying the Sherman Act to labor unions. The Court said that section 6 explicitly protected anticompetitive activity of labor unions in labor markets:

Since the enactment of [section 6 of the Clayton Act], it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combination or conspiracies in restraint of trade or commerce under the Sherman Act.¹⁶³

The Court acknowledged that the activities of labor unions affect the ability of employers "to compete in the market with those not subject to such demands" from labor, but concluded that "this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."¹⁶⁴

In the factual setting of *Apex Hosiery*, the Court was unable to find that the union had restrained competition in the product market in *any* way:

This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for [Apex Hosiery's] product.¹⁶⁵

The purpose of the concerted employee activity was to force the employer to accede to the union's demands. A natural consequence of the combination was to interfere with the interstate shipment of Apex Hosiery's goods, but it appeared that "the delay of these shipments was not intended to have and had no effect on prices" in Apex Hosiery's product market.¹⁶⁶

Thus, *Apex Hosiery* articulated two principles. First, the Sherman Act applies to concerted activity that has the purpose or effect of restraining the product market. As a result, federal antitrust laws are

162. *Id.* at 503.

163. *Id.* at 502-03.

164. *Id.* at 503-04.

165. *Id.* at 501.

166. *Id.*

concerned with concerted activity in the labor market only insofar as that activity has the purpose or effect of restraining competition in the product market. Second, unions are protected from antitrust liability under section 6 of the Clayton Act when they restrain the labor market for the purpose of promoting legitimate labor objectives, such as improving wages or working conditions. These activities are insulated even though they have indirect effects in the product market; however, unions have no protection from antitrust liability when they attempt to restrain the product market directly.

Apex Hosiery is most often remembered for providing a framework for analysis of the legality of union activities under the Sherman Act. Subsequent Supreme Court decisions have also considered to what extent unions are subject to the antitrust laws, and what is left of *Apex Hosiery* with regard to the antitrust liability of unions has been explored elsewhere.¹⁶⁷ But *Apex Hosiery* also provides a framework for analysis of the legality of concerted employer activities in labor markets, for the Court accepted the proposition that labor market restraints are not within the ambit of the Sherman Act unless there is some relationship to market control of the commodity:

[T]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which . . . result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers."¹⁶⁸

One commentator recently offered a different reading of *Apex Hosiery*.¹⁶⁹ Altman first described the "view" of one district court¹⁷⁰ and some commentators¹⁷¹ as follows:

Stone's use of the term "commercial competition" in *Apex* refers to the competitive structure of a product market only, not a labor market. In that view, Stone modified "competition" with the term "commercial" in order to refer only to transactions regarding goods and services between entrepreneurs.¹⁷²

Altman misreads the manner in which the one district court¹⁷³ and the

167. See Leslie, *supra* note 1.

168. *Apex Hosiery*, 310 U.S. at 512.

169. Altman, *supra* note 22.

170. *Amalgamated Clothing & Textile Wool Workers v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

171. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254-55 (1954); Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233, 235 (1971); St. Antoine, *supra* note 142, at 606.

172. Altman, *supra* note 22, at 138.

173. Many other courts share the view of the "one district court." See *infra* notes 262-308 and accompanying text.

commentators understand *Apex Hosiery*.¹⁷⁴ Stone said that "commercial competition" means competition "in the marketing of goods and services", that is, competition in the market where goods and services are sold, which is denominated in this article as the "product market." Hence, Stone referred to more than "transactions regarding goods and services between entrepreneurs." *Any combination* that restrains *product market competition*—whether an exchange of information, an agreement on the price to be charged, or an agreement to blacklist an employee—is subject to Sherman Act scrutiny unless specifically exempted.

Altman offered an "alternative interpretation" of what Stone said: Stone "could have used 'commercial competition' to distinguish between conduct that does or does not affect the competitive structure of a product market."¹⁷⁵ This "alternative interpretation" is actually consistent with the way we read, and probably the way the "one district court" and the identified commentators read Stone: multi-employer conduct that is anticompetitive in the product market is unlawful, but multi-employer conduct that is anticompetitive solely in the labor market is not unlawful.

Altman, however, concluded under his alternative interpretation that "commercial competition" must include labor market competition.¹⁷⁶ This conclusion is erroneous: it does not follow from Altman's "interpretation" that the Sherman Act must apply to anticompetitive conduct in labor markets. It is consistent with Stone's use of "commercial competition" to say that the Sherman Act is concerned with multi-employer conduct in labor markets *if* that conduct has an anticompetitive effect in a product market. Competitive conditions in labor markets, viewed apart from their relationship to conditions in the product market, are irrelevant so far as the Sherman Act is concerned.

Altman offered three reasons to support his contention that *Apex Hosiery* stands for the proposition that the Sherman Act applies to multi-employer conduct restraining competition in labor markets, even in the absence of an adverse effect on product market competition. Altman argued first that, unless Stone intended the Sherman Act to apply to labor market restraints, Stone's discussion of the product market-labor market distinction would have been *obiter dicta* and otherwise inapt.¹⁷⁷ This is incorrect: Stone's discussion was necessary because, under his framework, multi-employer restraints in labor markets are subject to the antitrust laws *if* those restraints have unlawful anticom-

174. It is impossible to know exactly what the "view" of these commentators was since none of them discussed employer restraints in the labor market.

175. Altman, *supra* note 22, at 138.

176. *Id.* at 138-40.

177. *Id.* at 138-39.

petitive effects in a product market. Consequently, it was perfectly appropriate for Stone to discuss the distinctions between the two markets.

Next, Altman contends that if Stone believed the Sherman Act to be concerned only with product market competition, his failure to discuss and either to distinguish or to overrule *Anderson* would have been a glaring omission.¹⁷⁸ As noted earlier, *Anderson* does not necessarily stand for the proposition that the Sherman Act applies to anticompetitive conduct in labor markets.¹⁷⁹ Because *Anderson* was principally a commerce clause case, not an antitrust case, Stone's failure to discuss it is not troubling. Indeed, *Anderson* was not cited in any of the briefs submitted in *Apex Hosiery*, as were the other cases discussed by Stone. Since *Anderson* was so confused, and since arguably it resolved a different issue, Stone may have deliberately chosen to overlook it, assuming he was even aware of it.¹⁸⁰

Finally, Altman argues that Stone would not have relied on common law restraint of trade cases to determine what section 1 means if he did not intend the Sherman Act to apply to labor market restraints.¹⁸¹ Altman notes that one unlawful restraint of trade around 1890 was a contract in which an employee promised not to seek similar employment for what courts deemed an unreasonable period of time following termination of current employment.¹⁸² This point must be qualified by several considerations. First, Stone specifically described the common law doctrines on contracts and combinations in restraint of trade as involving "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market."¹⁸³ These common law doctrines were the ones Stone believed the Sherman Act was intended to implement, and all of them involve product market competition. In addition, covenants not to seek employment with someone else after terminating employment are but one type of a covenant not to compete. Other such covenants are designed to prevent employees from starting their own businesses in competition with their former employers in the same product markets. Also, most covenants preventing employees from working for another employer are designed to preserve the present employer's competitive posture in the product market. Indeed, that is why courts insist that the

178. *Id.* at 139.

179. *See supra* notes 143-57 and accompanying text.

180. *See supra* note 147 and accompanying text.

181. Altman, *supra* note 15, at 139-40.

182. *Apex Hosiery*, 310 U.S. at 497.

183. *Id.*

covenants be geographically and temporally restricted: broader covenants are unnecessary to protect the employer's business. The employee who leaves to work for another employer has the potential to divert customers, reveal secrets about production methods, and give other assistance to the new employer which damages the business of the preceding one. Thus, such covenants, even though they affect the labor market, also have significant product market consequences. Finally, although the Sherman Act debates frequently suggest that the purpose of the Act was to codify existing English and American common law on restraints of trade, it has been documented elsewhere that the drafters had no real understanding of the common law prohibitions on restraints of trade.¹⁸⁴ Therefore, any effort to use the common law concerning "restraint of trade" to establish the scope of the Sherman Act is of dubious value.

Finally, Altman argues that "[e]ven if Stone had intended to restrict the Act's application to conduct affecting the competitive structure of a product market, subsequent antitrust cases would have undermined that restriction."¹⁸⁵ A number of cases to which Altman refers are simply decided incorrectly, many erroneously following the holding in *Cordova v. Bache & Co.*,¹⁸⁶ which is critically analyzed later in this Article.¹⁸⁷ Altman also refers to *United States v. National Association of Real Estate Boards*,¹⁸⁸ in which the Court adopted a definition of "trade" under the Sherman Act that includes the labor of an employee.¹⁸⁹ Still, it is not true, as Altman argues, that "[t]his holding can be reconciled with *Apex* only by adopting the view that 'commercial competition' includes competition in a labor market, because an employee's sale of labor is 'trade or commerce.'"¹⁹⁰ The defendants in *National Association of Real Estate Brokers* were real estate brokers charged with fixing commission rates they charged the public. Brokers are independent contractors, who are subject to the antitrust laws because, in providing a service to the public, they are engaged in business in product markets.¹⁹¹ Indeed, the Court specifically stated that "we think it a misconception to assimilate the services involved here to those of employees or to compare the present case to those involving the application of the antitrust laws to labor unions."¹⁹² Therefore, the Court's discussion of the meaning of "trade" must be read in the light

184. See *supra* note 48 and accompanying text.

185. Altman, *supra* note 22, at 140.

186. 321 F. Supp. 600 (S.D.N.Y. 1970).

187. See *infra* notes 221-51 and accompanying text.

188. 339 U.S. 485 (1950).

189. Altman, *supra* note 22, at 140.

190. *Id.*

191. See *infra* notes 317-20 and accompanying text.

192. *National Ass'n of Real Estate Bds.*, 339 U.S. at 489-90.

of the specific situation presented to the Court, which involved a product market restraint and not a restraint on the labor market where employees sell their services to employers.

To summarize, the question of whether the Sherman Act was concerned with labor market competition was not answered definitively for a half-century after the Act's enactment. Under the principles articulated in *Apex Hosiery*, employer restraints in labor markets are not illegal simply because of anticompetitive purposes or effects in labor markets. Employer restraints in labor markets are subject to antitrust scrutiny only if they have an effect upon or the purpose to affect competition in a product market.

C. *Apex Hosiery to 1970*

In the thirty years following *Apex Hosiery*, no one seriously suggested that the Sherman Act was intended to promote competition in the labor market. Professor Cox, in his influential article on antitrust and labor law, stated: "[t]he only demonstrable purpose of the Sherman Act was to protect consumers against rising prices, limitations on production or the deterioration of quality, by forcing businessmen to compete with one another."¹⁹³ He concluded "that the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of services or the selection and tenure of employees."¹⁹⁴ Professor Cox's article did not specifically address multi-employer activity in labor markets, but his conclusion accurately described the contours of the law in the period following *Apex Hosiery*. In each of the four federal Circuit Courts of Appeal that considered the question of employer restraints in labor markets after *Apex Hosiery* and before 1970, the courts, with varying degrees of clarity, insisted upon some evidence that the challenged restraint was intended to affect or actually had an effect in a product market.

The first of these cases was the Ninth Circuit's decision in 1950 in *Schatte v. International Alliance of Theatrical Stage Employees*.¹⁹⁵ Members of a carpenters union claimed, *inter alia*, that their employers, a number of major motion picture studios, compelled smaller studios to employ allegedly less efficient members of a rival union. Plaintiffs claimed that this would increase the production costs of the smaller studios and cause them to go out of business, thereby enabling the major studios to increase the prices of their products.

The court said that "these alleged acts do not constitute a violation

193. Cox, *supra* note 171, at 256.

194. *Id.* at 254-55.

195. 183 F.2d 158 (9th Cir. 1950).

of the anti-trust laws.”¹⁹⁶ Relying on *Apex Hosiery*, the court explained that “[c]ompelling others to adopt certain employment policies is not a restraint upon commercial competition.”¹⁹⁷ The court held that plaintiffs’ loss of “their rights of employment is not a result of any lessening of commercial competition among the studios.”¹⁹⁸ The claim that plaintiffs would be damaged by higher prices for tickets to movies did state a product market effect within the reach of the Sherman Act, but the “alleged possibility” that plaintiffs would have to pay higher ticket prices was “far too remote and speculative to be the basis of any recovery of damages.”¹⁹⁹ Thus, the court in this early decision viewed the complaint as essentially stating a restraint on labor market competition only, a claim with which the Sherman Act is not concerned.

