March 1974

Economic Pressure and Antitrust (with James A. Wilkinson)

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ECONOMIC PRESSURE AND ANTITRUST

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The antitrust laws are concerned with protection of the public against wrongful concerted conduct by those in possession of substantial economic power.[1] This same policy of protecting the public against abuse of economic power is manifested by direct governmental regulation of economic activity. All levels of government are involved in this effort. For example, cities and counties control market entry by issuing liquor licenses. States directly control prices by rate regulation of public utilities. The federal government controls market entry by issuing communication licenses and directly limits prices through the 90-year old tradition of regulating railroad rates and by the newer expedient of general wage and price controls.

The effectiveness of governmental regulation of economic activity can be severely impaired if those subject to the regulation can combine to use their economic power to coerce the government into changing its policies. Such concerted use of economic power to achieve a political result is common in many countries.[2] In this

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1. For an analysis of the development of the antitrust laws see W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (2d ed. 1970); S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS (3d ed. 1968) [hereinafter cited as S. OPPENHEIM & G. WESTON]; H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955). *See also* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1—2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

2. "When strikes [in France] are organized by the unions, their goal usually is to pressure the government rather than inflict a cost on a specific employer." Mitchell, *Incomes Policy and the Labor Market in France*, 25 IND. & LAB. REL. REV. 315, 331 (1972). Forty thousand Chilean truckers struck ostensibly to protest that

country, however, such actions by producers or sellers of goods and services—as opposed to employee groups[3]—have not been prevalent. But several events relating to enforcement of wage and price controls under the Nixon Administration's economic stabilization program[3.1] suggest the possibility that organized shutdowns or other restrictions on production and distribution might become more common to protest governmental policies or to compel governmental agencies to make specific changes in regulations, orders or general policy.

Meat, poultry, and dairy processors, for example, threatened slowdowns and shutdowns to protest the price freeze declared on June 13, 1973. During the same period, beef ranchers held cattle back from markets in an attempt to force an early termination of the price ceilings on beef.[4] In addition, several weeks after the announcement of Phase IV regulations controlling prices of petroleum

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government's inability to provide spare parts. Informed observers reported that the real purpose was to bring down the government by paralyzing the nation's transportation system, causing severe shortages of fuel, food, and other essential goods. *See* TIME, Aug. 27, 1973, at 43. *See also* Benham, *New Challenge for Chile After a Marxist Binge,* U.S. NEWS & WORLD REP., Sept. 24, 1973, at 46.

3. Strikes by labor unions against the government are not uncommon. *See* J. BLACKMAN, PRESIDENTIAL SEIZURE IN LABOR DISPUTES (1967).

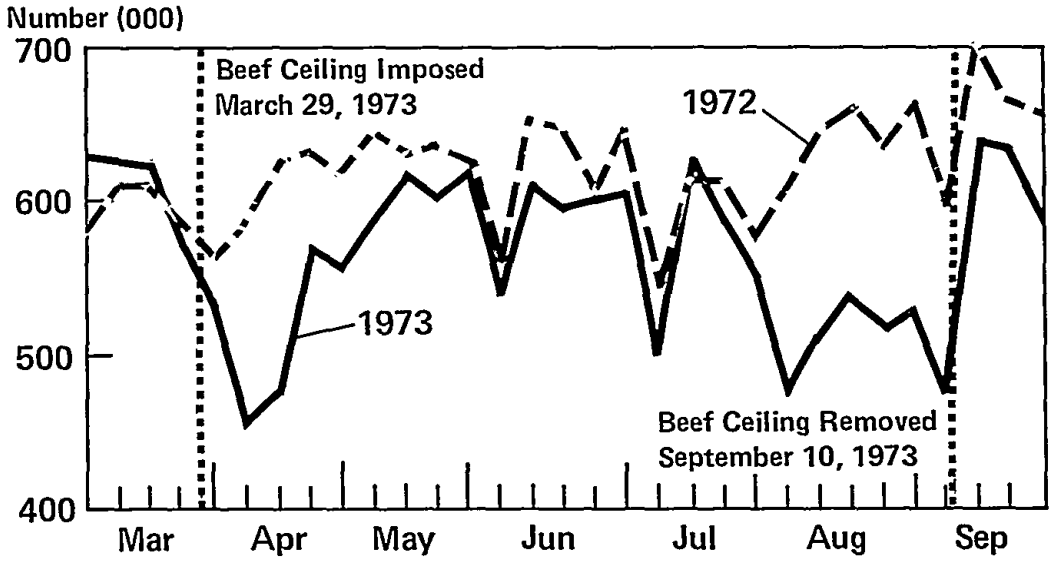
3.1. The Economic Stabilization Act of 1970 [12 U.S.C. § 1904 (1970), *as amended,* (Supp. II, 1972)], empowered the President to promulgate regulations for the stabilization of prices, rents, wages and salaries. These were frozen for 90 days under the Phase I regulations of August 15, 1971, which also established the Cost of Living Council, Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (1971). The Phase II regulations issued on October 15, 1971 continue mandatory economic controls and established the Pay Board and Price Commission. Exec. Order No. 11,627, 36 Fed. Reg. 20,139 (1971). These bodies, with the Internal Revenue Service, were empowered to prescribe regulations designed to implement the President's stabilization policies. *See* 6 C.F.R. §§ 101.1—05.82 (1972) (Cost of Living Council regulations), 200.20—05.82 (1972) (Pay Board regulations), 300.1—11.40 (Price Commission regulations), 401.1—.1014 (1972) (IRS rules).

The mandatory aspects of prospective regulations issued by these agencies were removed by the subsequent voluntary measures of Phase III [Exec. Order No. 11,695, 38 Fed. Reg. 1,473 (1973)], and Phase IV [(Exec. Order No. 11,723, 38 Fed. Reg. 15,765 (1973); Exec. Order No. 11,730, 38 Fed. Reg. 19,345 (1973)].

4. As the chart below illustrates, the imposition of a beef ceiling by the Cost of Living Council in March 1973, and the July decision to continue the ceiling until September 10, 1973, coincided with an unprecedented decrease in the number of cattle slaughtered. These decreases in supply did not adversely affect prices since beef was already selling to consumers at ceiling prices, but they did make beef harder to obtain.

products, regional and national associations of gasoline retailers announced plans for mass closure of gasoline stations. This threatened mass action was employed as a means of protesting regulations which the associations alleged were discriminatory, and forcing the Cost of Living Council to increase the ceiling prices for retail gasoline sales.[5] Then, in November 1973, 30,000 hospital workers in New York City struck in an attempt to force the Cost of Living Council to approve a 7.5 percent wage increase.[6]

Cattle Slaughter: Comparison of 1972 and 1973 Rates



Source: COST OF LIVING COUNCIL, ECON. STABILIZATION PROGRAM Q. REP. 29 (3d quarter 1973).

Conceptually, one should distinguish between: (a) slowdowns or shutdowns which are intended to restrict supply and thereby increase prices through the natural action of the marketplace, and (b) mass shutdowns aimed at forcing a change in government policy. While the meat, poultry, and dairy industries were arguably in the former category, the end result (no supply or limited supplies) could have the same effect as a mass shutdown and thus force government policy to change.

5. *See* U.S. NEWS & WORLD REP., Oct. 1, 1973, at 22; Silver, *L.I. "Gas" Stations Act on Price Law*, N.Y. Times, Oct. 4, 1973, at 50, col. 4; Wash. Post, Oct. 5, 1973, § A, at 7, col. 1; Wash. Star-News, Oct. 3, 1973, § B, at 2, col. 1; ABC Evening News, Sept. 21, 24, 1973.

6. Spokesmen and observers generally agreed that the New York strike by Local 1199 of the Drug and Hospital Workers Union was aimed at forcing Cost of Living Council approval of the wage increase which had been agreed to in arbitration

It is not the purpose of this article to reach any conclusion as to the legality of any of these *specific* organized protests against elements of the economic stabilization program regulations. The protests have been terminated, and if any further inquiry as to the circumstances surrounding such activities is warranted, comment by the authors would not be appropriate at this time. These recent events, however, do present a more general issue; whether concerted use of economic power by businessmen in the form of organized strikes or shutdowns attempting to force an economic regulatory agency to change its regulations, is, or should be, illegal as an unreasonable restraint of trade under the antitrust laws.[7]

If use of economic power to compel a change in government policy becomes an acceptable practice, serious political and economic crises could result. This type of economic action is likely to be extremely disruptive of basic production and distribution activities. Since the presumed objective is to affect the course of agency decision making, the disruption must be severe enough to cause the general public to pressure the legislative and executive branches to relieve the cause of the distress, or at least to cause active governmental concern about the potential harm to the public welfare and safety or national security that these actions could generate. Such public pressure or governmental concern is unlikely to result unless

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between the employees and employers. Blumenthal, *Origin of Hospital Dispute Traced to Summer of '72*, N.Y. Times, Nov. 6, 1973, at 29, col. 1; Kaufman, *Strike Curtails Medical Services at Hospitals Here*, N.Y. Times, Nov. 6, 1973, at 1, col. 8.