A few years later, the Second Circuit cited product market consequences when refusing to dismiss a complaint challenging a labor market restraint. In *Union Circulation Co. v. Federal Trade Commission*,²⁰⁰ the Commission charged agencies in the business of selling magazine subscriptions door-to-door with engaging in unfair trade practices in violation of section 5 of the Federal Trade Commission Act.²⁰¹ The agencies conducted their business by contracting with solicitors, who collected subscription proceeds and were paid on a commission basis.²⁰² The agencies entered into agreements, typically providing that no agency would retain any solicitors who had been employed by the other signatory agencies at any time during a certain period, usually the preceding year. The Commission found that the no-switching agreements unreasonably restrained trade and constituted unfair methods of competition under section 5.²⁰³

On appeal, the court applied the test for validity of a restraint of trade under section 1 of the Sherman Act to determine whether section 5 had been violated²⁰⁴ and affirmed the Commission’s findings.²⁰⁵ The court acknowledged that the restraint at issue was a labor market restraint in that the “no-switching” agreements are directed at the regulation of hiring practices and the supervision of employee conduct,²⁰⁶ but the court said that the validity of the restraints “must be considered in

196. *Id.* at 167.

197. *Id.*

198. *Id.*

199. *Id.*

200. 241 F.2d 652 (2d Cir. 1957).

201. *Id.* at 654.

202. *Id.*

203. *Id.* at 655.

204. *Id.* at 656.

205. *Id.* at 658.

206. *Id.* at 657. In this regard, the court referred to *Anderson v. Shipowners’ Ass’n of Pac. Coast*, 272 U.S. 359 (1926), but the court evidently placed no reliance on *Anderson*, because it did not state whether the restraint therein would be invalid per se or whether it was to be tested

the light of their impact upon the competitive structure of the industry affected."²⁰⁷ The court concluded that "the reasonably foreseeable effect" of the labor market restraint "will be to impair or diminish competition between existing subscription agencies, and to prevent would-be competitors from engaging in similar activity."²⁰⁸ The court added that one effect of the restraint would "be to 'freeze' the labor supply" and "to discourage labor mobility," and that the consequence of this effect would be to cause "the magazine-selling industry [to] become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations."²⁰⁹

Thus, the court in *Union Circulation* discussed the significant anticompetitive effects of the multi-employer restraint in the labor market, but the court also identified the secondary effect of the labor market restraint in the product market. While the court's decision was not entirely clear on this point, it seemed to find the multi-employer agreement to be harmful to competition; it therefore determined the agreement to be an unreasonable restraint of trade under section 1 of the Sherman Act because of the ultimate product market consequences of this restraint in the labor market.

Whatever uncertainty existed on this question in the Second Circuit after *Union Circulation* was resolved six years later by the Circuit's decision in *Kennedy v. Long Island Rail Road*.²¹⁰ A railroad workers union alleged that various railroads had violated the Sherman Act by participating in a strike insurance plan. The court rejected this allegation for the "fundamental reason" that the Sherman Act was "designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services" and was not intended as an "instrument . . . for the regulation of labor-management relations."²¹¹ The union specifically argued that "the price of *labor* is artificially manipulated whenever a railroad is permitted to avail itself of the proceeds of strike insurance,"²¹² but the court dismissed this argument, stating that the "answer lies in the clear language" of the first sentence of section 6 of the Clayton Act.²¹³

Four years after the Second Circuit's decision in *Long Island Rail Road*, the Seventh Circuit considered the validity of a no-switching

"under the particular circumstances of the industry," meaning, presumably, for its effect in the product market. 241 F.2d at 657 n.2. See *supra* text accompanying notes 133-47.

207. 241 F.2d at 656.

208. *Id.* at 658.

209. *Id.*

210. 319 F.2d 366 (2d Cir. 1963).

211. *Id.* at 372-73.

212. *Id.* at 373.

213. *Id.*

agreement under the antitrust laws in *Nichols v. Spencer International Press, Inc.*²¹⁴ In *Nichols*, the plaintiff, an encyclopedia salesman, alleged that manufacturers of encyclopedias had violated the Sherman Act to his detriment by agreeing not to hire a salesman who had within six months worked for another. The defendants claimed that the challenged activity could not, as a matter of law, violate the Sherman Act because, pursuant to the first sentence of section 6, any "agreement restraining freedom with respect to employment of labor is not, *as such*, a violation of the antitrust laws."²¹⁵ However, the court held that the allegations would state a claim under the Sherman Act if the alleged agreement had a substantial effect "upon the business of supplying encyclopedias and reference books."²¹⁶ In support of this conclusion, the court stated:

Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.²¹⁷

The court reversed a summary judgment in favor of defendants on the antitrust issues, stating "[w]e cannot say, as a matter of law, that the effect of the 'no-switching' agreement . . . upon the business of supplying encyclopedias and reference books is so negligible that the agreement is not a restraint of trade in such products."²¹⁸

Finally, in 1970, the Fifth Circuit in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*,²¹⁹ affirmed the dismissal of a union's claim that an alleged conspiracy between two companies not to deal with the union over wage rates and working conditions constituted a claim under section 1 of the Sherman Act. The Court, rely-

214. 371 F.2d 332 (7th Cir. 1967).

215. *Id.* at 335.

216. *Id.* at 337.

217. *Id.* at 335-336. However, a more recent Seventh Circuit opinion could be read as signaling a retreat from the analysis in *Nichols*. In *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983), the court considered whether plaintiff had suffered an antitrust injury that conferred standing. The court described the facts in *Nichols* as a conspiracy "intended to restrict competitive conditions in the labor market" and stated that the "injuries complained of, restriction of employment alternatives, were directly related to the anticompetitive restraints." *Id.* at 517. The court held plaintiff had no antitrust injury because "[h]is injury did not result from a lack of competition in the labor market." *Id.* However, whether a claim exists is conceptually distinct from the question of standing. See *infra* note 341 and accompanying text. Hence, *Industrial Gas* should not be interpreted to mean that a plaintiff who pleads damage from a labor market restraint, without pleading that the labor market restraint had an anticompetitive effect in the product market, states a claim under the Sherman Act.

218. 371 F.2d at 337.

219. 431 F.2d 1004 (5th Cir. 1970), *cert. denied*, 404 U.S. 801 (1971).

ing upon *Apex Hosiery*, stated that, because the union failed to allege "a conspiracy or combination on the part of Prepmore and Blue Bell to restrain competition in the marketing of Prepmore's goods," its allegations did "not rise to the level of alleging a restraint of the type to which the Sherman Act is directed."²²⁰

Thus, prior to the end of 1970,²²¹ three circuit courts had held and one other had suggested, consistently with *Apex Hosiery*, that the Sherman Act does not apply to labor market restraints absent some showing of anticompetitive product market effects.

V

RECENT CASES: TWO DISTINCT APPROACHES

Notwithstanding the substantial authority that the Sherman Act is not concerned with promoting competition in labor markets, Judge Mansfield's decision in *Cordova v. Bache & Co.*²²² held that the Sherman Act applies to multi-employer restraints in labor markets. A number of recent cases follow *Cordova* while other cases follow the analytical framework outlined in *Apex Hosiery*. Thus, the recent cases contain two distinct approaches to the question of whether employer restraints in labor markets that lack either a purpose to restrain or an actual anticompetitive effect in product markets are illegal under the Sherman Act.

A. *Cordova v. Bache & Co.*

In *Cordova*, unorganized employees of stock exchange brokerage firms sued their employers under section 1 of the Sherman Act for allegedly conspiring to reduce the commissions paid to such employees. The effect of this claimed agreement allegedly had "been to reduce competition in the hiring of representatives and in the compensation paid to them."²²³ The defendants moved to dismiss the antitrust claims.

Under existing precedents, including two cases in the Second Circuit,²²⁴ the complaint could have been attacked for its failure to allege an effect in, or an intent to affect, the product market. However, Judge Mansfield considered only the issue of whether "monolithic action of brokerage firms in uniformly reducing the commissions paid to their representatives is exempt from the prohibitions of the antitrust laws"

220. *Id.* at 1007.

221. *Prepmore* was decided on August 3, 1970. *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970), was decided on December 9, 1970.

222. *Id.*

223. *Id.* at 603.

224. *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir. 1963); *Union Circulation Co. v. Federal Trade Comm'n*, 241 F.2d 652 (2d Cir. 1957).

under section 6 of the Clayton Act.²²⁵ After reviewing the history of section 6, Judge Mansfield concluded that the only concerted employer conduct exempted by section 6 is conduct related to multi-employer collective bargaining, and that

no authority supports the proposition that a group of employers may jointly agree upon the wages to be paid to their respective employees in the absence of an anticipated multi-employer agreement with a labor organization representing the employees.²²⁶

This description of the scope of the Sherman Act is too broad. By focusing exclusively upon activity exempted from Sherman Act coverage, Judge Mansfield failed to even consider what types of concerted activities are covered by the Sherman Act. In fact, Judge Mansfield seems to have assumed that any concerted activity not exempted by section 6 of the Clayton Act is actionable under the Sherman Act. However, in the words of *Apex Hosiery*, concerted activities "not immunized by the Clayton Act are not necessarily violations of the Sherman Act."²²⁷ In particular, concerted activities not affecting competition in the market for goods and services are not within the scope of the Sherman Act even if not exempted by section 6 of the Clayton Act.²²⁸ For example, in *Amalgamated Clothing & Textile Workers v. J.P. Stevens & Co.*,²²⁹ the court agreed that an alleged wage-fixing conspiracy was not exempt under section 6.²³⁰ Nevertheless, the court dismissed the complaint, finding an absence of "monopolistic effect upon competition in the marketplace for goods or services."²³¹

In addition to incorrectly assuming that concerted activity affecting only the market for labor is illegal under the Sherman Act unless exempt, Judge Mansfield misinterpreted the first sentence of section 6 of the Clayton Act. Judge Mansfield agreed that the first sentence of section 6—"the labor of a human being is not an article of commerce"—supports the conclusion that concerted activities affecting only the labor market are not covered by the Sherman Act.²³² That

225. 321 F. Supp. at 608.

226. *Id.*

227. *Apex Hosiery*, 310 U.S. at 512. The Supreme Court has often referred to the "heavy presumption against implicit exemptions" from the Sherman Act. *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 370 (1963). However, the question of whether the Sherman Act applies to labor markets is not one of "implicit exemptions"; rather, the question is whether the Sherman Act is concerned with competition in labor markets at all.

228. *See Berman Enterprises Inc. v. Local 333, Trade Cas. (CCH) ¶ 63,852 at 78,516 (2d Cir. 1981)* (union-employer agreements on nonmandatory subjects of bargaining illegal only "if they constitute restraints on competition in a business market").

229. 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

230. *Id.* at 488.

231. *Id.* at 490.

232. 321 F. Supp. at 605 ("If the language of § 6 of the Clayton Act stopped with the sentence

interpretation, virtually compelled by the language of the first sentence, had already been rendered by the Second Circuit before 1970.²³³ However, Judge Mansfield went on to conclude that the clear meaning of that sentence was overridden by the remainder of section 6 and its history, which he interpreted as demonstrating "that the sole purpose and effect of [section 6] is to exempt activities and agreements on the part of labor, agricultural or horticultural organizations with respect to their furnishing labor in the market place."²³⁴ He elaborated as follows:

It seems clear that if Congress had wanted to exempt agreements between employers as to the money or compensation that would be paid to their employees, it would not have limited § 6 to exemption of "[t]he labor of a human being" which can be restrained only by the employees or unions controlling the labor itself. Congress would also have provided that compensation offered or paid by employers to employees is not a commodity or article of commerce. This it did not do.²³⁵

Although this analysis has been accepted without question,²³⁶ it is unsatisfactory for a number of reasons.

First, the fact that the history of section 6 shows no concern over exempting employer practices proves nothing. As documented earlier in this article, no one at the time had any reason to believe employer practices directed against labor violated the Sherman Act in the first place.²³⁷ The absence in the section 6 debates of any suggestion that Congress intended to exempt employer activities affecting labor is far less significant than the absence in the Sherman Act debates of any demonstrated intent to prohibit such activities.

Second, by focusing on the substance of section 6 divorced from the scope of the Sherman Act, Judge Mansfield engaged in analysis which risks overstating the legitimate reach of the Sherman Act. It does not follow from the conclusion that a given restraint falls outside the scope of the section 6 exemption that the restraint lies within the scope of section 1. Thus, if one's attention were confined to the exemption in testing an employer restraint in a labor market, one could decide that the exemption does not "cover" the activity but overlook the fact that the Sherman Act did not prohibit the restraint in the first place. Judge Mansfield's analysis notwithstanding, if the challenged

quoted by defendants, it would lend support to their position [that a combination and conspiracy on the part of employers with respect to the labor of their employees is exempt from the Sherman Act].").

233. *Kennedy*, 319 F.2d at 366.

234. 321 F. Supp. at 605.

235. *Id.* at 606.

236. See *Mackey v. National Football League*, 543 F.2d 606, 617 n.22 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

237. See *supra* text accompanying notes 38-71.

restraint does not impair product market competition, the scope of the section 6 exemption is irrelevant.

Third, Judge Mansfield's conclusion that exempting labor organizations from the reach of the Sherman Act is the only purpose properly ascribable to section 6 overlooks significant discussion concerning both the first and second sentences of section 6.²³⁸ In particular, it overlooks Senator Cummins' intent, as the author of the first sentence of section 6, to exclude the sale of labor to an employer from the reach of the Sherman Act.²³⁹ Moreover, Judge Mansfield's conclusion cannot be reconciled with what the second sentence of section 6 was thought to mean standing alone. When what became section 6 was first proposed, it did not include the first sentence declaring that the "labor of a human being" is not an "article of commerce." That sentence was added at the beginning of a paragraph that already specifically exempted activities of labor unions.²⁴⁰ In a report on a draft of section 6 *without* the first sentence, the Senate Committee on the Judiciary expressed its view that section 6 meant that "labor is not, and ought not to be regarded as, a commodity within the purview of the antitrust laws."²⁴¹ In the Committee's view, this abbreviated version of section 6, limited in that it referred only to "organizations," was still broad enough to mean that labor matters generally are outside the scope of the antitrust laws, which were presumably intended to apply only to commercial markets. Judge Mansfield agreed that the first sentence of section 6, if it stood alone, would support the view that employer restraints in labor markets do not, in and of themselves, violate the antitrust laws.²⁴² Yet the Senate Committee on the Judiciary thought the second sentence of section 6, standing alone, meant exactly what the first sentence says.

Fourth, it is at least ironic that Judge Mansfield did not apply strictly his own view of the purpose of section 6. After reviewing the history of section 6, Judge Mansfield concluded "that the *sole* purpose

238. See *supra* text accompanying notes 72-100.

239. See *supra* text accompanying notes 86-100.

240. As reported from the Senate Committee on the Judiciary, § 7 provided:

That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

H.R. 15657 as reported by the Senate Comm. on the Judiciary, 63rd Cong., 2d Sess., July 22, 1914, at 7; reprinted in 1 E. KINTNER, *supra* note 38, at 1756.

This line was not added until the last day of the Senate debates on the House bill, on September 2, 1914. 51 CONG. REC. 14591 (1914), reprinted in 1 E. KINTNER, *supra* note 38, at 2379-80.

241. S. REP. NO. 698, 63rd Cong. 2d Sess., 46 (1914), reprinted in 1 E. KINTNER, *supra* note 38, at 1748.

242. 321 F. Supp. at 605.

and effect of [section 6] is to exempt activities and agreements *on the part of labor*, agricultural and horticultural *organizations* with respect to their furnishing labor in the market place."²⁴³ However, Judge Mansfield also held that the exemption provided by section 6 extends to "multi-employer combinations with respect to industry-wide wages or working conditions" in the context of collective bargaining.²⁴⁴ Judge Mansfield's conclusion that section 6 exempts multi-employer agreements in connection with or in preparation for collective bargaining is correct, but this is not consistent with his conclusion that the "sole" purpose of section 6 is to exempt union activities and agreements. In some situations, multi-employer activity is protected by section 6, thus demonstrating that the purpose of section 6 is not *solely* to protect activities and agreements of labor organizations. The admitted extension of the exemption to employers in that context demonstrates that its purpose is *not* limited to the protection of unions.

Finally, even if this inconsistency is overlooked on the ground that the multi-employer agreements Judge Mansfield considers exempt are connected with collective bargaining, an activity in which unions do engage, Judge Mansfield's conclusion that employer agreements to determine wages are legal only in the collective bargaining context still cannot be correct. Section 7 of the National Labor Relations Act²⁴⁵ protects all concerted activities of employees related to working conditions, whether or not a union is involved.²⁴⁶ Surely such concerted activity does not violate the Sherman Act, even though it does not involve a "labor organization." In the same vein, an employer cannot reasonably be held to violate the Sherman Act when it responds to protected concerted behavior of its employees.²⁴⁷ For example, were a group of employees to threaten resignation unless their supervisor were removed because the supervisor had failed to recommend wage increases, their activities would be protected. If the employer responded to that demand by firing the supervisor, that surely would not give the supervisor

243. *Id.* (emphasis added).

244. *Id.* at 607.

245. 29 U.S.C. § 157 (1976).

246. *E.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Also, § 8(d) of the NLRA, 29 U.S.C. § 158(d) (Supp. IV 1980), defines collective bargaining as discussions between "the employer and the representative of the employees." The term "labor organization" is not used. "Representatives" is defined in § 2(4) of the NLRA, 29 U.S.C. § 152(4) (Supp. IV 1980) as including individuals *or* labor organizations, and "labor organizations" is defined broadly in § 2(5), 29 U.S.C. § 152(5) (Supp. IV 1980).

247. Virtually all employer conduct toward employees is at least arguably directed toward concerted employee behavior. This is because in all but the smallest companies the employer must deal with employees as a group, with full recognition that the employees will probably collaborate on their response.

an antitrust claim against the employer.²⁴⁸ Moreover, when two non-union contractors who are simultaneously seeking a federal contract agree to pay their employees the prevailing wage, they may have "conspired" within the meaning of the antitrust laws.²⁴⁹ The antitrust laws presumably do not reach these agreements, even if no union or concerted employee action is involved. Thus, the exemption provided by section 6 cannot properly be limited to employee activities involving "labor organizations." The exemption must also include all concerted employee activity related to working conditions and concerted responses by employers to that activity.

In short, the analysis in *Cordova* lays a weak foundation for a far-reaching application of the Sherman Act to labor markets. Nonetheless, *Cordova* has received unusual recognition for a district court opinion,²⁵⁰ perhaps because of Judge Mansfield's elevation to the Second Circuit in 1971. It has been approved by distinguished commentators,²⁵¹ and it has been relied upon in some cases, many of which involve professional sports.²⁵²

B. *Cordova's Kindred*

A number of other courts have decided expressly or by implication that the Sherman Act does not apply to employer restraints in labor markets regardless of whether the restraints have a purpose to affect or an effect in product markets, but these cases lack Judge Mansfield's searching analysis in the *Cordova* case. One of the few cases in which a rationale is at least clearly articulated is *Cesnick v. Chrysler Corp.*²⁵³ The court, in holding that "the market for employee skills is a market subject to the provisions of the Sherman Act,"²⁵⁴ concluded that *Ander-*

248. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (Court held it is illegal *per se* for a manufacturer to refuse to deal with one store at the request of other stores).

249. *Interstate Circuit, Inc. v. United States*, 306 U.S. 209, 226-27 (1939) (conspiracy existed when several persons all participated in a common scheme, even though they did not deal with each other).

250. See, e.g., *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n Inc.*, 483 F.2d 384, 393 (3d Cir. 1973) ("exhaustive opinion").

251. See 1 P. AREEDA & D. TURNER, *supra* note 2, at 198-99. In the first volume of their treatise, Areeda and Turner criticize *Nichols* and use *Cordova* to illustrate the "correct view" that "trade restrictions in the labor market are subject to the same antitrust sanctions as usual when collective bargaining is not involved." *Id.* at 202. If Areeda and Turner mean that restraints in labor markets that have illegal product market effects or purposes violate the Sherman Act, they are correct. But if Areeda and Turner approve, as they seem to, of *Cordova's* conclusion that restraints in labor markets *per se* offend the antitrust laws irrespective of any anticompetitive product market restraint, we disagree.

252. E.g., *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

253. 490 F. Supp. 859 (M.D. Tenn. 1980).

254. *Id.* at 864.

son was controlling; however, the court neither referred to nor cited *Apex Hosiery*.

The reasoning in other cases is less clear.²⁵⁵ One such case is particularly interesting because Judge Mansfield sat on the panel which decided it. *Drayer v. Krasner*,²⁵⁶ an opinion authored by Judge Friendly, held that the New York Stock Exchange's requirement of arbitration in all disputes between registered representatives and member firms did not violate the antitrust laws. The court began by noting that compelling member firms to include such a clause in their contracts with registered representatives "does not inhibit the freedom of any firm in competing for business or of any investor in seeking the firm that will give him the best and cheapest service."²⁵⁷ Unfortunately, the opinion then undercut the significance of this sentence by testing the clause under the rule of reason to determine its effect in inhibiting firms competing for the services of registered representatives;²⁵⁸ the court thus assumed that labor market restraints are subject to antitrust scrutiny because of their effects in labor markets.

The First Circuit rejected a similar argument advanced by an employee in *Dickstein v. duPont*,²⁵⁹ but the rationale underlying the court's view of the scope of the Sherman Act is unclear. The court first expressed its inability to understand how the arbitration requirement "could have an anti-competitive impact in the securities market."²⁶⁰ Yet it later referred to the employee's argument that "the Stock Exchange rule unreasonably impairs the ability of its members to compete with one another in the labor market" as "appellant's best antitrust argument." The court went on to reject this argument, but it did not consider whether the Sherman Act was concerned with labor market restraints that have no anticompetitive effect in the product market.²⁶¹

Cordova remains the leading case for the proposition that the Sherman Act applies to labor market restraints, in large part because no other case reaching the same result attempts to articulate a cogent rationale. At the same time, other courts have refused to follow the approach of *Cordova* and have instead continued to insist the plaintiff demonstrate that the challenged restraint has an anticompetitive effect

255. For example, in *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1148 (5th Cir. 1977), the circuit court assumed that the Sherman Act applies to labor markets. In making this assumption, the circuit court may have been confused by the closely related sports cases. See *infra* notes 319-26 and accompanying text.

256. 572 F.2d 348 (2d Cir. 1978).

257. *Id.* at 354.

258. *Id.* at 354-59.

259. 443 F.2d 783 (1st Cir. 1971).

260. *Id.* at 787.

261. *Id.* at 787-88.

in the product market or is accompanied by an intent to restrain that market.

C. Recent Decisions Following Apex Hosiery

During the last twenty years, a number of cases have reiterated the *Apex Hosiery* theme that restraints are not subject to Sherman Act proscriptions unless they are intended to affect or actually do unreasonably restrain competition in a market for goods or services.²⁶² These cases agree that the only focus of the antitrust laws is on "direct restraints in the business market," and that this focus reflects "the congressional policy favoring free competition in business markets."²⁶³

I. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.

The foregoing principles were embraced in the Fifth Circuit's recent opinion in *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*²⁶⁴ Two unions sued two trade associations and two member construction companies, claiming that the defendants had violated the Sherman Act by agreeing among themselves and with other construction employers to hire only non-union contractors and subcontractors.

262. *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 715 n.16 (1981) (citing *Apex Hosiery*, Court states that "the Sherman Act prohibits only restraints on 'commercial competition,' . . . or those market restraints designed to monopolize supply, control prices, or allocate product distribution"); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 692 (1956) (agreement between union and employer might be illegal because of "the obvious restraint on the product market"); *United Mine Workers v. Pennington*, 381 U.S. 657, 663 (1965) (agreement between union and coal producers illegal under the antitrust laws because "the restraint on the product market is direct and immediate"); *Radovich v. National Football League*, 352 U.S. 445, 453-54 n.10 (1957) (quoting *Apex Hosiery*, conspiracy to boycott football players from competing league with a view toward destruction of that league actionable under the antitrust laws because of the effect on "purchasers or consumers of goods and services"); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552, 554 (6th Cir. 1946); *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc.*, 331 F. Supp. 1298, 1301 (W.D. Pa. 1971), *vacated*, 483 F.2d 384 (3rd Cir. 1973). *Cf. Volkswagenwerk A.G. v. Federal Maritime Comm'n*, 390 U.S. 261, 278-82 (1968) (agreement involving union is possibly anticompetitive under standards of shipping Act because of its effect on competition among employers); *Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979) (question in cases involving labor is "whether the restraint directly or indirectly affects market prices and free competition for the consuming public"); see Leslie, *supra* note 1, at 1184 ("the antitrust statutes prohibit restraints of trade, that is, business market restraints").

263. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). A number of other cases contain similar language. See, e.g., *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 51 (2d Cir. 1960) ("antitrust laws do not reach possibly tortious activities by labor organizations which are not shown to have or to be intended to have an effect upon competition or prices"); *United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552, 554 (6th Cir. 1946); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 511 F. Supp. 509, 520 (E.D. La. 1981) ("The [Sherman] Act was aimed at business combinations and not labor unions"); *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc.*, 331 F. Supp. 1298, 1301 (W.D. Pa. 1971); *Kolb v. Pacific Maritime Ass'n*, 141 F. Supp. 264, 266 (N.D. Cal. 1956).

264. 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3342 (1983).

tors.²⁶⁵ The unions contended that this agreement undermined existing collective bargaining agreements between the unions and other construction employers, reduced wages and fringe benefits, and resulted in less favorable work opportunities and working conditions. These claims, at least facially, alleged only that the defendants had restrained the labor market. The district court doubted whether these alleged acts of the defendants were within the scope of the Sherman Act, but the trial court dismissed the claims on the ground that the defendants' conduct was protected by the nonstatutory exemption to the antitrust laws articulated by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*.²⁶⁶ The unions appealed. In support of the order of dismissal, defendants claimed that their conduct was protected by both the statutory and the nonstatutory labor exemptions to the antitrust laws, and also that the Sherman Act did not apply to the alleged conduct, irrespective of the scope or applicability of the labor exemptions.²⁶⁷

Of the two arguments asserted by defendants on appeal, the sec-

265. *Id.* at 497-98.