7. The antitrust implications of concerted action by business organizations has not gone unnoticed. Most commentators address the threshold question of the application of the antitrust laws in light of the *Noerr-Pennington* doctrine [UMW v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)], which affords first amendment immunity to such concerted actions as "political activity." *See, e.g.*, Barnett, *Joint Action by Competitors to Influence Public Officials: Antitrust Exemption or Trap?*, 24 BUS. LAW. 1097 (1969); Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209 (1972) [hereinafter cited as *Antitrust Immunity*]; Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968). The question of whether the antitrust laws apply to concerted actions motivated by anticompetitive, rather than political considerations, is left open under *Noerr-Pennington*. *See* Barnett, *supra* at 1100—05; Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense*, 12 B.C. IND. & COM. L. REV. 1133 (1971); Note, *supra* at 852—53. *See also* note 60 *infra*.

the target of the private action is a product or service which is essential, and unless an interruption in the flow of the product or service will quickly result in serious shortages. Food and gasoline are obvious examples, and there are instances with these products where a disruption has recently been threatened and, as previously cited, in some cases has been experienced.[8]

In addition to the pragmatic desire of those seeking favorable governmental action to cause as much immediate hardship as possible, the nature of the action sought can cause the disruption to multiply. In a pluralistic political system, any regulation or statute is unlikely to be exactly what all groups would desire; the legislative and regulatory processes must take into account competing desires and conflicting goals and reach a result which in the minds of the decision makers strikes a fair balance.[9] Administrative agencies have been granted broad latitude to make such balancing choices because of the complexity of the subject matter of the regulations and the need for expertise and specialization in implementing congressional intent.[10] If economic disruption by one group can successfully bias administrative decisions toward the interests of that group, it is possible that other groups, with conflicting interests, would seek to invoke *their* economic power to force a different result, or maintenance of the original result, notwithstanding the opposition of the first group. Though speculative, it is certainly conceiva-

8. For a discussion of the problems resulting from food and fuel shortages see *What the Voters Are Telling Congress About*, U.S. NEWS & WORLD REP., Jan. 21, 1974, at 13; *"Big Oil" Under Attack*, U.S. NEWS & WORLD REP., Jan. 21, 1974, at 18. For a discussion of the disruptions to the trucking industry see Bird & Stetson, *Truck Strikes Cutting Jobs and Some Stocks of Food*, N.Y. Times, Feb. 7, 1974, at 1, col. 2—3.

9. *See* THE FEDERALIST No. 51, at 400—02 (J. Hamilton ed. 1888) (A. Hamilton).

10. This doctrine of *primary jurisdiction* has been applied frequently by the Supreme Court. *See* International Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 237—39 (1971); Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68—69 (1970); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684—85 (1965); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 364 (1965); Far East Conference v. United States, 342 U.S. 570, 573—76 (1952); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130—31 (1944); United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 481—83 (1932). *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 19.01—.06 (3d ed. 1972) [hereinafter cited as K. DAVIS]; Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964); Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812 (1967).

ble that a protest could widen until complete economic paralysis resulted, with no way for the target of the protest—the agency—to capitulate. Equally disturbing is the likelihood that associations of businesses are likely to be better organized than consumer groups and thus exercise disproportionate influence.[11]

Moreover, there is no particular reason why such a protest should be limited to the relatively narrow issues related to price controls, or other administrative actions of interest to a particular sector of the economy. Such action could be undertaken to influence broader economic, social, or foreign policy decisions being considered by any branch of government at any level from a local judge to the Congress of the United States.

Approach

This article will address the issue of whether concerted use of economic power by business in the form of organized strikes or shutdowns in an attempt to force a change in government policy is illegal under the antitrust laws.[12] It focuses on several specific questions. First, does such a shutdown cause the kind of restraint of trade which is prohibited by the antitrust laws? Second, can such an

11. C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 827—29 (1971).

12. Particular emphasis will be placed on coercive shutdowns and closures by businessmen as opposed to labor unions. The former situation has been infrequently treated, while there is a considerable body of case law dealing with the latter.

While a union's right to strike to apply economic pressure on an employer is expressly protected [*see* National Labor Relations Act § 13, 29 U.S.C. § 163 (1970); NLRB v. International Rice Milling Co., 341 U.S. 665 (1951)], its right to apply indirect pressure by secondary actions such as boycotts, picketing, or strikes against third parties is clearly limited [*see* National Labor Relations Act §§ 8(b)(4), 8(e), 29 U.S.C. §§ 158(b)(4), 8(e) (1970)]. This policy should be applied a fortiori when the objective is to create sufficient public pressure or governmental concern to effect a change in government policy. Such secondary objectives are even further removed from the immediate dispute than the ordinary case of a secondary boycott, and the policy against secondary boycotts is, after all, based upon the inherent unfairness of imposing economic loss on uninvolved bystanders. *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 366 U.S. 667 (1961).

The courts have generally been quick to enjoin strikes when the objective was to coerce governmental action rather than to compel employer concession, although the statutory basis for such action has usually not been the antitrust laws. *See* McGuire Shaft & Tunnel Corp. v. Local 1791, UMW, 475 F.2d 1209 (Temp. Emer. Ct. App.), *cert. denied*, 412 U.S. 958 (1973); J. BLACKMUN, *supra* note 3, at 23—75.

organized shutdown amount to a conspiracy or combination prohibited by the antitrust laws? Third, even if the resulting restraint of trade is within the scope of the antitrust laws, and even if a prohibited conspiracy or combination is involved, is the right of businessmen to engage in such a protest protected by countervailing policy considerations?

The question whether an organized shutdown amounts to a restraint of trade under section one of the Sherman Act[13] is addressed from parallel directions. Initially, the article deals with whether the policy embodied in section one is broad enough to prohibit restraints on the free flow of interstate commerce regardless of whether such restraints are anticompetitive. Secondly, it discusses whether such shutdowns or mass closures are anticompetitive and thus prohibited by section one even if the policy of section one is solely to protect competition. The article then makes a preliminary inquiry into the question of whether the organization of such mass protests can be construed to be a conspiracy or combination prohibited by section one of the Sherman Act.

The question of countervailing policy considerations is dealt with in three parts: 1) whether the intervention of governmental regulatory power into the competitive marketplace lessens the public interest in competition sought to be protected by the antitrust laws; 2) whether the inherent right of a businessman to cease doing business is such to prevent sanctions for organized shutdowns; and 3) whether the constitutional rights of free speech and petition for redress of grievances protects the protesters notwithstanding the impact of their actions on interstate commerce and competition.

I. The Scope of Section One—More than Competition?

This section explores the policy embodied in section one of the Sherman Act to determine whether that policy is concerned merely with acts which restrain competition or whether it is more broadly concerned with acts which restrain the free flow of commerce notwithstanding whether competition is directly affected.

The political climate which led to passage of the Sherman Act focused on economic power which could be, and in some instances was, exercised contrary to the public interest.[14] Section one of the

13. Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1970).

14. In discussing the history of the Act Chief Justice White stated:

[T]he main cause which led to the legislation was the thought that it was

Act 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 hereby declared to be illegal . . . ."[15] It is generally agreed that Congress intended to enact the common law definition of "restraint of trade."[16] At common law, contracts in restraint of trade were understood to include all agreements wherein one of the contracting parties is restrained from following a particular occupation, industry or trade.[17] Such

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required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

The opening declaration of the Attorney General's Antitrust Committee Report states:

> The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization.

THE ATT'Y GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 1 (1955) [hereinafter cited as ATT'Y GEN. REP.].

See also P. AREEDA, ANTITRUST ANALYSIS 21—22 (1967) [hereinafter cited as P. AREEDA]; A. DIETZ, AN INTRODUCTION TO THE ANTITRUST LAWS 1—4 (1951); W. THORNTON, A TREATISE ON COMBINATIONS IN RESTRAINT OF TRADE 1—31 (2d ed. 1928); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 222—24 (1956) [hereinafter cited as Letwin].

15. Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1970).

16. A. Neale, the noted British expert on American antitrust laws, has stated:

> The American senators of the period [in which the Sherman Act was formulated], as of most periods, were nearly all professional lawyers. When they finally settled for the present wording of the Sherman Act with its blanket prohibition of restraint of trade, they assumed that they were carrying into statute law various distinctions between lawful and unlawful restraints and combinations that the courts had already made in common law and would continue to make. "Restraint of trade," in other words, was a term of art from the beginning.

A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 13—14 (2d ed. 1970).

For a detailed analysis of the common law see Standard Oil Co. v. United States, 221 U.S. 1, 51—62 (1911). *See also* 1 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES § 13.3, at 249 (1949) [hereinafter cited as 1 H. TOULMIN]; Letwin, *supra* note 14, at 255—58.

17. 1 H. TOULMIN, *supra* note 16, § 2.9, at 37.

contracts were opposed because, among other things, the public would be deprived of the economic benefits derived from participation by one of the contracting parties.[18] This concern with the right of the public to the benefits involved can be likened to a more modern concern that commerce continue unimpeded. The early decisions of the Supreme Court support the view that section one of the Act prohibits more than anticompetitive behavior. In *Standard Oil Co. v. United States*[19] the Court concluded that: "The statute . . . evidenced the intent . . . to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint."[20] Since section one did not expressly define acts to be embraced, and since its enumeration of prohibitions addressed itself to broad classes of acts, the Court concluded that the provision necessarily called for the exercise of judgment and for reliance on some standard to determine when a factual situation constituted a violation.[21] Thus, the "rule of reason" was formulated whereby only *unreasonable* restraints of trade were deemed illegal.[22] Though the "rule of reason" has been much criticized,[23] the Court's reasoning is sound in that it suggests a broad scope of section one and the resulting necessity to look at the policy set forth by the Congress and test whether an "old or new method of restraint of trade" should be declared illegal. If one is to apply the underlying reasoning of *Standard Oil* to modern circumstances, one could conclude that the "new" method for restraining commerce clearly embraces use of economic power to force change

18. *Id.* § 2.10, at 38.

19. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

20. *Id.* at 60.

21. *Id.*

22. ATT'Y GEN. REP., *supra* note 14, at 5.

23. The Supreme Court has taken note of the chief criticism of the "rule of reason":

> [It necessitates] an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

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

For a discussion of the "rule of reason" and its interplay with the so-called "per se" violations of the antitrust laws see Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964); Stocking, *The Rule of Reason, Workable Competition, and Monopoly*, 64 YALE L.J. 1107 (1955).

in government price control policy, quite apart from whether competition is affected.[24]

The development of labor law related to the Act buttresses the view that section one of the Sherman Act applies to conduct which is not anticompetitive in the ordinary, narrow sense of the term. Five years after enactment of the Sherman Act, the Supreme Court had the opportunity to consider the breadth of the statutory prohibition against restraints on trade. In *In re Debs*[25] the question presented was whether a circuit court had jurisdiction to enjoin a strike which had shut down railroads throughout the northcentral United States.[26] The circuit court granted the injunction, concluding that it had jurisdiction under the Sherman Act.[27] The Supreme Court, however, preferred to rest its approval of jurisdiction on broader grounds than the Sherman Act and thus did not reach the question whether the Sherman Act gave jurisdiction to enjoin this particular kind of restraint of trade.[28] In the opinion, however, the Court commented on the large number of cases in which state legislation restraining interstate commerce had been held unconstitutional, and reasoned that, a fortiori, a mere voluntary association of individuals within the limits of a state did not have the power to restrain interstate commerce.[29]

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24. *See* 221 U.S. at 58—60.

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

26. The Pullman strike of 1894 initially involved a dispute between George M. Pullman and 4,000 workers employed in his railway car manufacturing plant in Pullman, Illinois. The workers had organized a union, which affiliated with the newly-formed American Railway Union (ARU) led by Eugene V. Debs. Debs' objective was to bring all railway workers into a single industrial union. An initial strike of the Pullman workers on May 11, 1894, spread rapidly on railways radiating from Chicago. Beginning on June 26, 1894, ARU members refused to handle Pullman cars. On July 2, ARU leaders were enjoined from compelling railway employees not to perform their duties. *See* THE PULLMAN BOYCOTT OF 1894 (C. Warne ed. 1955).

27. United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894).

28. *In re* Debs, 158 U.S. 564 (1895). The Court stated in part:

> We enter into no examination of the act of July 2, 1890 . . . upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principle underlying it should be fully stated and affirmed.

Id. at 600 (citation omitted).

29. *Id.* at 581—82.

In *Loewe v. Lawlor*[30] the Court addressed the Sherman Act more directly. It concluded that the Sherman Act prohibits any combination whatever which essentially obstructs the free flow of commerce between the states.[31] The Court noted that while the statute had its origin in the evils of massed capital, Congress broadened the Act's prohibition to include any combination in restraint of commerce.[32]

Even after passage of the Clayton Act in 1914, which sought to limit the use of the Sherman Act as authority for injunctions against strikes by employees,[33] the Court found that significant disruptions of interstate commerce by strikes, secondary boycotts, and similar activities could be enjoined under the Sherman Act.[34] Again, the

30. Loewe v. Lawlor, 208 U.S. 274 (1908).

31. *Id.* at 292—93.

32. The Court cited with approval the lower court decision of United States v. Workingmen's Amalgamated Council, 54 F. 994 (C.C.E.D. La. 1893):

> [T]he statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition . . . [t]he subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them.

208 U.S. at 301—02, *quoting* 54 F. at 996.

33. The Clayton Act § 6, 15 U.S.C. § 17 (1970), states:

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

Id.

34. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). *Accord*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. UMW, 268 U.S. 295 (1925). *Cf.* Local 66, United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457, 471 (1924). *But see* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). In *Apex* the Court focused on restraints on competition as the sole concern of the Sherman Act, refusing to hold that section one was applicable generally to police interstate transportation of goods and services. It should be noted, however, that the specific holding of *Apex* applies the test of *Coronado Coal Co. v. UMW* [268 U.S. 295, 310 (1925)], in determining whether a restraint is within the Sherman Act. 310 U.S. at 512. The *Coronado* test involves intent to stop production directly and prevent shipment to other states or to re-

emphasis was on the interest of the general public in unobstructed commerce which, in the opinion of the Court, constituted the prime and paramount concern of Congress in enacting the antitrust laws.[35] Clearly, in these cases, the concern of the Court was to a great extent centered on the disruption of the orderly flow of commerce, and not necessarily on the possible effect on competition of the prohibited actions.[36]

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strain the price in interstate markets. 268 U.S. at 310.

That, coupled with the deep concern expressed by the *Apex* Court in preventing expansion of federal antitrust authority into virtually every local factory strike which could upset the federal-state balance [*see* 310 U.S. at 513], suggests that the *Apex* holding should be viewed as seeking to limit application of the Sherman Act in instances of commercial disruption *incidental* to a labor dispute.

35. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. UMW, 268 U.S. 295 (1925); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

36. In *Duplex* the Court stated:

> An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the antitrust laws, of which the section under consideration [section one of the Sherman Act] forms, after all, a part.

254 U.S. at 477—78.

The Court has frequently been in accord with a broadened view of the applications of the antitrust statutes. *See, e.g.,* Burke v. Ford, 389 U.S. 320 (1967) (activity which does not occur in interstate commerce comes within Sherman Act if it substantially affects interstate commerce); United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960) (refusal to deal may be conspiracy to restrain trade even in absence of express or implied agreement); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (group boycott not tolerable simply because victim is single merchant whose destruction would have little effect on the economy); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489—92 (1950) ("trade" as used in the Sherman Act encompasses sale of personal services as well as commodities); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (local price-fixing conspiracy is within Sherman Act if means of so doing reach beyond boundaries of one state); United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947) (amount of interstate trade affected by conspiracy is immaterial in determining whether Sherman Act violation has occurred).

Finally, in the Norris-LaGuardia Act,[37] Congress successfully excluded strikes growing out of labor disputes from coverage of the antitrust laws. But this has been held to be a limited exclusion. Combinations between unions and employers to restrict use of electrical equipment from other parts of the country, and agreements between miners and mineworkers to fix wage rates throughout the industry have been held violative of the antitrust laws.[38] Moreover, a strike against the government after a governmental seizure of coal mines was held not to be protected from injunction under the labor laws.[39]

The statutory exclusion from the antitrust laws for activity growing out of labor disputes is thus a narrow one, suggesting that the policy embodied in the Sherman Act is broader than that set forth

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37. The Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (1970) states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Id.

38. *See, e.g.*, UMW v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). *Cf.* Ramsey v. UMW, 401 U.S. 302, 312—13 (1971) (union agreement with one set of employers to maintain wage standards ruinous to other employers is not within exemption); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 692—93 (1965) (limitation on hours of marketing incorporated into collective bargaining agreement may be within antitrust laws if not necessary to protect interests of workers); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 190 (1954) (combination of union and its president with contractors to suppress competition is not exempt from antitrust laws); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 463 (1949) (labor-management agreement to restrict jobbers to trade association contractors designed to reduce competition removes the agreement from exemption status); United Bhd. of Carpenters v. United States, 330 U.S. 395, 400 (1947) (contract between employers and labor group to restrict materials handled, restrained out-of-state manufacturers from shipping into area, thus not within antitrust exemption); United States v. Hutcheson, 312 U.S. 219, 232 (1941) (test of whether labor activity is within exemption is whether labor group is acting in its self-interest and not in combination with non-labor group). *See also* Handler, *Labor and Antitrust: A Bit of History*, 40 A.B.A. ANTITRUST L.J. 233 (1971); Winter, *The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963); Note, *Impact of the Antitrust Laws on Labor Organization in the Light—or Shadow—of Pennington and Jewel Tea*, 46 B.U.L. REV. 83 (1966); 13 B.C. IND. & COM. L. REV. 383 (1971).

39. United States v. UMW, 330 U.S. 258 (1947).

in the labor laws. The vital interest of the general public in unobstructed commerce can be protected notwithstanding the interest of the worker in concerted action.[40]

So the antitrust laws have been applied to prohibit strikes and similar activities by employees when such strikes interfere with interstate commerce and have as their objective interests other than those traditionally expressed by organized labor. Such injunctions are uncommon only because of a specific statutory exemption granted to labor organizations with respect to activities associated with legitimate industrial relations activities. Even in the industrial relations area, however, strikes related to objectives other than those protected under the Norris-LaGuardia Act have successfully been enjoined.[41]

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40. The need to balance the interests of labor and the general public has long been recognized. One commentator, writing shortly after the landmark *Allen Bradley* decision [325 U.S. 797 (1945)], noted that the restrictive attitude toward labor during the crisis atmosphere of the World War II years may have played some part in the decision. Yet, even with the return of normalcy,

> . . . the general public will have the right to demand that organized labor, now grown to big business statute [*sic*] with governmental protection of collective bargaining during the past decade, shall assume certain reciprocal responsibilities. . . . Congress, in prescribing in detail what particular types of activity should be considered beyond the bounds of legitimacy, would necessarily have to reweigh the conflicting interests of labor and the general public. This reweighing might well take into consideration the purpose for which certain labor activity is conducted, rather than merely the nature of the conduct.