266. 421 U.S. 616 (1975), *discussed at* 690 F.2d at 530. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 511 F. Supp. 509, 515-22 (E.D. La. 1981).

In *Connell*, the union, representing plumbers and mechanical tradesmen, sought to force Connell, a general building contractor, from subcontracting mechanical work to non-union firms. Initially, Connell refused to sign an agreement with the union committing it to subcontracting only with firms that had a current bargaining agreement with the union. However, Connell signed the agreement under protest when the union picketed one of Connell's major jobsites and shut it down. Connell brought a suit against the union charging that the agreement violated the antitrust laws. 421 U.S. at 619-21. The Fifth Circuit held that the agreement was lawful, reasoning that the union's goal, organizing nonunion subcontractors, was a legitimate union interest and that efforts to achieve that goal were immune from the antitrust laws. *Id.* at 621. The Supreme Court agreed that the goal was legitimate, but reversed on the question of the antitrust immunity, holding that a union could be liable under the antitrust laws for coercing a "stranger employer," that is, one with whom the union had no collective bargaining relationship, to agree not to use non-union subcontractors. *Id.* at 635.

The rationale for this holding was that the union's activity was not protected by labor's "non-statutory" exemption to the antitrust laws. This exemption for "some union-employer agreements" devolved from "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Id.* at 622. The Court recognized that all union activity has some potential effect on prices, and the "goals of federal labor law never could be achieved" if an effect on prices were enough to subject union activity to antitrust scrutiny. As a result, "labor policy requires tolerance for lessening of business competition based on differences in wages and working conditions." *Id.* However, the Court explained, "labor policy clearly does not require . . . that a union have freedom to impose direct restraints on competition among those who employ its members." *Id.* The statutory exemption provides some protection for unions that by unilateral action restrain product markets, but "the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." *Id.* at 622-23. Accordingly, the Court concluded that the agreement between Connell and the union could be the basis of an antitrust suit because "it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." *Id.* at 635.

267. 690 F.2d at 530, 531.

ond is the most significant, for if the Sherman Act does not apply to the employers' restraint upon the labor market, there is no need to decide the scope or applicability of the labor exemptions. *Carpenters Local Union No. 1846* was the first case to articulate clearly this distinction between the scope of the Sherman Act on the one hand, and the scope of exemptions to its legitimate reach on the other.

The court inquired "whether, questions of antitrust exemption aside, the plaintiffs have stated a cause of action under the antitrust laws."²⁶⁸ Answering this question in the negative in either case would have rendered irrelevant the issue of the scope of the statutory exemption, but *Cordova* did not even address it. The Fifth Circuit panel in *Carpenters Local Union No. 1846* did not make the same error. The court stated:

[I]n order for a restraint of trade to be actionable under the Sherman Act there must be a restraint upon commercial competition in the marketing of goods or services. *Apex Hosiery Co. v. Leader* [citations omitted]. We have held in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers* [citations omitted] that *Apex* requires such a restraint whether the restraint is caused by a labor organization or an employer.²⁶⁹

The court explained that "a concerted refusal to deal with a union" may restrain "competition in the marketing of labor; it may have anticompetitive effects on wages and working conditions."²⁷⁰ But the Court cautioned: "[T]his anticompetitive effect is not enough without more to fulfill the requirements of the Sherman Act."²⁷¹ Upon closer inspection of the pleadings, the court concluded that plaintiffs had alleged a restraint of trade in the contractor services product market.²⁷² The court acknowledged that the purpose of the agreement was to re-

268. *Id.* at 531.

269. *Id.* at 532.

270. *Id.*

271. *Id.*

272. The court said that most of the plaintiffs' pleadings did not allege antitrust injury; but, applying the lenient rule of FED. R. CIV. P. 12(b)(6), the court decided that two theories were pleaded "which do allege anticompetitive effects outside of the labor market per se." The essence of the claim was that the purpose of the defendants' activity was to weaken the unions, but this could be accomplished either by refusing to deal with the unions, which does not state an antitrust cause of action, or by trying to drive other contractors hiring union members out of business, which does state an antitrust claim. *Id.*

The conclusion that the plaintiffs' complaint stated a Sherman Act claim was virtually compelled by *Connell*. *Carpenters Local Union No. 1846* was the "flip-side" of *Connell* in that the case involved employers, instead of unions as in *Connell*, conspiring to coerce "stranger employers" to agree not to use union-signatory contractors and subcontractors. (The term "flip-side" was employed in the argument of the unions in California State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527, 530 (9th Cir. 1980), *rev'd*, 103 S. Ct. 885 (1983). If, as *Connell* indicated, unions combining with employers to coerce stranger employers not to use union-signatory subcontractors could have a direct effect on product market competition, then it followed that multi-employer conduct to coerce other employers not to use union-signatory subcontractors could also have a direct effect on the business market. Thus, on the authority of *Connell*, it was

strain the labor market, but it concluded that "a restraint at the level of the labor market itself does not state a claim of violation of the anti-trust laws."²⁷³

Since the court concluded that plaintiffs had pleaded that the challenged agreement affected product market competition, the question of whether the employers' concerted activity was nevertheless exempt from the Sherman Act became relevant. Defendants argued that their conduct was protected by both the statutory and nonstatutory exemptions that had been articulated in the Supreme Court's decision in *Connell*.²⁷⁴ Defendants' nonstatutory exemption argument was rejected, since the exemption is available only for agreements between a union and an employer.²⁷⁵

Defendants' argument that their conduct was immunized from the Sherman Act by the statutory labor exemption, which is derived from three statutes including section 6 of the Clayton Act,²⁷⁶ was likewise rejected. The Supreme Court has described the three statutes on which the statutory exemption is based as "declar[ing] that labor unions are not combinations or conspiracies in restraint of trade, and [as] exempt[ing] specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws."²⁷⁷ This exemption is not available when a union combines with a non-labor party.²⁷⁸ In *Carpenters Local Union No. 1846* the Fifth Circuit concluded that the exemption could not be used to protect concerted conduct by employers acting alone²⁷⁹ because the statutory exemption does not protect business group conspiracies involving unions.

The Fifth Circuit's analysis in *Carpenters Local Union No. 1846* of the scope of the statutory exemption, which derives in part from section 6, is correct. It might seem inconsistent for the court to conclude that multi-employer conduct is not within the scope of the statutory labor exemption to the antitrust laws while also concluding that multi-employer conduct restraining labor markets, which has no anticompetitive effect in product markets, is not within the reach of the Sherman Act. There is, however, no inconsistency in these conclusions. When con-

clear that the combination in *Carpenters Local Union No. 1846* had the potential for unlawful product market consequences.

273. 690 F.2d at 534.

274. 421 U.S. 616 (1975).

275. 690 F.2d at 530 (citing *Connell*, 421 U.S. at 622); *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. at 716-17 n.19.

276. *Id.* at 531. The other two are § 20 of the Clayton Act, 15 U.S.C. § 52, and § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. See 421 U.S. at 621.

277. *Connell*, 421 U.S. at 621-22.

278. *Id.* at 622.

279. 690 F.2d at 531 (these "exemptions are for the benefit of employees and their unions, and offer no shelter for the acts of employers, except perhaps only incidentally").

duct is not within the reach of the Act, the scope of an exemption becomes irrelevant.

Yet, if the first sentence of section 6 means what it says—specifically, that “the labor of a human being is not a commodity or article of commerce” to which the Sherman Act proscriptions apply—it might appear that multi-employer conduct restraining labor markets should be protected by the statutory exemption. Again, this is not so, because the statutory exemption that the Supreme Court has applied is an exemption for *organized labor*; therefore, to the extent that the statutory exemption is derived from section 6, it depends on the second sentence of that section, not the first. As discussed earlier, the first sentence of section 6 of the Clayton Act reaffirms Congress’ intent when it enacted the Sherman Act, namely, that the Sherman Act is concerned with product market competition, not with concerted employer activity in labor markets that has no anticompetitive product market effect.²⁸⁰ The second sentence of section 6 specifically protects “the existence and operation of labor . . . organizations.” If the first sentence of section 6 had not been appended to the language in the bill which eventually was enacted into law, the statutory exemption would still be based on three statutes, one of which would still be section 6 of the Clayton Act. Accordingly, there is no inconsistency between concluding that multi-employer conduct is outside the scope of the statutory labor exemption to the antitrust laws and concluding that multi-employer conduct having anticompetitive significance only in labor markets is not within the reach of the Sherman Act.

2. *California State Council of Carpenters v. Associated General Contractors of California*

Although its opinion lacks the clarity of the Fifth Circuit’s opinion in *Carpenters Local Union No. 1846*, the Ninth Circuit reached the same result on similar facts in *California State Council of Carpenters v. Associated General Contractors of California*.²⁸¹ This decision was subsequently reversed by the Supreme Court on the ground that the two carpenters’ unions that filed the action lacked standing, but the Ninth Circuit’s analysis of the scope of the Sherman Act was approved by the Court.²⁸² The two unions claimed that a contractor’s association with which the unions had entered into collective bargaining agreements for several years and each of the association’s individual members had violated section 1 by conspiring among themselves and with other industry

280. See *supra* notes 39-71 and accompanying text.

281. 648 F.2d 527 (9th Cir. 1980), *rev’d*, 103 S. Ct. 885 (1983).

282. *Id.* at 903 (“The Union’s antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws”).

employers to boycott subcontractors who had entered into collective bargaining agreements with the unions.²⁸³ The district court dismissed the complaint on the ground that a union does not possess an antitrust cause of action against an employer in a typical labor dispute.²⁸⁴ On appeal, the unions argued that this case was the analogue of *Connell* because it involved employers conspiring to coerce "stranger" employers to agree not to use union-signatory subcontractors, and that therefore the complaint did state a cause of action.

The Ninth Circuit agreed with the union, holding that their arguments did state a claim under the antitrust laws. Citing *Apex Hosiery*, the court explained that "[t]he Supreme Court has rejected the proposition that every arguable 'restraint' falls within the scope of the [Sherman] Act" and that "a showing of some form of restraint upon commercial competition in the 'marketing of goods or services' is a prerequisite to the application of the Sherman Act."²⁸⁵ As was the situation in *Carpenters Local Union No. 1846*, the court found that the claims asserted by the unions alleged that the association's members had done more than conspire to restrain the labor market. Indeed, the defendants' activity, in addition to harming the union, also "could impose a direct restraint on the business market which would affect competition for goods and services in ways that would not follow naturally from elimination of competition over wages and working conditions."²⁸⁶ Accordingly, the court reversed the district court's dismissal of the antitrust claims.²⁸⁷ The court subsequently denied the employers' petition for rehearing, at the same time issuing an "explanation" of part of its earlier opinion:

Agreements among employers are not, in themselves, violative of the Sherman Act. To state a claim under the Sherman Act, one must allege that such an agreement has either an anticompetitive purpose or a substantial anticompetitive effect [citations omitted]. Thus, many innocent agreements among employers, such as the bylaws of national and local chambers of commerce, could not possibly be thought to fall within the Sherman Act.

283. 648 F.2d at 529-30.

284. *Id.* at 530.

285. *Id.* at 531.

286. *Id.* at 532.

287. *Id.* at 540. Judge Sneed dissented from both the original opinion and from the order supplementing that opinion. He disagreed with the majority as to the nature of plaintiffs' injury and as to how *Connell* was being applied, but he agreed with the majority's premise that the Sherman Act applies only to product market restraints:

The injury . . . [alleged by plaintiffs] is to the plaintiffs' organizational and representational efforts. An injury of this type without more is not within the ambit of the antitrust law. Lacking is the restraint upon commercial competition in the marketing of goods and services . . . Injuries to a union's organizational and representational efforts must be redressed pursuant to the terms of the National Labor Relations Act.

Id. at 542 (Sneed, J., dissenting).

Moreover, mere elimination of competition over wages and working conditions cannot give rise to an antitrust claim Thus, although multi-employer bargaining units may affect or restrain competition in the area of wages and working conditions, such restraints will not be considered to violate the antitrust laws. Accordingly, the question of whether multi-employer bargaining units may be exempt under one of the labor antitrust exemptions need not arise.

. . . In summary, an employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions.²⁸⁸

3. Mid-America Regional Bargaining Association v. Will County Carpenters District Council

The Seventh Circuit reached a result consistent with those in the Fifth and Ninth Circuits, but the Seventh Circuit's analysis failed to distinguish the legitimate reach of the Sherman Act from the scope of exemptions to its reach. In *Mid-American Regional Bargaining Association v. Will County Carpenters District Council*,²⁸⁹ collective bargaining representatives for construction contractors alleged that a wage agreement entered into "outside the collective bargaining process" by a union and a major employer had raised the cost of labor and had undermined collective bargaining.²⁹⁰ The representatives contended that the agreement was made at the instigation of the employer whose construction projects had been halted by a work stoppage during negotiation of a new collective bargaining agreement between the industry representatives and the union. The district court dismissed the complaint on the ground that the only direct restraint alleged in the complaint "was a restraint in the market for human labor."²⁹¹

On appeal, the Seventh Circuit began its analysis by defining the scope of the labor exemptions, rather than by addressing the question of the scope of the Sherman Act. The court read *Apex Hosiery* "as establishing a nonstatutory exemption from Sherman Act coverage for restraints acting primarily upon the labor market."²⁹² Thus, the court reasoned, "a complaint must allege conduct operating as a direct restraint upon the business market" or else the complained-of activity is "exempt from antitrust scrutiny."²⁹³ Accordingly, the Seventh Circuit agreed with the district court that the collective bargaining representa-

288. *Id.* at 544.

289. 675 F.2d 881 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 132 (1983).

290. *Id.* at 882-83. See *Mid-American Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, Trade Cas. (CCH) ¶ 63,821, at 78,407 (N.D. Ill. 1981).

291. 675 F.2d at 883.

292. *Id.* at 890.

293. *Id.* at 893.

tives failed to state a claim because the complaint "alleged no more than an agreement to restrain the labor market" and did not allege a "direct restraint on the business market."²⁹⁴

In cases where a labor union is involved, it will not change the result if a court treats labor market restraints as "exempt" from the Sherman Act, as did the Seventh Circuit in *Mid-American Regional Bargaining Association*, rather than accepting the premise that the Sherman Act does not purport to cover labor market restraints that have no anticompetitive effects in a product market. Regardless of the logic employed, multi-employer restraints on labor market competition are not prohibited by the Sherman Act.

Nevertheless, there is a problem with the Seventh Circuit's analysis. The court based its removal of the labor market restraint from Sherman Act scrutiny on an "implied" exemption—which is what a nonstatutory exemption is—instead of relying on statutory grounds as it could have done. On several occasions, the Supreme Court has noted that implied exemptions from the antitrust laws "[are] not favored and not casually to be allowed."²⁹⁵ Exemptions are implied only when there is a "plain repugnancy between the antitrust and regulatory provisions."²⁹⁶ At minimum, the implied nonstatutory exemption recognized in *Mid-America Regional Bargaining Association* is based upon a "clear repugnancy" between antitrust policy and national labor policy favoring collective bargaining. However, under the Seventh Circuit's analysis, a different, incorrect result could be reached where no union is involved and no repugnant regulatory scheme can be identified. The Sherman Act should not be applied to employer restraints in labor markets, whether or not a union is involved, and the Seventh Circuit's analysis does not clearly adopt this premise.

4. Cases Not Involving Union Activity

Using the Seventh Circuit's analysis in *Mid-American Regional Bargaining Association* as an example, one might attempt to explain the results in cases holding that concerted activity by either employers or employees is not unlawful under the antitrust laws absent an anticompetitive effect in or intent to restrain a product market²⁹⁷ as depending

294. *Id.*

295. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975).

296. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

297. *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133, 136 n.6 (8th Cir. 1979) (court holds as a matter of law that alleged agreement among employers affecting only the labor market did not violate the antitrust laws); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., Inc.*, 475 F. Supp. 482, 490 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980) (plaintiff's allegations do not state a claim under the antitrust laws because they merely "complain of efforts to impede its activities as a union, entirely unaccompanied or uncomplicated by any element of monopolistic effect upon competition in the marketplace for goods or services").

on the exemption from the antitrust laws for *organized* labor.²⁹⁸ Under this explanation, broad statements in these opinions concerning the inapplicability of the Sherman Act to labor markets are merely ill-considered dicta. As noted earlier, these "ill-considered dicta" are firmly grounded in the legislative history and policies of the Sherman Act.²⁹⁹

Moreover, several cases not involving union activity have employed the distinction between product markets and labor markets to describe the scope of the Sherman Act. These cases cannot be explained as resting upon an exemption for organized labor. Two of these cases were decided prior to 1970. Both *Union Circulation* in the Second Circuit and *Nichols* in the Seventh Circuit³⁰⁰ recognized that concerted employer activity is unlawful under the Sherman Act only if it has a purpose to affect or an anticompetitive effect in a product market. Since 1970, two more federal circuit courts have stated that the Sherman Act applies to restraints on commercial market competition in situations where no union was involved.

One of those cases was decided by the Fifth Circuit in 1976, the same circuit which followed *Apex Hosiery* in two cases involving labor

See also Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1134 (4th Cir.), *cert. denied*, 423 U.S. 877 (1974) (company shut down by non-employee picketing seeking to enjoin the picketing as illegal under the Sherman Act fails to state a cause of action; court states that "[t]here is no allegation or contention that the strike of the unions involved . . . was for the purpose of restraining commercial competition in the marketing of goods or services, or that it has operated to restrain commercial competition in some substantial way"); United Brick & Clay Workers v. Junction City Clay Co., 158 F.2d 552, 554 (6th Cir. 1946) (where union charged several clay companies with conspiracy to thwart union activity under Sherman Act, court said that the acts complained of "do not come within the purview of the Sherman Antitrust Act, for they do not allege the imposition by appellees of any form of restraint upon commercial competition in the marketing of goods or service"). *Cf.* Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir. 1982), *cert. denied* 103 S. Ct. 348 (1983); Plumbers & Steamfitters Local 598 v. Morris, 511 F. Supp. 1298, 1306, 1310 (E.D. Wash 1981) (where union alleged that an agreement among several employers to conduct a lockout and engage in other collective action violated the Sherman Act, court granted summary judgment for defendants because of, among other things, union's failure to allege facts which show how [commercial] competition was adversely affected by Defendants' conduct"); LK Productions, Inc. v. American Fed'n of Tel. & Radio Artists, 475 F. Supp. 251, 267 (S.D. Tex. 1979) (union action blacklisting television producer because he did not pay union scale not unlawful because the "challenged conduct did not prevent [the producer] from competing in any market, but merely required that if he was to compete, he must pay [union scale]").

298. When a collective bargaining agreement fixes wages or working conditions, it falls within the protection of national labor policy and is exempt from the Sherman Act. *E.g.*, Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965). However, even in this case, the Court has taken the position that for a term of a collective bargaining agreement to lose the protection afforded by national labor policy there must be an intent to affect the product market in a way not incidental to a legitimate labor market objective. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975); Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. at 690 n.5; United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965). *See supra* notes 72-100 and accompanying text.

299. *See supra* notes 72-100 and accompanying text.

300. *See supra* notes 200-09, 214-18 and accompanying text.

unions.³⁰¹ In *Quinonez v. National Association of Securities Dealers*,³⁰² plaintiff, a securities sales representative, claimed that he was the victim of an illegal antitrust combination when, after being hired and fired by two large dealers, a concerted employer boycott kept him from obtaining employment with any other firm.³⁰³ He charged, *inter alia*, that the monopolization of the securities business by a limited number of firms, combined with "blackball exclusionary practices of these firms," injured the public "by reducing the number of securities sales representatives and thus artificially reducing competition in the sale and purchase of securities in the United States."³⁰⁴ Defendants moved to dismiss for failure to state a claim. Plaintiff was predominately concerned with the injury to his own business, but he did allege an effect of the restraint on product market competition. Although the court's opinion is not entirely clear, it ultimately followed *Nichols*, where the allegation of a product market restraint was required, and held that "no-switching agreements which allegedly impair competition among the defendants and others are sufficient as a matter of law to state a claim under the Sherman Act."³⁰⁵

The First Circuit has also addressed this issue in a setting where no union was involved. In *Carroll v. Protection Maritime Insurance Co.*,³⁰⁶ the plaintiffs, sailors and commercial fishers, alleged that a conspiracy among insurance companies had forced vessel owners not to hire the plaintiffs. In holding that these allegations did not state a claim under the antitrust laws, the court relied on the first sentence of section 6:

As for the allegations that . . . defendants sought to create an unlawful boycott of certain classes of seamen, the allegedly unlawful activity is directed exclusively at the labor market, a market which the anti-trust acts do not govern: "the labor of a human being is not a commodity or article of commerce."³⁰⁷

301. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971).

302. 540 F.2d 824 (5th Cir. 1976).

303. *Id.* at 826.

304. *Id.* at 827-28.

305. *Id.* at 829. A fair reading of the case must note the court's reliance upon cases such as *Anderson*, which has been read as not requiring an allegation of a restraint on product market competition to make a § 1 claim, and *Cordova*, which did not require the allegation of a product market effect. See *id.* at 829 nn.8, 9. As a result, *Quinonez* has been cited as authority by one court that concluded the Sherman Act does apply to labor market restraints. See *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 864 (M.D. Tenn. 1980). While *Quinonez* is correctly decided, it appears that the court neither perceived the implications of applying the Sherman Act to labor market restraints nor deemed it important to distinguish between product market and labor market effects.

306. 512 F.2d 4 (1st Cir. 1975).

307. *Id.* at 9-10.

These cases, and others similar to them,³⁰⁸ do not involve labor organizations, and thus they cannot be explained as depending on an exception from the Sherman Act for labor organizations. These cases descend directly from *Apex Hosiery's* recognition that the Sherman Act applies to product market restraints and not to labor market restraints lacking an anticompetitive product market effect.

D. Cases Involving Professionals

Thus far, we have discussed two lines of cases addressing the scope of the Sherman Act that have developed largely independently of each other. Arguably, there is a third line of cases, distinct from the two previously discussed categories, that involve professional services. The most prominent of these cases involve alleged restraints in the market for the services of professional athletes. Despite broad language in some of the opinions,³⁰⁹ however, none really involves the question of whether conduct affecting only the labor market violates the Sherman Act.

Owners of professional sports franchises employ athletes to perform on their teams. The teams engage in athletic contests with other teams, and all the teams are usually affiliated in a league. Players have frequently alleged that employer-imposed player restraints, such as player drafts and free agent rules, are employer combinations condemned by the antitrust laws. It is firmly established that the antitrust laws apply to all professional sports except baseball,³¹⁰ and the willing-

308. See *Gutierrez v. E. & J. Gallo Winery Co.*, 604 F.2d 645, 646 (9th Cir. 1979) (court affirms dismissal of complaint by farm workers alleging that employers had conspired to limit hours per day and days per year worked by farm workers; court states that the allegations involved "an effort to use the antitrust laws 'as a vehicle to achieve goals unrelated to the purposes for which the antitrust laws were passed'"); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir.), *cert. denied*, 429 U.S. 1122 (1976) ("[i]n addition the record is barren as to the actual effect of these covenants on competition in the LP retail market"); *Laborers' Dist. Council v. McDonald*, TRADE REG. REP. (CCH) ¶ 65,249, at 69,489 (D.C. Ariz. 1983) (allegation of conspiracy "to lower, fix, stabilize, and maintain the wages, conditions and terms of employment, i.e., the price of labor" failed to state a claim); *Daley v. St. Agnes Hospital, Inc.*, 490 F. Supp. 1309, 1317 (E.D. Pa. 1980) (alleged boycott by hospitals of employee not actionable under the antitrust laws because no "evidence of anti-competitive effect other than with regard to labor"); *Taterka v. Wisconsin Tel. Co.*, 394 F. Supp. 862, 865 (E.D. Wis. 1975) (agreement between telephone companies not to hire plaintiff not actionable under the antitrust laws because *inter alia*, "no factual allegations that competition is impaired"), *aff'd without published opinion*, 559 F.2d 1224 (7th Cir.), *cert. denied*, 434 U.S. 924 (1977); *Miller v. Kimberly-Clark Corp.*, 339 F. Supp. 1296, 1298 (E.D. Wis. 1971) (agreement between employer and employee prohibiting post-employment disclosure of information required during course of employment not actionable under antitrust laws in absence of restraint on commercial competition).

309. *E.g.*, *Mackey v. National Football League*, 543 F.2d at 617-618; *Boston Professional Hockey Ass'n v. Cheevers*, 348 F. Supp. 261, 265 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972).

310. *Flood v. Kuhn*, 407 U.S. 258, (1972); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979).

ness of courts to scrutinize player restraints suggests that the Sherman Act does apply to labor market restraints, thereby calling into question the continued validity of the *Apex Hosiery* analysis.

However, the fact that the Sherman Act is applicable to professional sports does not show that the antitrust laws apply to labor market restraints. In professional sports, the product sold to the public by team owners is the "game," or a combination of intra-league games culminating in a league championship.³¹¹ Because the combination of various players' services makes up the game, professional teams really sell to the public the services of their players. As stated—if not understated—by one court, "the service supplied to the public by a professional football club is highly dependent upon the ability of the players employed by the club."³¹² It follows that any restraint on competition for the services of players inevitably affects the product market.³¹³ For example, if professional teams were to restrain the labor market by blacklisting a player, that would impair competition "as to the quality of the service supplied, even though, as between player and club it is only a restriction on freedom to employ."³¹⁴ Thus, the sports cases cannot properly be used as precedent for the general proposition that concerted activity affecting only the market for labor is actionable under the antitrust laws.