Pierce, *Labor and the Antitrust Laws*, 18 S. CAL. L. REV. 171, 212 (1945).
For a discussion of the marked superiority of labor's position at present over that which prompted passage of the Norris-LaGuardia Act in 1932 see H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 19—21 (1950); J. ROSENFARB, THE NATIONAL LABOR POLICY AND HOW IT WORKS 2—4 (1940), both of which underscore the continuing need to remove the antitrust exemption when labor activity clearly goes beyond the legitimate goals of promoting labor interests and combines with other non-labor groups to obstruct the flow of commerce. *See also* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Frank, *The Myth of the Conflict Between Antitrust Law and Labor Law in the Application of Antitrust Law to Union Activity*, 69 DICK. L. REV. 1 (1964); Comment, *Labor Immunities and the Public Interest*, 44 TUL. L. REV. 297, 299—306 (1970); Note, *Antitrust Laws and Union Power*, 16 U. FLA. L. REV. 103 (1963); 54 YALE L.J. 853, 859 (1945).

41. The Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1970), enumerates the types of activities subject to the Act's anti-injunction provisions:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or

No such statutory exemption exists for combinations of businessmen engaged in strikes—even when they have called themselves a union.[42] When strikes, shutdowns or other disruptions of interstate commerce are undertaken by businessmen, there is all the more reason to conclude that such activities are within the scope of section one prohibitions, since combinations of businessmen enjoy no such exclusion from operation of the antitrust laws.

Restraint of the free flow of commerce in general should be tested by asking the broad question of whether such activities are prohibited, rather than the narrower question of whether the activities were undertaken for the purpose of limiting competition.

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growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor disputes who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

42. *See, e.g.*, Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 (1962) (action of businessmen who join union and use its influence to restrain competition is not within the antitrust exemption for labor activities); Columbia River Packers Ass'n, Inc. v. Hinton, 315 U.S. 143 (1942) (exclusive contracts between fishermen, calling themselves a union, and fish merchants declared illegal under the antitrust laws).

II. The Scope of Section One—Competition Alone

This section addresses the question whether organized shutdowns by businessmen to compel a change in federal regulatory policy is sufficiently anticompetitive in character to be prohibited by section one of the Sherman Act, even if section one is construed to apply only to the preservation of competition.

Regardless of the total scope of the antitrust laws, as interpreted by the courts, the laws focus on a particular class of restraint of trade: competition. Competition is seen as the best force to control economic behavior and to protect the public interest.[43] Thus acts which interfere with the effective functioning of competition are prohibited on the grounds that such interference adversely affects the public interest by undermining the force on which society relies for control. If protection of competition is the focus, we must consider competition in its purest form.[44]

Theoretically perfect competition benefits society by encouraging innovation, equilibrating supply and demand, ensuring that productive resources are allocated so as to satisfy consumer demand, and allocating available supplies of scarce products.[45] Perfect competition as a theoretical construct is supported by a number of critical assumptions. There must be many sellers, each acting independently and each small relative to the market so as to have no appreciable effect on market price. Their products must be identical, so that the consumer is indifferent to all attributes of the product or service, except price. There must be freedom of entry for new sellers who wish to enter the market.[46]

The construct depends heavily on the assumption that producers act rationally in economic terms. This means, *inter alia*, that each producer acts when he makes decisions so as to maximize his net profit. It should be emphasized in this context that such rational profit maximization should cause a producer to sell an additional increment of merchandise so long as the price for that increment is higher than the variable costs associated with that increment. This is true even when the price for the increment is below his total or

43. *See* S. Oppenheim & G. Weston, *supra* note 1, at 78; 1 H. Toulmin, *supra* note 16, at § 8.2.

44. P. Areeda, *supra* note 14, at 5.

45. *Id.* at 6—7; S. Oppenheim & G. Weston, *supra* note 1, at 78.

46. G. Bach, Economics 362 (7th ed. 1971); S. Oppenheim & G. Weston, *supra* note 1, at 85.

average cost.[47]

Now let us apply the perfectly competitive mode to the situation where price controls are imposed and sellers may be tempted to cease operating until the government allows them a higher price. The purely competitive model would be altered in this situation since direct control of prices has been imposed by the government. In such a situation, price cannot vary upward above a ceiling. The other variables, however, are unconstrained. Demand can vary, and in the short term such demand is likely to hold constant at a level sufficient to warrant a higher price than that allowed by the government. Otherwise there would be no reason for the government

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47. Assume, for example, that there is an island on which there are 10 retail gasoline stations. Each station pays $500 rent per month and sells 14,400 gallons of gasoline per month at 37 cents per gallon, for which it pays 30 cents per gallon to an importer. It can be seen that each retailer makes $508 profit per month.

Let: Pi = profit per month
R = rent per month
C = cost per gallon
V = volume sold per month
P = price per gallon

Then: $Pi = PV - [R + VC]$
$= (0.37)(14,400) - [500 + (14,400)(0.30)]$
$= 5328 - [500 + 4320]$
$= \$508$ profit per month

His average cost per gallon is total cost, divided by volume:

$$\text{Average cost} = [R + VC] / V$$
$$= [500 + 4320] / 14,400$$
$$= 33.5 \text{ cents per gallon}$$

Suppose now, that the island's government puts a price ceiling on the 10 retailers equal to their original gross margin per gallon (7 cents) plus their original cost per gallon (30 cents). The ceiling price would be 37 cents per gallon. Suppose further that the importer raises the price to the retailers to 34 cents per gallon. The individual retailers would then experience a loss instead of a profit since their average cost per gallon would exceed their legal price per gallon:

$$\text{Average cost}' = [R + VC] / V$$
$$= [500 + (14,400)(0.34)] / 14,400$$
$$= 38 \text{ cents per gallon}$$

Suppose, however, due to the stabilization in price and the consequent increase in demand, that the retailers are able to sell an additional 3,000 gallons each per month. With a new total of 17,400 gallons per month and the maximum legal price remaining at 37 cents per gallon, a retailer can earn a $22 profit per month by selling more gasoline at a "price below cost":

$$Pi' = PV - [R + V'C']$$
$$= (0.37)(17,400) - [500 + (17,400)(0.34)]$$
$$= \$22 \text{ profit per month}$$

price ceiling since prices would be lower than the ceiling as a result of the natural operation of supply and demand. So long as the government price ceiling is higher than the unit cost for any producer, such a producer behaving rationally and competitively has an incentive to sell, at least in the short run. In perfect competition he will continue to do so as long as his variable costs are lower than the government price ceiling. If total industry supply diminishes because producers cease selling, the remaining producers have added incentive to stay in business. Demand for the products of such remaining producers increases; thus the volume (market share) for each individual producer increases, and along with it, total revenues and total profits.

Even in the face of government intervention in the form of price controls, competitive forces which remain should suffice to protect the public from the disruption resulting from mass closure or exit by all producers. It should be noted, however, that this is true only so long as the government price ceiling is not lower than the variable cost of the most efficient producer in the market.

Said differently, a mass closure in any particular market is a phenomenon which can occur in only one of two circumstances: (a) where the government price ceiling is lower than the incremental variable costs of most producers; or (b) where there has been some interference with the remaining competitive forces which create an incentive for producers to continue in operation notwithstanding the ceilings.[48]

Assume that the government has behaved rationally—and knowledgeably—and has set its ceiling price above the incremental variable cost. A mass closure can result only in a situation where there has been some interference with competitive forces, as by an agreement to limit competition.

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48. Assume the same facts as in note 47 *supra*. Now, the island-gasoline-retailer association decides that all of its members should close until the government raises the price ceiling. The motorists on the island still want to buy a total of 144 thousand gallons of gasoline per month at the ceiling price of 37 cents per gallon. If nine stations actually close but one decides to remain open, he has considerable incentive and reward for his deviant action. Assume he has no physical limitation on his ability to sell more gasoline:

$$Pi' = PV'' - [R + V''C]'$$
$$= (0.37)\ (144{,}000) - [500 + (144{,}000)\ (0.34)]$$
$$= \$3{,}820 \text{ profit per month}$$

His profit is more than seven times larger than when he started, even though he is still "selling below cost."

III. The Need for a Combination or Conspiracy

Regardless of the scope of the "restraint of trade" policy embodied in section one of the Sherman Act, the use of economic power to coerce a change in government policy must be taken "in concert" or as the result of a "conspiracy" within the meaning of section one in order to be prohibited.

On several occasions the Supreme Court has addressed the issue of what constitutes a conspiracy, and it is clear that while a formal agreement by two or more persons is a "conspiracy," *Interstate Circuit, Inc. v. United States*[49] held that an agreement can also be inferred from the actions of those accused. If a number of businesses actually close for a period of time after a spokesman had threatened or warned that the closure would occur unless a policy change was forthcoming, an inference could be drawn that closures were the result of an agreement to act in concert. The question remains, however, does the government have to prove that there was a formal agreement, or is an inference alone sufficient to prove conspiracy within the meaning of section one?