The professional sports cases, in addition to raising the question of whether the Sherman Act is limited to commercial market restraints, suggest a broader question involving professional services generally. It is now well settled that the selling of professional services by, for example, doctors and lawyers is subject to antitrust analysis under section 1 of the Sherman Act.³¹⁵ It might be argued that professional services

311. See *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1979) (NFL clubs "are not competitors in any economic sense"). This conclusion is confirmed by the fact that in cases charging illegal restraints in the market for players, the market relevant to determining the anticompetitive effects has been held to be the market for the sport itself. *E.g.*, *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867, 894 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 500-02 (E.D. Pa. 1972).

312. *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 336 (7th Cir. 1967). Judge Mansfield came close to acknowledging this relationship when he wrote in *North Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied* 103 S. Ct. 499 (1982) that "player relations . . . affect competition between member teams . . ." *Id.* at 1257.

313. By this analysis, some enterprises which sell the services of their employees may be fixing the price of the "product" when they nominally fix the wage or salary. Highly labor-intensive enterprises, such as a law firm employing associate lawyers, may be selling a "product" in much the same way as a professional sports team owner sells a product. Food service in restaurants is highly labor intensive, but it is arguable that the product is the food, not what the waiter does when he serves the food.

314. 371 F.2d at 336.

315. *Bates v. State Bar of Arizona*, 433 U.S. 350, 356, 363, 368-72 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

constitute the "labor of human beings" being sold in the labor market;³¹⁶ therefore, since the Sherman Act applies to these "labor market" transactions, *Apex Hosiery* is no longer valid. However, the argument is effectively answered by reference to the well-settled distinction between independent contractors and employees.

Courts have long held that an employer-employee relationship is a prerequisite to applying the labor exemption in section 6.³¹⁷ Under these cases, the supplying of a service by an independent contractor is not a labor market transaction, but is instead a product market transaction. Professionals who sell their services to the public are independent contractors.³¹⁸ The entrepreneurial character of the work of lawyers, for example, was acknowledged by the Supreme Court in *Goldfarb v. Virginia State Bar*,³¹⁹ where the Court held a county minimum fee schedule enforced by the state bar unlawful as illegal price fixing under section 1 of the Sherman Act. The Court spoke of the "business aspect" of the lawyer's examination of land titles in exchange for money, and, citing *United States v. South-Eastern Underwriters Association*,³²⁰ noted the Sherman Act's design to bring within it "every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."³²¹ Therefore, since professionals are independent contractors selling services in product markets, those cases holding that the sale of professional services is subject to the Sherman Act are not inconsistent with *Apex Hosiery*.

316. This argument appears never to have been raised by professionals arguing for an exemption from the antitrust laws. In the briefs in the cases cited *supra* in note 315, counsel did not advance this argument. *But see* *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950) (trial court, in deciding that real estate brokers could fix commissions, "seemingly was influenced" by § 6 of Clayton Act).

317. *Williams v. St. Joseph Hospital*, 629 F.2d 448, 453 n.8 (7th Cir. 1980); *Taylor v. Local No. 7, International Union of Journeyman Horseshoers*, 353 F.2d 593, 605-06 (4th Cir. 1965), *cert. denied* 384 U.S. 969 (1966); *Ring v. Spina*, 148 F.2d 647, 651 (2d Cir. 1945). *But see* *H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981) ("a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur").

318. In effect, services sold by independent contractors are "commodities." For general purposes, a laborer's services are human effort that has no existence apart from the person, while commodities sold in the product market have an existence and value independent of the parties who produce them. When a professional markets his services in connection with his "business," the professional converts what is presumptively a labor market transaction into a commercial transaction, in effect converting his "labor" into a "commodity." Thus, the product market is indeed a market for goods and *some* services. The services that are within the product market are those services that are marketed and sold as if they were commodities.

319. 421 U.S. 773 (1975).

320. 322 U.S. 533 (1944).

321. 421 U.S. at 787-88 (quoting 322 U.S. at 553).

VI
NEW FRAMEWORK: SYNTHESIS, APPLICATION, AND
IMPLICATIONS

A. Synthesis

The question we have considered is the extent to which the Sherman Act applies to employer restraints in labor markets. We conclude that the Sherman Act should not be applied to employer restraints on labor market competition when they have no purpose to restrain the product market or do not produce an anticompetitive effect in that market. To state a claim under the Sherman Act, a plaintiff challenging a multi-employer labor market restraint must allege that the restraint is intended to affect or actually has an unreasonable anticompetitive effect in the product market. All labor market restraints have some influence upon the functioning of product markets since such restraints affect cost, which in turn has a secondary effect on price, but not all labor market restraints result from illegal intentions or lead to unlawful product market effects. Indeed, some labor market restraints might have pro-competitive product market effects. An allegation that a multi-employer restraint is intended to restrain the labor market or has an anticompetitive effect solely in that market does not state a claim under the Sherman Act. The legislative history of the Sherman Act and section 6 of the Clayton Act supports this analysis.³²² Moreover, examination of the policies of the Sherman Act demonstrates that the Act is a blunt instrument inappropriate for promoting competition in labor markets.³²³

In *Apex Hosiery*, the Supreme Court first articulated the proposition that the Sherman Act applies to product market restraints and not to labor market restraints whose effects are limited to the labor market.³²⁴ Since that decision, two largely independent lines of cases addressing the scope of the Sherman Act have developed. One line, of which *Cordova* is the leading case, has incorrectly focused on the scope of the exemption in section 6 and has assumed that, in the absence of an applicable exemption, the Sherman Act applies to employer restraints in labor markets.³²⁵ The other line has followed the *Apex Hosiery* theme that the Sherman Act applies to product market restraints but not to labor market restraints that have no product market effect.³²⁶

If the *Cordova* line of cases stands for the proposition that the Sherman Act was intended, and should be used, to promote competi-

322. See *supra* text accompanying notes 132-92.

323. See *supra* text accompanying notes 19-32.

324. See *supra* notes 148-92 and accompanying text.

325. See *supra* notes 221-61 and accompanying text.

326. See *supra* notes 262-308 and accompanying text.

tion among employers in labor markets because ensuring competitive *labor markets* is an objective of the Sherman Act, then those cases are wrong. The Sherman Act was not intended to promote competition in labor markets and should not be used to achieve that objective. If, however, those cases are based on the unstated assumption that all labor restraints have some potential product market effect, and that therefore all multi-employer restraints in labor markets need to be scrutinized under the Sherman Act, then those cases are not necessarily incorrect. Indeed, such a reading of *Cordova* and its kindred would significantly narrow the gap between that line of cases and the line devolving from *Apex Hosiery*.

Nevertheless, if the plaintiff in *Cordova* had a Sherman Act claim based on the anticompetitive product market consequences of the multi-employer agreement to reduce the commissions paid to the securities representatives they employed, he did not plead it. Instead, plaintiff alleged only the existence of a labor market restraint and its effect on the income of the employees. Without an allegation that the challenged restraint had a purpose to restrain the product market or an unlawful, anticompetitive effect in that market, plaintiff, contrary to the court's holding, failed to state a claim.

In short, all labor market restraints bear some relationship to a product market, since a labor market restraint affects cost, which has a secondary effect on price. However, some labor market restraints have pro-competitive product market effects, some labor market restraints have anticompetitive product market effects, and other labor market restraints have absolutely no measurable effect on product market competition. Challenges to labor market restraints that are alleged only to have a purpose to restrain the labor market or an anticompetitive effect in a labor market do not state claims under the Sherman Act.

This analytical framework is suggested, if not required, by the Supreme Court's opinion in *Apex Hosiery*.³²⁷ A plaintiff who challenges a multi-employer labor market restraint on the ground that it has depressed wages or otherwise affected conditions of employment fails to state a Sherman Act claim. A plaintiff who alleges an unlawful product market consequence of the labor market restraint states a claim, which must be evaluated under the ordinary substantive tests for antitrust liability.

Under these ordinary substantive antitrust rules, conduct of employers who act in concert to stabilize wages for the purpose of fixing product price is illegal *per se*. This follows from the substantive antitrust principle that a purpose to fix product price renders the challenged restraint illegal *per se* under section 1 of the Sherman Act, even

327. See *supra* notes 148-92 and accompanying text.

though the agreeing firms lack the power to affect prices or simply fail to affect product price.³²⁸ In the absence of a purpose to stabilize product price, multi-employer agreements to stabilize wages are not illegal *per se*, since these agreements are not the kinds of restraints that inevitably have "pernicious effect on competition" in the product market or lack "any redeeming virtue."³²⁹ Such restraints could actually enhance product market competition, instead of impede it.³³⁰ If the product market consequence of the labor market restraint is anticompetitive, and if, after "analyzing the facts peculiar to the business, the history of the restraint, and the reasons it was imposed,"³³¹ it is determined under the Rule of Reason that the pro-competitive effects (if any) of the restraint are outweighed by the restraint's anticompetitive effects, then the restraint is unlawful. Problems of proof for the plaintiff in such a case are substantial,³³² but suppose an employee-plaintiff is able to demonstrate the following: (1) that all law firms in a particular city agreed to decrease the salaries of their associates in order to encourage associates to leave the firms and work in some other city; (2) that the demand for legal services in the city is inelastic; and (3) that the decrease in the number of associates in the city decreases the law firms' output, which causes the price charged for the firms' services to be bid up. The law firms' labor market restraint has the consequence of reducing output in the product market, thereby increasing price. The anticompetitive effects in the product market outweigh pro-competitive benefits (which are non-existent), and the restraint is unreasonable. The application of this framework to a situation where multi-employer conduct is likely to be challenged is discussed in the next section.

The ultimate disposition of plaintiff's claim in *Cordova* helps to illustrate what happens when this analytical framework is ignored.³³³ Judge Mansfield refused to dismiss the allegations involving wage fixing;³³⁴ however, after trial on the merits, Judge Ward³³⁵ found that the challenged agreements among employers to exclude certain amounts from the computation of commissions paid their employees were not illegal. Judge Ward appeared to treat wage fixing, outside the context of collective bargaining, as price fixing, citing Judge Mansfield's opinion as authority along with a comment that research failed

328. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); L. SULLIVAN, *supra* note 11, at 185.

329. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

330. *See supra* text accompanying notes 32-34.

331. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 692.

332. *See infra* text accompanying notes 367-75.

333. *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

334. 321 F. Supp. at 605-06.

335. Judge Mansfield was appointed to the Second Circuit while the case was pending.

to disclose another case like it.³³⁶ Surprisingly, however, Judge Ward refused to concede that regulation of a "single element of compensation . . . was a scheme to fix or stabilize prices."³³⁷ He reasoned that because there was no purpose to fix prices, application of the *per se* rule was inappropriate. Instead, he concluded that this was a "type of arrangement" to which the rule of reason applied.³³⁸ Applying the rule of reason, Judge Ward concluded that the challenged agreement to reduce commissions did not violate the antitrust laws. He found that the plaintiffs may have received "less money than they would have" absent the employers' agreement to reduce their commissions, but that this was not "conclusively demonstrated."³³⁹ He also found that there was "no stabilizing effect on wages," and under those circumstances "[c]ompetition continued unabated."³⁴⁰

Judge Ward's application of substantive antitrust principles is untenable. If *Cordova* had been a product price-fixing case, Judge Ward's conclusion that the sellers conspired to fix an element of price would have required finding a *per se* violation.³⁴¹ Moreover, if the Sherman Act is concerned with labor market competition, naked wage fixing, as the corollary to price fixing, should be *per se* unlawful. Judge Ward's failure to reach the result required by ordinary application of substantive antitrust principles is significant. Perhaps he perceived the disruptive implications of applying substantive antitrust principles wholesale in labor markets. If Judge Ward possessed this foresight, his opinion should be read as a successful effort to circumvent the natural consequences of Judge Mansfield's opinion while appearing to give the earlier decision the weight it deserved as the law of the case.

Also, although this point is not clear, Judge Ward seemed to find that the agreement among defendants was a reasonable restraint on labor market competition. Such an approach is not consistent with the framework we outline here, because the Sherman Act is not concerned with labor market competition as such. If instead Judge Ward had concluded that the challenged agreement among the employers to reduce the commissions was reasonable because of the absence of an anticompetitive effect in the *product* market, then Judge Ward would have adopted the approach urged in this article.³⁴²

336. 377 F. Supp. at 95.

337. *Id.*

338. *Id.* at 96.

339. *Id.*

340. *Id.*

341. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 222-24.

342. In Judge Mansfield's opinion, such a conclusion would have corrected the errors we identified earlier. See *supra* notes 227-51 and accompanying text. Because of the deference Judge Ward had to give Judge Mansfield's earlier order as law of the case, this approach was not available to Judge Ward.

Finally, concluding that the Sherman Act does not limit concerted employer activity in labor markets in the absence of unlawful product market consequences raises the question of who has standing to challenge employer restraints in labor markets. If the Sherman Act is concerned with promoting competition among employers in the labor market, an employee-plaintiff who asserts that his wages have been depressed because of the restraint clearly has standing. If, however, to state a claim under the Sherman Act it is essential to plead an illegal product market restraint, an employee who merely asserts that his wages have been depressed by the labor market restraint with a resulting unlawful product market effect may not have standing to challenge the restraint.³⁴³

The questions of whether a cause of action exists and whether there is standing are conceptually distinct issues.³⁴⁴ Under section 4 of the Clayton Act,³⁴⁵ a person injured "by reason of anything forbidden in the antitrust laws" may recover three times his damages. However, not every person injured by an antitrust violation will recover treble damages because of that violation. The scope of this provision, which if taken literally would be unworkably broad, has been narrowed by courts through the standing requirement.³⁴⁶ Employees claiming antitrust injury from concerted activity of firms competing with their employers or from illegal activity in which their employers participated have frequently been denied standing on the ground that their injuries were too remote from the restraints in question.³⁴⁷ Yet standing has

343. An employee who alleges that he was damaged because he purchased a good manufactured by one of the defendants, the price of which was inflated because of the secondary effect of the labor market restraint, has standing under prevailing standing rules. L. SULLIVAN, *supra* note 11, at 771.

344. Association of Gen. Contractors of California v. California State Council of Carpenters, 103 S. Ct. 897, 904 (1983); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 536 (5th Cir. 1982).

345. 15 U.S.C. § 15 (1980).

346. L. SULLIVAN, *supra* note 11, at 770; In re Industrial Gas Antitrust Litigation, 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

347. *E.g.*, In re Industrial Gas Antitrust Litigation, 681 F.2d at 514 (former corporate president who was terminated by employer and blacklisted by the industry for alleged refusal to participate in conduct illegal under the antitrust laws did not suffer an antitrust injury affording him standing); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (former employee of one of two corporations, that employee claimed merged illegally, lacked standing); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (members of unions (and others), who were former employees of major studios whom the studios refused to rehire, sued another union and the studios on an agreement that allegedly had the effect of destroying smaller movie studios; former employees alleged they lost wages as a result of this agreement, but court held they lacked standing; "appellants' connection with the alleged illegal conspiracy is not such as would bring them within the contemplation of the anti-trust law . . . [t]he damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry"); Plumbers & Steamfitters Local 598 v. Morris, Trade Cas. (CCH) ¶ 63,898 (E.D. Wash. 1981) (employees lack-

been found where the employee is the immediate object of the restraint, as is the case where employers have conspired not to hire a particular employee.³⁴⁸ Considerable confusion persists in this area.³⁴⁹

The Supreme Court's recent decision in *Associated General Contractors of California v. California State Council of Carpenters*³⁵⁰ has clarified some of the uncertainty surrounding antitrust standing, but the Court specifically left open the question whether the "direct victim" of illegal concerted activity "who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the [activity] is to restrain competition in the relevant economic market."³⁵¹ Unlike the unions in *Associated General Contractors* that the Court found to lack standing, the employee who claims his wages have been depressed by concerted employer activity is the "direct victim" of the restraint. However, the employee does not suffer an injury that the antitrust laws are designed to remedy. Thus, if an employee-plaintiff's only claimed injury is that his wages were reduced, it is an open question whether, in alleging that his employer has violated the Sherman Act by restraining the labor market and thereby causing an unreasonable effect on price, he possesses standing.

ed standing to assert an antitrust claim based on an agreement to conduct a lockout); *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520, 525 (S.D.N.Y. 1963) (where employees challenged under antitrust laws an agreement among competing newspapers that all would suspend publication if one were involved in a strike, court refuses to enjoin newspapers from abiding by agreement, stating that "[t]he reason plaintiffs are affected is not that trade or commerce . . . is restrained, but because the economic pressure of employers against employees affects their employment"). But see *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 51 U.S.L.W. 3633 (1983).

348. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d at 1378 (former sales manager who was terminated and blacklisted by the industry for refusing to participate in conduct illegal under the antitrust laws possessed standing under § 4 to seek damage allegedly caused him by his employer's and other manufacturers' boycott of his services); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) (employee had standing to attack agreement of potential employers not to hire him); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685, 689 (S.D. Tex. 1975) (employee alleging that employers conspired to prevent his employment in the oil well surveying industry had standing to sue the employers).

349. As the previous two footnotes indicate, the Seventh and Ninth Circuits have reached contradictory results on substantially the same facts. Moreover, each Circuit has arguably contradicted its own earlier decisions. The Ninth Circuit in *Ostrofe* did not discuss its previous decision in *Conference of Studio Unions*, though it did acknowledge that its prior decisions had not been "clear and consistent." 670 F.2d at 1383 n.7. In *Industrial Gas* the Seventh Circuit specifically approved Judge Kennedy's dissent in *Ostrofe*. Also, the Seventh Circuit in *Industrial Gas* attempted to distinguish its previous decision in *Nichols* as involving a conspiracy "intended to restrict competitive conditions in the labor market;" thus, "the injuries complained of, restriction of employment alternatives, were directly related to the anticompetitive restraints." 681 F.2d at 517. Since the employee's injury "did not result from a lack of competition in the labor market," the employee in *Industrial Gas*—unlike the employee in *Nichols*—lacked an "antitrust injury." *Id.* at 517. The possible relationship between *Industrial Gas* and *Nichols* regarding the scope of the Sherman Act is discussed at *supra* note 217 and accompanying text.

350. 103 S. Ct. 897 (1983).

351. *Id.* at 910 n.44.

B. Application of the New Framework to Multi-employer Efforts to Stabilize Wages

In the future, employee claims that employers have restrained the labor market in violation of the Sherman Act are likely to involve an examination of the current widespread use of wage surveys. The exchange of wage and salary data makes naked wage fixing easier, and there are strong incentives for tacit wage fixing. Two recent articles argued that the use of wage surveys might violate the federal antitrust laws,³⁵² but neither examined the underlying issue in the argument: whether the Sherman Act applies to employer restraints in labor markets.³⁵³ Having proposed a framework for applying the Sherman Act to multi-employer restraints in labor markets, we can now examine how claims based on the use of wage surveys should be resolved within that framework.

1. Significance of Wage Surveys

Wage stabilization can be achieved by either a naked or a tacit restraint. Naked wage fixing, where two or more employers simply agree what wage will be offered the labor force, is the starkest example of an employer-imposed labor market restraint. If the labor force is immobile and a substantial number of employers who are product market competitors cooperate, then the employers, acting collectively as a monopsonist, can set the wage at a low level; this allows the colluding firms to maximize their joint profits.³⁵⁴ Employers who are not product market competitors but who nevertheless compete for the same labor supply would also benefit from naked wage fixing, either in the form of greater profits or the ability to decrease prices without decreasing profits.

352. Cohen, *Information and Antitrust: Information Exchanges Relating to Wages and Other Conditions of Employment*, 32 LAB. L.J. 55 (1981); Velvel, *The Legality Under the Antitrust Laws of Wage Statistics Compiled by Professional Associations*, 27 CATH. U.L. REV. 729 (1978).

353. Cohen merely asserted the validity of the analogy in a footnote and did not analyze it: "The antitrust analysis of information exchanges relating to conditions of employment mirrors the antitrust analysis of other information exchanges, including price information exchanges." Cohen, *supra* note 352 at 55 n.3. Velvel did not articulate the premise that principles applicable to the market for goods and services apply to the market for labor, but simply concluded that an "agreement to fix the price of labor" would be "illegal per se" under the antitrust laws. Velvel, *supra* note 352 at 731.

One commentator, in the course of a discussion on multi-employer mutual aid, concluded that the antitrust laws apply only to commercial or product markets and do not apply to labor markets. Comment, *Employers' Mutual Aid: No Antitrust Laws Need Apply and Almost All's Fair in Industrial War*, 44 FORDHAM L. REV. 1145, 1149-51 (1976).

354. This statement necessarily assumes that other variables are constant. For example, if the firm depends on the well-being of its employees, as is the case where the employees are also the firm's consumers, then the firm has an incentive not to set the wage at the lowest possible level. See Winter, *supra* note 75, at 14, 26-27.

Short of naked wage fixing, employers might "tacitly" fix wages, in a manner akin to parallel pricing behavior.³⁵⁵ The existence of natural pressures toward tacit wage fixing was recognized by Adam Smith more than two centuries ago:

Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate. To violate this combination is every where a most unpopular action, and a sort of reproach to a master among his neighbors and equals. We seldom, indeed, hear of this combination, because it is the usual, and one may say, the natural state of things which nobody ever hears of.³⁵⁶

These pressures are still operative today: like their eighteenth-century counterparts, most modern employers are unwilling to pay workers more than their "actual rate."³⁵⁷ The uniformly low wages earned by domestic help in particular neighborhoods, where no employer wants to be the first to raise the rate of compensation, is but one example of the continued existence of this "natural state of things." On the other hand, employers are rarely willing to offer wages and benefits substantially below the prevailing rate of compensation for similar work. A low-paying employer may be able to retain its work force in the short run; however, in the long run, an employer that pays too little will not only lose its employees to competing employers but will also find itself unable to hire employees with minimally acceptable skills and aptitudes.

Adam Smith did not explain how the eighteenth-century masters determined the "actual rate" of labor's wage. Perhaps it was nothing more complicated than discussing, over a pint of ale, the wages paid a blacksmith's helper. Today, the exchange of information which facilitates naked or tacit wage stabilization is much more systematized. Most employers engage in some sort of organized activity to collect and evaluate information about the level of wages other employers provide to their work forces. Wage surveys,³⁵⁸ in particular, play an extremely important role in the compensation decisions of most modern employers.³⁵⁹

355. *E.g.*, *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

356. A. SMITH, *THE WEALTH OF NATIONS* 66-67 (Mod. Ch. Ed. 1937).

357. This statement assumes that most employers participate in a labor market in which the labor supply is relatively static and immobile. When the supply of labor is scarce, employers will compete for the limited supply by offering higher wages. In most markets, however, employers are not required to secure their labor force by bidding up the price of labor. *See Winter, supra* note 75, at 26-28.

358. The surveys referred to in this article may collect wage data, salary information, or data concerning the types of levels of fringe benefits. Hereafter, all such surveys will be referred to as "wage surveys."

359. *See* N. TOLLES & R. RAIMON, *SOURCES OF WAGE INFORMATION: EMPLOYER ASSOCIATIONS* (hereinafter "Tolles and Raimon") 236 (1952) (among 170 wage surveys for which incep-

Despite the wide use of wage surveys, generalizations about them are difficult because the surveys vary widely in significant respects. For example, the sources and methods used in collecting wage survey data are extremely diverse. Manufacturing associations use questionnaires to collect wage, salary, and benefit information, which is then disseminated to their members. Some employers conduct their own surveys, either by collecting data through formal methods, or, as is more often the case, by exchanging information informally, such as through a meeting of personnel directors of two or more companies or via a simple telephone request from one employer to another for the hourly wage being paid a particular job description. Whether wage survey data are collected by association or by individual employers, or by formal or informal methods, employers provide information about their wages and benefits on the understanding, either express or implied, that other employers will do the same.

Furthermore, many types of information are generated from a wage survey. Some surveys show only composite information, such as the lowest, highest, and average wages for a particular job. Some surveys, however, specifically identify which employers pay what wages, and some of these surveys show each employer's projections of its future wages. Usually, surveys collect information both from employers who compete in the market for goods and services and from those who do not, but some surveys are limited to those employers who compete in the same product market. Some surveys are confined geographically. This is particularly true of surveys conducted by individ-

tion dates are available, 27 were started prior to 1940, 30 were started between 1940 and 1944, and 103 were started between 1945 and 1951); R. LESTER, *COMPANY WAGE POLICIES: A SURVEY OF PATTERNS OF EXPERIENCE* 10 (1948); C. BALDERSTON, *WAGE SETTING BASED ON JOB ANALYSIS* 58-59 (1940) (surveys have been used "for a number of years"); Cohen, *Information and Antitrust: Information Exchanges Relating to Wages and Other Conditions of Employment*, 32 LAB. L.J. 55, 60 (1981) ("[v]irtually all employers engage in some type of program to compile and assess competitive information on the wages, benefits, and other conditions of employment of their employees"); L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 188 (7TH ED. 1978); R. STOCKTON, *WAGE POLICIES AND WAGE SURVEYS: A STUDY OF PRACTICES IN OHIO MANUFACTURING* 5 (1959). Although no reported decision has yet discussed the antitrust implications of wage surveys, there are a number of decided cases involving disputes over surveys or otherwise referring to wage surveys, thereby providing further evidence of their widespread use. *E.g.*, *NLRB v. Hasbro Industries, Inc.*, 672 F.2d 978, 988-89 (1st Cir. 1982) (in defending unfair labor practice charge company argued that amount of wage increases was determined by wage surveys); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 7-8 (1st Cir. 1981) (nurses wages tied to community wage surveys); *Florida Steel Corp. v. NLRB*, 648 F.2d 233, 237 (5th Cir. 1981) (company policy to grant wage increases based on wage surveys); *Texas Instruments, Inc. v. NLRB*, 599 F.2d 1067, 1069 (1st Cir. 1979) (company conducts annual wage surveys among area employers for wages and benefits for specific jobs); *Delchamps, Inc. v. NLRB*, 588 F.2d 476, 478, 480 (5th Cir. 1979) (company surveys wage levels of competitors); *NLRB v. Planters Peanuts*, 574 F.2d 400, 402 (8th Cir. 1978) (recently prescribed company policy that local wage surveys be conducted at each plant at least once a year); *General Elec. Co. v. NLRB*, 466 F.2d 1177, 1178 (6th Cir. 1972) (company had conducted wage surveys at four plant locations for a number of years).

ual employers, who are likely to collect data from other employers in an area surrounding a particular plant or outlet. A geographically confined survey is likely to include companies which do not compete in the product market but which do compete for the services of the available labor supply. In contrast to geographically restricted surveys, some surveys collect information from employers throughout the United States. These surveys may be limited to employers who compete in the same product market, or they may include companies who are merely thought to be competing for the same labor supply.