The Supreme Court confirmed in the *Interstate Circuit* case its *Eastern States Retail Lumber Dealers' Association v. United States*[50] decision, that a formal agreement is not necessary in certain circumstances for there to be a violation of the antitrust laws. In circumstances where there is a strong motivation for concerted action, where there is knowledge that the plan, if carried out, would result in a restriction of interstate commerce, and where there is an awareness early in the development of a situation that others had joined in the plan, the Court held that formal agreement was not a prerequisite to an unlawful conspiracy.[51] The Court declared that:

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49. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939). *Cf.* United States v. General Motors Corp., 384 U.S. 127, 142—43 (1966); United States v. Parke, Davis & Co., 362 U.S. 29, 43—44 (1960); United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948); United States v. Griffith, 334 U.S. 100, 105 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); United States v. Masonite Corp., 316 U.S. 265, 275—76 (1942). *See also* Murchison, *Significance of the American Tobacco Company Case*, 26 N.C.L. Rev. 139, 147—48 (1948); 43 Ill. L. Rev. 551 (1948).

50. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

51. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).

Even agreements between those engaged in a form of joint enterprise may be found to have constituted a conspiracy absent specific proof of an intent to conspire

"It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[52]

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to restrain trade. In *United States v. General Motors Corp.* [384 U.S. 127 (1966)], franchise arrangements between G.M. and Chevrolet dealers that prohibited the dealers from selling to local "discount houses" were held to be a conspiracy in restraint of trade. The Court was unmoved by argument that the arrangements were designed not to force competitors out of business, but to protect the parties economic self-interests:

> It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under §1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the "location clause" and franchise system are lawful or economically desirable. And although we regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory "finding" that there had been no "agreement" among the defendants and their alleged coconspirators, it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.

Id. at 142—43.

See also Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy*, 1967 DUKE L.J. 732.

52. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). The Court later emphasized that lack of an agreement does not remove a commercial practice from the realm of unlawful restraint of trade. *See* United States v. Parke, Davis & Co., 362 U.S. 29, 45—46 (1960). In this case the Court traced the rise and fall of the so-called *Colgate* doctrine [United States v. Colgate & Co., 250 U.S. 300 (1919)], which had been interpreted by the lower court in the instant case to mean that a manufacturer's refusal to deal with distributors who did not acquiesce to a resale price list, was a unilateral act, and, absent any agreement, express or implied, removed from the ambit of the antitrust statutes by *Colgate*. The Supreme Court held that proof of a bilateral agreement was not necessary:

> In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

362 U.S. at 43.

The unlawful combination came about in that by

> . . . involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegal-

From these decisions the doctrine of "conscious parallelism"[53] evolved. When a number of firms followed an identical pattern of interdependent behavior, knowing that their competitors were going to do the same thing, they had in effect formed an agreement or conspired within the meaning of section one. Even though, however, both actual and inferred agreements can violate section one of the Sherman Act, the Supreme Court has cautioned that parallel business behavior does not conclusively establish agreement, and that parallelism itself is no offense. The Court stated in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*[54] that "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional attitude toward conspiracy; but conscious parallelism has not yet read conspiracy out of the Sherman Act altogether."[55] Before taking *Theatre Enterprises*

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ity," . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

Id. at 45—46 (citation omitted).

See also Comment, *The Parke, Davis Case: Refusal to Deal and the Sherman Act*, 1961 DUKE L.J. 120; 13 VAND. L. REV. 1299 (1960).

53. *See* ATT'Y GEN. REP., *supra* note 14, at 38, *quoting* Federal Trade Commission, Notice to the Staff: In Re: Commission Policy Toward Geographic Pricing Practices, Oct. 12, 1948:

> [W]hen a number of enterprises follow a parallel course of action in the knowledge and contemplation of the fact that all are acting alike, they have, in effect, formed an agreement. . . . The obvious fact [is] that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion . . . .

Id.

See also S. REP. No. 1147, 85th Cong., 1st Sess. 43—50 (1957); Givens, *Parallel Business Conduct Under the Sherman Act*, 5 ANTITRUST BULL. 273 (1960); Phillips & Hall, *The Salk Vaccine Case: Parallelism, Conspiracy and Other Hypotheses*, 46 VA. L. REV. 717, 724—27 (1960); Sorkin, *Conscious Parallelism*, 2 ANTITRUST BULL. 281 (1957); Comment, *Conscious Parallelism In the Pricing of Gasoline*, 32 ROCKY MT. L. REV. 206 (1960); 45 MARQ. L. REV. 633 (1962).

54. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

55. *Id.* at 540. This is apparent from the term itself; not only must the obvious "parallelism" be shown, but evidence of the "consciousness" of the action must also be offered. As one author has put it:

> On the basis of *Theatre Enterprises* in conjunction with the earlier Supreme Court decisions, the rules have been developed that parallel conduct with knowledge of the similar action of others is evidence of a combination or conspiracy, but that a "plus factor," which might be the quality of the

as substantially limiting the *Interstate Circuit* rule, one should bear in mind that the former was decided on the narrow issue of petitioner's allegation that the court below should have *directed* a verdict in favor of the plaintiff in an antitrust suit, where there was evidence of parallel behavior, but no evidence of common purpose or motivation for acting in concert.[56] In addition, there were alternative explanations for the behavior of those whom *Theatre Enterprises* alleged to be acting in restraint of trade.[57]

As an example of the difference between the applicability of these decisions, suppose a regulation of the Department of Health, Education and Welfare (HEW) which affected the availability of all manufactured drugs until a new licensing system could be devised, touched off a series of drugstore closures in a given area. If drug supplies remained the same, an inference could certainly be drawn that there was a conspiracy to close. On the other hand, if the HEW regulation dried up drug supplies so owners had no rational economic choice but to close, these closures might not be a conspiracy. So, while the end result is the same—closed drugstores—the clo-

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> conduct itself, such as a radical departure from past practice or a price rise during a depression is necessary for the inference of conspiracy to be made.

Givens, *Parallel Business Conduct Under the Sherman Act*, 5 ANTITRUST BULL. 273, 279 (1960) (footnote omitted).

56. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

The Supreme Court later had occasion to comment upon the relationship between *Theatre Enterprises* and *Interstate Circuit*:

> *Theatre Enterprises*, also relied on by petitioner, *merely reiterated* the holding of *Interstate Circuit* that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," . . . in the course of ruling that the parallel behavior there shown did raise a conspiracy issue for the jury, which permissibly resolved it in the defendants' favor on the basis of the other contrary evidence in the case.

First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 287—88 (1968) (emphasis added) (citation omitted).

57. *See* Oppenheim, *Antitrust Policy and Third-Party Prepaid Prescription Drug Plan*, 40 GEO. WASH. L. REV. 244, 253—55 (1971), which discusses the interrelationship between *Theatre Enterprises* and *Interstate Circuit*. In part, the article quotes Bruce Wilson of the Justice Department's Antitrust Division as saying that the distributors' actions in the *Theatre Enterprises* case "were *independent* rather than *inter-dependent*" and "there was considerable evidence which indicated that each offeree's response would have been economically rational even if its competitors had reacted in a contrary manner. . . ." *Id.* at 255, *quoting Hearings on H.R. 5 & 19 Before the Subcomm. on Environmental Problems Affecting Small Business of the House Select Comm. on Small Business*, 92d Cong., 1st Sess. 231 (1971).

sures in one case were apparently the result of a conspiracy to close (it should also be noted that to the extent spokesmen for the owners threatened closures, or held mass meetings, the inference of a conspiracy would be easily proved under the *Interstate Circuit* decision) and in the other were the result of an independent business decision.

Since the Court seemed willing in the *Eastern States, Interstate Circuit*, and *Theatre Enterprises* cases to accept circumstantial evidence, it seems reasonable that the existence of a clear purpose to restrain trade, and the motivation to act in concert may lessen the necessity for clear evidence.[58] In fact, the Attorney General's Na-

58. James A. Rahl aptly described the use of circumstantial evidence in antitrust cases as follows:

> Circumstantial evidence of business conduct supporting an inference of collusion is freely admitted in anti-trust cases; according to Mr. Justice Burton, the conspiracy in the recent *American Tobacco* case [American Tobacco Co. v. United States, 328 U.S. 781, 804—09 (1946)] was shown almost entirely by circumstantial evidence. There is nothing novel about the principle of admissibility of this type of evidence to prove conspiracy, but the matter of what kinds of indirect evidence will be judicially recognized as probative of conspiracy is important. Inferences drawn from documents, gestures, paradoxical behavior and other indicia of a state of mind are one thing. Inferences drawn from purely external market data and analysis demonstrating non-competitive uniformity of action, but not necessarily any particular subjective facts, are something else. Economic evidence of the latter type has been admitted in huge quantity in recent cases such as the *Tobacco, Paramount* [United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)] and *Cement* [FTC v. Cement Institute, 333 U.S. 683 (1948)] proceedings, although in all of these cases such evidence was supported by substantial amounts of either direct evidence of agreement or indirect evidence pointing strongly to the existence of formal collusion. In such cases, the purely objective economic evidence is merely corroborative of the subjective. The balance between the two may shift, however, as courts become more and more accustomed to the newer forms of "proof." . . .
>
> Blending with the liberalization of evidence has been a somewhat broadened judicial perception of the mechanics of conspiracy formation. Today, an industrial conspiracy need not be concluded in a formal compact, negotiated and solemnized by concurrent exchange of pledges. "Meeting of the minds" does not require meeting of the bodies. So long as assent to joint participation is manifest it does not matter how it came about. . . . The conspiracy may creep into existence from the merging of unilateral actions upon a common course if at some stage, not necessarily simultaneously, the defendants take on the feeling of common cause.

Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 757—59 (1950) (footnotes omitted).

tional Committee to Study the Antitrust Laws has concluded: "In short, evidence of uniformity will have varying probative significance depending on the particular business setting in which it occurs . . . . No hard and fast rule can be formulated for all possible combinations of evidentiary features."[59] Hence, it appears that *Interstate Circuit* and *Theatre Enterprises* taken together support the view that parallel action, engaged in with knowledge that others were acting in a similar manner and with the common intention that the result be a restraint of trade, may be enough to violate the antitrust laws.

In our opinion, it would appear likely that in the class of cases dealt with here, the factors present which show consciously parallel action are: first, that the motivation is clear and is commonly shared; second, that there is recognition that unless all act unanimously the attainment of the objective will be impaired; third, that there is no doubt that there is a "wait and see attitude" as to whether competitors will close their doors; and finally, that the purpose to restrain trade is at the heart of this type of parallel action. Unless there is an impairment of commerce there is no hope that the desired pressure for a change in government policy will materialize. Thus, even in the absence of a binding agreement to shutdown, the fact of a shutdown in the face of competitive motivation to stay open is persuasive evidence of a prohibited combination or conspiracy.

IV. Countervailing Considerations

Even if an organized shutdown or mass closure in order to coerce a change in government policy is wrongful conduct within the parameters of the intent of the antitrust laws, it may nevertheless be protected by some other countervailing policy consideration.[60] Spe-

59. Att'y Gen. Rep., *supra* note 14, at 40.

60. The most obvious example is concerted action taken to influence public officials under the *Noerr-Pennington* doctrine. *See* note 7 *supra*. Under this rule, "[t]he Sherman Act, it [is] held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed." UMW v. Pennington, 381 U.S. 657, 669 (1965). The rationale behind the Court's formulation of the doctrine was the preservation of free access to governmental regulatory agencies by those groups so regulated, and the petitioner's first amendment right to petition the government. *See* Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense*, 12 B.C. Ind. & Com. L. Rev. 1133, 1137—38 (1971). Recently, the Court had indicated that

cifically, the issue of violation of the antitrust laws may be mitigated in one case by government intervention into the marketplace by means of the imposition of price controls.[61] In another case, the interest in unrestrained flow of commerce and uninterfered-with competition may be overcome by the interest in economic freedom —here, the freedom to go out of business permanently or temporarily.[62] Finally, such activity may be overcome by the constitutional right of free speech and the right to petition to the government for redress of grievances.[63] Each of these countervailing policies will be addressed.

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the important countervailing considerations of the type underlying the *Noerr-Pennington* doctrine will not be advanced at the expense of a complete abrogation of the antitrust laws. In California Motor Transp. Co. v. Trucking Unlimited [404 U.S. 508 (1972)], the Court affirmed a ruling that a conspiracy to institute state and federal proceedings to resist and defeat applications by competitors to acquire operating rights over certain routes was not removed from the scope of the antitrust laws by the *Noerr-Pennington* doctrine. The Court held that the actions were within the "sham" exception to the doctrine [*see* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)], and not protected by first amendment rights of association and petition:

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" . . . which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

404 U.S. at 515 (citation omitted).

See text accompanying notes 93—97 *infra*. In *Otter Tail Power Co. v. United States* [410 U.S. 366 (1973)], the Court again relied upon the "sham" exception to remove litigation, if found to have been instituted by the power company to frustrate and harass potential competitors, from protection under the *Noerr-Pennington* doctrine. *See also Antitrust Immunity, supra* note 7; Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973); 26 SW. L.J. 926 (1972).

61. The relationship between government regulation by means of an interventionist control system and a government policy geared to maximizing competition is discussed in ATT'Y GEN. REP., *supra* note 14, at 262.

62. *See* notes 71—78 *infra* & accompanying text.

63. *See* notes 7 & 60 *supra*, concerning the interrelationship between *Noerr, Pennington, California Motor* and the antitrust laws.

A. *Government Intervention*

An obvious question which presents itself is: does the presence of price controls lessen the public interest in protecting competition if that is the primary concern of the antitrust laws? Generally, it can be argued that price controls are imposed only where it has been found that competition is not sufficient to control economic behavior in the public interest. In some cases, it is believed that competition is sufficiently imperfect and that some regulatory supplement is necessary.[64] In others, it has been determined that the public interest cannot be served even by perfect competition.[65] But in any event, since price controls are used to supplement competition, the general policy reflected in their imposition is the same policy sought to be preserved by protection of competitive forces by the antitrust laws.[66] This would suggest that interference with the governmental price controls ought to be treated the same as interference with competition. Both types of activity ultimately interfere with the interests sought to be protected by the policy of price controls or competition. Thus, the proscription of the antitrust laws would be applied a fortiori where the government has found it necessary to supplement competition with price control policies.

Alternatively, it could be argued that price controls suggest a lessened reliance on competition. Imposition of price controls suggests an unwillingness on the part of the legislature and its delegates to accept the prices which result from unrestrained operation of competitive forces.[67] This line of reasoning suggests that the pres-

64. *See* J. K. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); J. K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

65. In certain situations, such as that which confronted the United States during World War II, the demand for goods and services in almost every market sector exceeds the capacity of the economic system, at least in the short run, to produce. Consumer demand remains relatively constant, while productive resources must be diverted to military purposes. Perfectly competitive conditions would lead to enormous price increases for consumer goods which could not be tolerated. One remedy is rigid price controls and rationing, as were imposed in the United States from 1942 to 1946.

66. The antitrust laws, among other things, reflect the policy that competition is the best means of protecting the consuming public's interest in reasonable prices for goods and services. Government price controls by controlling price levels directly seek to protect the same interest. Thus, there is a congruence of policy goals between statutes protecting competition and statutes imposing price controls.

67. *See* Economic Stabilization Act of 1970 § 202, 12 U.S.C. § 1904 (note), *as amended*, (Supp. II, 1972).

ence of price controls is a form of preemption of the traditional interest in protecting the operation of competition. It could certainly be argued that this preemption should extend to the antitrust laws if one's view of the purpose of the antitrust laws is that they operate only to protect those competitive forces. Thus, anticompetitive behavior which otherwise would be violative of the antitrust laws should be exempted when such behavior takes place in an environment subject to governmental price controls.

In other areas subject to governmental economic regulation, the question is not open to such general arguments. Sectors of the economy in which the legislature has decided that direct control of prices is desirable have been granted express exemption from the antitrust laws. In most of these areas, however, the regulatory agency also has authority to control market exit,[68] thus ensuring the public continuing operation of the firms subjected to regulation. Thus, it could be argued that where the legislature has determined that intervention is sufficiently warranted to ensure a continuation of service to the public by restricting market exit by vesting the agency with the power to compel continued operation, it has been willing to grant an exemption to the antitrust laws, thus demonstrating a diminished legislative concern for the effectiveness of competitive forces. In other areas where the regulatory authority was not so comprehensive, the legislature has intended that competitive forces should be relied upon to ensure the public a continued flow of commerce and the provision of adequate service.[69]

The Economic Stabilization Act, for example, does not vest the agencies acting pursuant to the Act with express authority to prevent market exit, or to preserve continuity of service to the public; neither does the Act grant an exemption from the operation of

68. For example, the Interstate Commerce Commission controls market exit, and the carriers it regulates are exempt from operation of the antitrust laws. *See, e.g.*, 49 U.S.C. § 1(18) (1970) (rail carriers must obtain ICC approval before extending or abandoning any of their lines); 49 U.S.C. § 1(21) (1970) (ICC has authority to order rail carriers to maintain adequate facilities and to extend their lines if extension is required in interest of public convenience and necessity); 49 U.S.C. § 5(b)(9) (1970) (carriers exempted from operation of antitrust laws if agreement between carriers is approved by ICC). The same is true of the Civil Aeronautics Board; 49 U.S.C. § 1371(j) (1970) (air carriers must obtain CAB approval before abandoning a route for which a certificate has been issued); 49 U.S.C. § 1384 (1970) (air carriers exempted from operation of antitrust laws).

69. *See generally* P. AREEDA, *supra* note 14.

the antitrust laws.[70] Thus, it can be argued that the legislative scheme (supplemented by administrative interstitial development) embodies a reliance on competitive forces to control economic behavior and to ensure that the public interest is protected in the face of price controls. In other words, controls are thought to supplement, not to supplant, competition. The antitrust laws are the fundamental protector of these competitive forces. Thus, anticompetitive behavior within such a regulatory framework should be restrained by operation of such laws.

B. Freedom to Go Out of Business

There is also the matter of fundamental economic freedom, which is itself protected by the antitrust laws. Should not a businessman have the right to cease doing business despite the fact that such cessation, by its very nature, lessens competition and in some sense interferes with the free flow of commerce?

In the class of cases at issue here, firms are not going out of business altogether, but rather are ceasing operation temporarily in order to force a change in government policy. The question, therefore, is whether a businessman has an absolute right not to operate his business regardless of the duration or the totality of that cessation. If that query is answered in the affirmative, the fact that the temporary shutdown is for the purpose of coercing a change in government policy contrary to the antitrust laws would not matter. Hence, whether a businessman has an absolute right to cease doing business becomes a crucial question.

The issue has been addressed squarely in the labor law context. *National Labor Relations Board v. Rapid Bindery, Inc.*,[71] and *Textile Workers Union of America v. Darlington Manufacturing Co.*,[72] endorse the proposition that a businessman may discontinue

70. *See* Economic Stabilization Act of 1970 § 202, 12 U.S.C. § 1904 (note), *as amended*, (Supp. II, 1972).

71. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

72. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965). Darlington Manufacturing Co. was a South Carolina corporation which operated one mill. The corporation was controlled by the Milliken family which operated 17 textile companies. After a successful and hard-fought organizing campaign by the Textile Workers Union, Darlington was liquidated on October 17, 1956, by a vote of its stockholders. The NLRB found that the mill had been closed because of antiunion animus and held the closing to be a violation of section 8(a)(3) of the National Labor Relations Act [National Labor Relations Act § 8(a)(3), 29

operations when that discontinuance is dictated by sound financial or economic reasons. The *Darlington* Court however, declined to view the right to discontinue as absolute, preferring to balance that right against the employer's obligations under the labor laws.[73] Thus in *Darlington*, the Court found that an employer does not have the right to terminate a *part* of his business when the decision to close is motivated by discriminatory reasons under section seven of the National Labor Relations Act.[74] More particularly, the Court found

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U.S.C. § 158(a)(3) (1970)]. The court of appeals denied enforcement of the Board's resulting order on the grounds that a company had the right to close all or part of its business regardless of antiunion motives. 325 F.2d at 687. The Supreme Court vacated the judgment of the court of appeals and remanded the case to the Board for its determination as to whether Darlington should be regarded as an integral part of the Milliken enterprise. 380 U.S. at 277. The Court held that a *partial* closing could be illegal, depending on the motivation for such partial closing. 380 U.S. at 274—77.

73. The Court stated:

> A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent to construing the Labor Relations Act.

380 U.S. at 270.

The Court, however, limited this holding to a complete shutdown of the business, where the decision to close had already been made. This "right" has been characterized as one of the "inherently managerial prerogatives" [National Cash Register Co. v. NLRB, 466 F.2d 945, 963 (6th Cir. 1972)], but the Court has made it clear that while the shutdown may be motivated by antipathy toward the union, it must also be based upon valid economic considerations:

> If there is any implication that an employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."

NLRB v. Gissel Packing Co., 395 U.S. 575, 618—19 (1969), *quoting* NLRB v. Sinclair Co., 397 F.2d 157, 160 (9th Cir. 1968).

Accord, NLRB v. Roselyn Bakeries, Inc., 471 F.2d 165, 167 (7th Cir. 1972). An analagous situation could arise if a mass closure, ostensibly predicated upon the exercise of first amendment rights and economic considerations, was, in actuality, organized as a coercive attempt to modify regulatory policy with the aim of improving one's competitive position, *i.e.*, a "sham" attempt to take advantage of the *Noerr-Pennington* doctrine. *See* notes 7 & 60 *supra*.

74. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970).

that an employer could not close a *part* of his business in order to discourage the exercise of rights protected under section seven.[75] He would, however, be permitted to close his *entire* business even though his purpose was discriminatory because such a closing would end the employer/employee relationship which is the subject of the National Labor Relations Act.[76] This important distinction between complete versus partial dissolution of a business can be likened to a distinction between permanent and temporary shutdown. A series of cases dealing with the right of an employer to lock out his employees established the policy that this kind of cessation of operation will also be evaluated in light of its purpose. When the purpose of the lockout conflicts with the policy embodied in the labor laws, such cessation will not be permitted.[77] Similarly, decisions in the antitrust area that limit concerted refusals to deal when their purpose is anticompetitive, reinforce the view that businessmen do not have an absolute right to refuse to do business.[78]

If a businessman cannot cease operation in a part of his company in order to discourage the exercise of rights guaranteed under section seven of the National Labor Relations Act, and if businessmen acting in concert may not refuse to do business with certain customers when their objective is anticompetitive, there is no reason to

75. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268—69 (1965). *See also* NLRB v. Kaiser Agricultural Chemicals, 473 F.2d 374, 380 (5th Cir. 1973); National Cash Register Co. v. NLRB, 466 F.2d 945, 962 (6th Cir. 1972); NLRB v. Miller Truck Serv. Inc., 445 F.2d 927, 930 (10th Cir. 1971).

76. 380 U.S. at 273—74.

77. American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965). *See also* Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir. 1971) (employer's conduct in continuing his operation with substitute employees after locking out of his workers following an impasse in bargaining held an unfair labor practice); NLRB v. Southern Beverage Co., 423 F.2d 720 (5th Cir. 1970) (record supported conclusion that the employer's conduct in placing conditions upon the rehiring of employees after calling off the lockout changed the original economic strike into an unfair labor practices strike); Laclede Gas Co. v. NLRB, 421 F.2d 610 (8th Cir. 1970) (court of appeals remanded to the Board the question of whether the lockout constituted an unfair labor practice); Aluminum Co. of America v. Unemployment Compensation Bd., 9 Pa. Cmwlth 368, 305 A.2d 389 (Cmwlth Ct. Pa. 1973) (work stoppages which resulted from the employer's refusal to permit the employees to return to work, on the basis of a fictional dispute, after a union offer to do so, constituted a lockout rather than a strike).

78. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 377—78 (1967); FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

permit other activities or cessation of activities which are contrary to statutorily-expressed policies simply because they fall solely within the discretion of the businessman. It seems clear that if a concerted shutdown by businessmen seeking to force a change in government policy is within the scope of the antitrust laws, as discussed earlier, it would not be protected by any inherent economic right to cease doing business.

C. *Freedom of Speech and Petition*

Perhaps the most important countervailing consideration is that organized shutdowns or mass closures may be protected by the guarantees of free speech and petition in the first amendment[79] of the Constitution, regardless of their effect on the free flow of commerce or competition. After all, the manifest intent of the actions described in the introduction was to improve the economic status of the actors by influencing government policy. The relationship between these activities and the so-called *Noerr* doctrine must be evaluated.

Eastern Railroad Presidents Conference v. Noerr Motor Freight Co.[80] was the first significant case to reach the Supreme Court which directly addressed the issue of whether attempts to influence governmental action could result in violations of the antitrust laws. In the *Noerr* case, a group of Pennsylvania truckers filed suit against the Eastern Railroad Presidents Conference alleging that the railroads had designed a publicity campaign against the truckers which was vicious, corrupt, and fraudulent, and it was alleged that this campaign had attempted to influence legislation which would be detrimental to truckers.[81] The railroads not only did not contest this allegation but contended that their efforts were "in furtherance of their rights 'to inform the public and the legislatures' . . . ."[82] "[T]hey denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers

79. U.S. CONST. amend. I.

80. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See* notes 7 & 60 *supra*. *See also The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 199—202 (1961); 47 CORNELL L.Q. 250 (1962); 23 U. PITT. L. REV. 216 (1961).

81. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961). *See Antitrust Immunity, supra* note 7, at 209—12.

82. 365 U.S. at 131.

. . . [and] [s]uch a campaign . . . did not constitute a violation of the Sherman Act. . . ."[83]

The trial court[84] found that the railroads' campaign had violated the Sherman Act since the campaign was "malicious and fraudulent."[85] The court of appeals affirmed.[86] The key issue, as far as the Supreme Court was concerned, was the legality of undertaking a publicity campaign to influence governmental actions, not whether the campaign was ethical or whether the end result would produce a "restraint or a monopoly."[87] The Court held that regardless of whether the courts felt the campaign was ethical ". . . no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[88] The Court felt that the purpose of the Sherman Act had been to regulate business activity, not political activity, and that the primary goal of the railroads' campaign had been to exercise their right of petition as part of the political process.[89]

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83. *Id.*

84. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 155 F. Supp. 768 (E.D. Pa. 1957).

85. The Supreme Court later described the basis of the lower court's holding:

> [I]t rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique; and, secondly, that the railroads' campaign also has as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law.

365 U.S. at 133 (footnote omitted).

86. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 273 F.2d 218 (3d Cir. 1959).

87. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

88. *Id.* at 135.

89. The Court based its decision primarily on the effects which antitrust jurisdiction would have on American society:

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the govern-

The Court stated, however, that: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[90] This doctrine was reinforced in *United Mine Workers v. Pennington*,[91] where the Court said, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[92]

The Court further clarified the issue of immunity from the antitrust laws in *California Motor Transport Co. v. Trucking Unlimited*.[93] In this case, California Motor alleged that Trucking Unlimited, a competitor, had conspired to monopolize trade in violation of the antitrust laws by instituting frivolous actions in state

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ment retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137—38 (footnote omitted).

See Antitrust Immunity, supra note 7, at 214—15, commenting on the *Noerr* decision as being consistent with American political traditions.

90. 365 U.S. at 144. *See* note 60 *supra*.

91. UMW v. Pennington, 381 U.S. 657 (1965). This action, brought by the trustees of the United Mine Workers of America Welfare and Retirement Fund, concerned the refusal of the owners of Phillips Brothers Coal Company to pay $55,000 in royalty payments into this fund, in accordance with the National Bituminous Coal Wage Agreement of 1950, as amended. The coal company cross-claimed for damages, alleging violation of sections one and two of the Sherman Act. The basis of this claim was that the UMW and the large coal operations were conspiring to restrain and monopolize commerce by eliminating the smaller companies through these payments and other terms imposed in the agreement. The court set aside the jury's verdict against the trustees and the mineworkers. Their ruling was affirmed by the court of appeals; the Supreme Court, however, reversed and remanded, concluding that joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal standing alone, nor as part of a broader scheme. *Id.* at 659—61. *See* notes 7 & 60 *supra*.

92. 381 U.S. at 670.

93. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). *See* note 60 *supra*.

and federal administrative proceedings to defeat applications by California Motor for operating rights. After the district court dismissed the suit for failure to state a claim upon which relief could be granted,[94] the court of appeals reversed.[95] The Supreme Court affirmed that reversal by holding that even though this case was "akin" to *Noerr*, it was manifestly different in that ". . . the allegations are not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process."[96] While the Court relied on the "sham" exception in *Noerr* in order to decide the case narrowly, it did back down somewhat from both the *Noerr* and *Pennington* decisions, stating that: "It is well settled that First Amendment rights are not immunized from regulations when they are used as an integral part of conduct which violates a valid statute."[97]

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94. Trucking Unlimited v. California Motor Transp. Co., 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967) (memorandum decision). *See* Note, *Antitrust: The Brakes Fail on the Noerr Doctrine*, 57 CALIF. L. REV. 518 (1969).

95. Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755 (9th Cir. 1970).

96. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972).

97. *Id.* at 514. It remains unclear as to the extent *Noerr-Pennington* is restricted by the *California Motor* case. The majority opinion, written by Justice Douglas, stressed the fact that in the case the alleged violative actions were directed against administrative and judicial bodies, as opposed to the legislative or executive branches and that the defendant trucking companies were taking actions that could deprive the plaintiff companies of their own right of access and petition to regulating bodies. In a concurring opinion Justices Stewart and Brennan questioned the distinction between the types of public intervention involved. *Id.* at 517 (Brennan and Stewart, JJ., concurring). Furthermore, can it be said that the degree of interference with first amendment rights was potentially any greater in *California Motor* than that confronted by the trucking industry in *Noerr*? If analyzed in this manner *California Motor* represents a real rather than insignificant modification of the *Noerr-Pennington* doctrine. Yet the majority seemingly reaffirmed the basic thrust of the *Noerr-Pennington* doctrine:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.

Id. at 510—11.

This apparent contradiction in the majority decision was criticized by Justices Stewart and Brennan in their concurring opinion:

> The Court concedes that the petitioners' "right of access to the agencies

After a review of the *Noerr, Pennington* and *California Motor* decisions, the obvious question is, do these applications of the first amendment apply at all to attempts at influencing government policy by mass shutdown or closure? Probably not.

In the examples of concerted action, cited earlier,[98] the influence was directed at affecting government policy which would change the relationship between an individual vis-à-vis his competitor; however, in the type of case under consideration competitors have conspired together to directly or indirectly influence government policy for the benefit of their collective selves. While the *Noerr-Pennington* doctrine may seem broad at first, it must be viewed in its proper context. What the Court was faced with in *Noerr* and again in *California Motor* was the extent to which a businessman could use the first amendment as a legitimate tool to influence governmental actions so he could harm a competitor without violating the antitrust laws. Here, that is not the issue. In this instance competitors have conspired together to restrain trade in hope that the resulting restraint of trade would force the government to act for their benefit.

Stated otherwise, in *Noerr, Pennington* and *California Motor*, the issue was the use of political power and political processes to achieve an economic result which was arguably contrary to the antitrust laws. Our focus is different. We are addressing the use of economic power as a means of achieving a political result with economic implications. *Noerr-Pennington* can be viewed as applying to the protection of access to political means notwithstanding the nature of the economic objectives. Such a doctrine has no applicability to the use of economic means.

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and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, *their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws."* . . . It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws.

Id. at 517 (Brennan and Stewart, JJ., concurring) (citation omitted) (emphasis added). *See also* note 60 *supra*.

98. *See* notes 73, 84 & 86 *supra*. *See also* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 293 F. Supp. 617, 624 (S.D. Iowa 1968), *aff'd*, 422 F.2d 504 (8th Cir. 1970); Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 883—86 (D.N.J. 1967).

In the past, the Court has ruled that economic threats of coercion are not proper uses of the first amendment right of petition. This was made clear in *Baines v. City of Danville*[99] and *Cox v. Louisiana*.[100] Justice Douglas stated the principle clearly in his concurring opinion in *Thomas v. Collins*:[101] "But once he uses the economic power which he had over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment."[102]

It seems clear that if organized shutdowns or mass closures for the purpose of coercing a change in government policy are found to be violations of the antitrust laws, the actors cannot claim that their attempts to influence government policies—legislative or administrative—are immune from the antitrust laws because they are merely exercising their first amendment rights. As the Court said in *California Motor*, "If the end result is unlawful, it matters not that the means used in violation may be lawful."[103] In *Giboney v. Empire Storage*,[104] the Court said, "It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject this contention now."[105] If political means cannot be used for illegal ends, then economic means should not be so used.

It is significant that mass shutdowns or closures are totally outside the normal administrative, judicial, or legislative processes. While direct intervention into any of these processes to obtain relief might arguably be partially covered by *Noerr-Pennington* and protected by the first amendment, the actions to force a change in policy by disrupting commerce reject established avenues of protest and petition and rely on protest by threat.

Before judicial review of administrative action may be obtained, it is a well-established requirement that available administrative

99. Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *aff'd per curiam*, 384 U.S. 890 (1966).

100. Cox v. Louisiana, 379 U.S. 536 (1965). *See The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 152 (1965); 40 TUL. L. REV. 185 (1965).

101. Thomas v. Collins, 323 U.S. 516 (1945).

102. *Id.* at 543—44 (Douglas, J., concurring).

103. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

104. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

105. *Id.*

remedies must be exhausted.[106] This policy that remedial steps should be sought in an orderly progression should be applied a fortiori where the remedial action undertaken is, as here, outside the established framework. This is particularly true since, even where resort to economic power is sanctioned by the Congress—as in the labor area—the Court has held that resort to this economic power may be protected only when there is no reasonable alternative.[107] Here, however, there are reasonable alternatives: resort to administrative processes, resort to the courts for review of the administrative result, or, ultimately, resort to the Congress.

Certainly we do not suggest that all attempts by businessmen to influence governmental activities are violations of the antitrust laws. This is clearly not the case. To hold that any combination of businessmen formed to influence government policy, even if they would benefit from the change, is violative of the antitrust laws, would be on its face a denial of first amendment rights. The facts of each case are critical; what were the motivations, what were the means relied upon and what were the incidental results?

Perhaps the significance of these questions can best be shown by returning to the hypothetical drug store example and looking at it from a slightly different perspective.[108] Suppose drug store operators felt they had been unfairly discriminated against by a new regulation promulgated by the Department of Health, Education and Welfare, and decided to protest by a march on Washington to see their elected representatives. To come to Washington, they have to close their drug stores. The impairment in the free flow of commerce and the public's interest therein would be incidental to the exercise of first amendment rights. On the other hand, suppose the same HEW regulation touches off a protest among drug store operators and they simply decide to display their dissatisfaction and to try to change the government's policy by the public pressure which would result from closing their stores.

These cases are similar in that a government policy touches off a protest which closes all drug stores. Both protests are designed to

106. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50—51 (1938). *Cf.* McKart v. United States, 395 U.S. 185 (1969). *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424—58 (1965); K. DAVIS, *supra* note 10, at § 20.01.

107. *See, e.g.*, Brotherhood of Ry. Clerks v. Florida E. Coast Ry., 384 U.S. 238 (1966); NLRB v. Universal Serv., Inc., 467 F.2d 579 (9th Cir. 1972); Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926, *rehearing denied*, 398 U.S. 915 (1970).

108. *See* text accompanying notes 49—51 *supra*.

force the government to change its policy for the druggist's benefit and have antitrust implications inasmuch as they interfere with the free flow of commerce and are not theoretically compatible with perfect competition. In one case, however, the closures were necessary so the individual could exercise a constitutionally protected right, while in the other the closures themselves were the means used to achieve the same political result. The conspiracy to close may violate the antitrust laws, while the incidental closures may not.

As this simple example shows, bound up in any controversy would be not only the legality of conspiring to close in order to force a change in policy, but perhaps more importantly the constitutional issue of the limitations of the right to petition.

V. Conclusion

This article has attempted to demonstrate that certain combinations of businessmen who directly or indirectly attempt to coerce the government, especially a regulatory agency, into changing its policies, for their collective benefit, may violate the antitrust laws. We have shown that certain activities can be considered a conspiracy in restraint of trade and anticompetitive within the meaning of section one of the Sherman Act. Once this was shown, we went on to acknowledge that there are countervailing considerations such as the intervention of the government into the marketplace, the economic freedom to go out of business, and the scope of first amendment freedoms, which might protect these actions. The article also attempted to lay out some fairly basic parameters to highlight the extent to which these countervailing considerations would be a defense against alleged violations of the antitrust laws. We have concluded that concerted action by businessmen to coerce the government into changing policies by use of their economic power is a violation of the antitrust laws absent any countervailing consideration. Further, we have concluded that countervailing considerations essential as they are, do not necessarily protect such concerted use of economic power.

It should be noted that we have only been concerned with the relationship of these actions to section one of the Sherman Act and have deliberately omitted discussion of the possible ways these activities could violate section two of the Sherman Act,[109] the Clayton

109. Sherman Anti-Trust Act § 2, 15 U.S.C. § 2 (1970).

Act,[110] or the Federal Trade Commission Act.[111] Although these and other statutes may apply to the problem at hand, discussion of them and their interrelationships has been left for other commentators.

110. Clayton Act § 1, 15 U.S.C. § 12 (1970).
111. Federal Trade Commission Act § 1, 15 U.S.C. § 41 (1970).