Wage survey information, once collected, can be used for a variety of purposes.³⁶⁰ One important, perhaps overriding, purpose of survey data is to give assurance to employers that their employees will not leave in the future because of inadequate compensation. When an employer uses a survey in this manner, the function of the survey is merely to alert the employer when its wages and benefits become grossly deficient. Of course, data may also be used in negotiating compensation on an individual basis with salaried employees, and plainly, in collective bargaining, wage survey data assists the employer in formulating its bargaining strategy. Almost all rational employers, however, rely to some extent on surveys in setting their compensation levels. The reliance may be total; for example, an employer may have a policy of paying its employees a predetermined percentage of a composite wage in a particular area. Short of total reliance, an employer may use survey data as one factor among several in setting its compensation levels.

The widespread reliance of employers upon wage surveys in setting compensation levels has two potentially significant antitrust implications. First, the availability and free exchange of information facilitates naked wage fixing by those employers inclined to the practice. Second, short of overt wage fixing, the availability of information about what other employers are paying their work force reinforces natural tendencies toward wage stability, thereby encouraging "tacit" wage fixing.

Because the use of wage surveys is widespread, most employers are in potential violation of the Sherman Act if the Act is concerned with labor market competition. Of course, if the Sherman Act does prohibit employer restraints in labor markets regardless of the product market consequences of those restraints, any employer basing a compensation

360. See R. STOCKTON, *supra* note 359, at 43-44 ("wage comparison policy" has several advantages, including assisting employers in recruiting from the labor market, increasing employee satisfaction, and decreasing employee turnover). Whatever the purpose, as a general rule, the wage survey data is kept strictly confidential; employees are not given access to it. In *Texas Instruments, Inc. v. NLRB*, 637 F.2d 822 (1st Cir. 1981), the court held that the employer had a proprietary interest in the confidentiality of its wage survey data, and a company security rule protecting the information was valid. *Id.* at 831-33.

decision upon wage survey data could be violating the Sherman Act. Given the widespread use of wage surveys, this prospect is staggering: none of the commentators who believes that the Sherman Act is concerned with labor market competition has either mentioned wage surveys or considered the implications of making employers potentially liable for this longstanding, widespread practice.³⁶¹

2. *Resolving Employee Challenges to Multi-employer Use of Wage Surveys*

Simply put, under traditional tests for substantive antitrust liability, a plaintiff must prove concerted activity, the intent of which is to stabilize product price or the effect of which on price is unreasonably anticompetitive. Assuming that an employee-plaintiff has standing to assert an antitrust claim challenging the use of wage surveys, it is doubtful that he would prevail. First, an employee faces substantial obstacles in establishing that the employer restrained the labor market with the intent of stabilizing the product price.³⁶² With naked wage fixing, it is not likely that a plaintiff will be able to prove an intent to fix the product price, with the possible exception of those situations where labor cost is such a high percentage of the product price that fixing labor cost is tantamount to fixing the product price. Where wages are but a small part of product cost, it is not likely that employers would fix wages for the purpose of fixing prices. A firm that intends to fix prices is likely to reach an agreement with the competitor on price to be charged rather than on the wages to be paid. In short, an employer may have participated in a wage survey with the intent of fixing wages, but it is quite another matter to establish that the employer intended to fix prices.

Thus, it is likely that most plaintiffs will not assert that employers restrained the labor market with an intent to stabilize product price, but will instead claim that the employer-imposed labor market restraint had an unreasonable anticompetitive effect upon the product market. Whether there is even a plausible claim of price stabilization caused by participation in a wage survey and the use of wage survey data depends on the nature of the wage survey.³⁶³ Some surveys are not even capable of causing an effect on product price. Many surveys compile information collected from companies who are not competitors in the

361. See *supra* notes 22-23 and accompanying text.

362. The existence of an opportunity to fix wages does not establish that wages were fixed. See *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 575, 585 (1925) (competitors had meetings at which they could have agreed on prices, but court gave no weight to this fact because they had not done so; exchange of price information provided a basis for illegal agreement, but no liability because of lack of proof of such an agreement).

363. See *supra* text accompanying notes 358-60.

product market. An exchange of information among those who are not competitors is not a violation of the Sherman Act, even if price information is being exchanged instead of wage information.

The situation becomes more problematical when competitors exchange wage information, but employee-plaintiffs still face substantial hurdles. The employee is unlikely to be able to demonstrate an effect of the use of the wage surveys upon the product market. Agreements to conduct wage surveys are clearly not unreasonable *per se*. Neither are agreements to exchange information on prices of goods illegal *per se*.³⁶⁴ Considering the various federal policies favoring the regulation of labor market wage rates,³⁶⁵ exchange of wage information is certainly not illegal *per se*.³⁶⁶

Thus, multi-employer participation in and use of wage surveys would give an employee-plaintiff a claim for damages only if the use "unreasonably" restrained trade.³⁶⁷ A plaintiff would have to demonstrate unreasonableness by showing that surveys are "reasonably calculated to prejudice the public interest."³⁶⁸ Such a demonstration would in turn require proof of a significant "impact upon competitive conditions in a definable product market."³⁶⁹ This proof is difficult to assemble. The surveys themselves show that their use has not resulted in wage uniformity,³⁷⁰ let alone price uniformity. Most surveys demonstrate an unusually large difference between wages paid by survey participants in the same job description. Rate ranges of up to fifty percent exist in some surveys. City-wide surveys by the United States Bureau of Statistics "commonly show a rate range of the order of 20 to 30 percent" for a particular job.³⁷¹

One reason that wage surveys have not led to wage uniformity is

364. *E.g.*, *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975).

365. Agreements involving price are unreasonable *per se* because federal policy in the market for goods and services "protects that vital part of our economy against any degree of interference" with prices, no matter how benign the intent. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). On the other hand, federal policy in the labor market is largely premised on interference with the free setting of wage rates. *See supra* text accompanying notes 101-32.

366. *E.g.*, *Drayer v. Krasner*, 572 F.2d 348, 354-355 (2d Cir.) (agreements to require arbitration provisions not illegal *per se* in labor context, even though illegal *per se* in services context), *cert. denied*, 436 U.S. 948 (1978), *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 865 (M.D. Tenn. 1980) (alleged boycott of employees not illegal *per se*); *Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974) (agreement fixing term of compensation not illegal *per se* because not price fixing), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

367. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-92 (1978).

368. *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 867 (M.D. Tenn. 1980).

369. *E.g.*, *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

370. *See Altemose Constr. Co. v. Building & Constr. Trades Council*, 443 F. Supp. 492, 504 (E.D. Pa. 1977) (wage-fixing agreement cannot be found when a "wide divergence" exists "in the wages paid in each job category").

371. L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 185 (1978).

the inherent difficulty of using wage surveys to determine what wages to pay. The data obtained in surveys typically are not comparable, because of differences in job functions across the same job titles and because of distinctions among worker quality which are not reflected in most wage comparisons, even assuming that quality can be measured effectively.³⁷² Since wage surveys have not had an ascertainable effect in promoting wage uniformity, it is difficult to argue persuasively that surveys have had an adverse effect on competition in product markets.

Even if a wage survey had an ascertainable effect on wage levels among competitors, or if employers fixed wages directly, the link between wage uniformity and impaired competition in a product market would be difficult, if not impossible, to establish. Higher wages do not necessarily lead to higher total costs because the ratio of labor costs to total costs varies within industries.³⁷³ One commentator has observed that economic gains from a high-wage position can offset the higher wage costs through gains in worker quality, superior employee performance, decreased turnover, increased managerial efficiency, and other advantages.³⁷⁴ Moreover, variations in the efficiency of plant, equipment, and management cause changes in wage levels to have disparate effects on total costs.³⁷⁵ Because the relationship of wages to total costs varies from company to company, the relationship between wage uniformity and lessened competition in the product market is, at best, remote.

Judged under the rule of reason, agreements to base compensation on the results of the surveys should fare no worse than express agreements fixing aspects of compensation, which some courts have held to be lawful.³⁷⁶ Moreover, wage surveys and their use are so common and their use so varied and respected that it is difficult to imagine a court considering illegal a mere agreement to participate in a survey. The nearly universal and long-unchallenged use of wage surveys is itself substantial evidence of their legality.³⁷⁷

Even if wage surveys were not of such longstanding and wide-

372. *Id.* at 185-86; R. STOCKTON, *supra* note 360, at 99.

373. Cox, *supra* note 171, at 278; Scheinholtz & Kettering, *supra* note 22, at 361-62.

374. L. REYNOLDS, *supra* note 370, at 187-88. Because worker quality increases, the company should be able to impose a stricter hiring standard, and recruitment costs should be expected to decline. Nonunion companies may gain "insurance" against unionization by a high-wage policy, while a high-wage policy may reduce losses from labor disputes and work stoppages in a unionized company. Also, a high-wage policy is likely to increase psychological satisfaction of management and employees, which could increase company profits. *Id.*

375. Cox, *supra* note 171, at 279.

376. *E.g.*, Jacobi v. Bache & Co., 520 F.2d 1231, 1238-40 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

377. *E.g.*, Drayer v. Krasner, 572 F.2d 348, 353-54 (2d Cir. 1978), *cert. denied*, 436 U.S. 948 (1978) (agreements among employers to impose arbitration clauses on employees not illegal under the antitrust laws because, *inter alia*, of widespread use of such agreements).

spread use, it would be difficult to conclude that their use prejudices the public interest or is otherwise contrary to the Sherman Act's policies. To the extent that such surveys lead to wage uniformity, they are consistent with federal policy that wage rates among employers for the same job should be comparable.³⁷⁸ To the extent that wage surveys assist an employer in keeping its employees by paying the prevailing wage, the surveys support the public interest in employment stability. Even if the only effect of wage surveys were to reduce average wages, that effect does not offend the articulated antitrust objective of lower prices for goods and services. There is no articulated federal policy that wages should be as high as possible, as there is that prices should be as low as possible. Currently, the only ascertainable federal policy concerning wages is that wages among employees should be comparable and above a minimum level.

C. Implications: Basis for a Unified Theory of Labor-Antitrust Law

Determining the extent to which the Sherman Act applies to unions and their activities has proved difficult for courts and commentators for many years, but the answer which seems to be emerging resembles remarkably what Senator Jones told his colleagues on the Senate floor in 1914: let the Sherman Act apply to the product markets, and let the labor laws establish national labor policy.³⁷⁹ Most courts and commentators have sought to articulate the boundary between antitrust and labor law by examining the extent to which antitrust laws should be applied to labor union activity. We, too, seek to explain the boundary between antitrust and labor law principles, but our inquiry begins from a completely different vantage point, suggested by this question: to what extent do the antitrust laws apply to employer restraints in labor markets?

Having proposed a framework for analysis of employer restraints in labor markets that devolves ultimately from the Supreme Court's reasoning in *Apex Hosiery*, we note with interest two articles examining the extent to which the antitrust laws apply to labor union activity. In a 1976 article, Professor St. Antoine made the following observation: "Further refinement of the *Apex Hosiery* doctrine might have been the soundest course for the Court to follow in dealing with labor and the antitrust laws. But that was not to be."³⁸⁰ Similarly, Professor Leslie's 1980 article on the subject argued that *Apex Hosiery* "accommodates labor and antitrust policies in a way consistent with the framework of

378. See *supra* text accompanying notes 116-29.

379. See *supra* note 84 and accompanying text.

380. See St. Antoine, *supra* note 149, at 607.

the federal statutes.”³⁸¹

Upon our examination of a different but related problem, we have reached the same conclusion. We doubt this is a coincidence. It appears that *Apex Hosiery* does indeed provide the basis for a modern, more cogent theory of labor-antitrust.

381. See Leslie, *supra* note 1, at 1233.