



Office of Commissioner  
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UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**“Aiming at Dollars, Not Men”**

**Prepared Remarks of Commissioner Alvaro M. Bedoya  
Federal Trade Commission**

**“Whither the Consumer Welfare Standard?  
How Antitrust Can Promote Worker Interests”**

**Hosted by the Utah Project on Antitrust and Consumer Protection  
The University of Utah S.J. Quinney College of Law**

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“We are aiming at the gigantic trusts and combinations of capital and not at associations of men for the betterment of their condition. We are aiming at the dollars and not at men . . . Let us put the man above the dollar and exempt all associations of men for the betterment of their condition.”

Representative Thomas F. Konop (D., Wisconsin), June 1, 1914

Thank you for that kind introduction. I’m grateful to the Utah Project, the University of Utah, and the organizers of this convening. Today, I’m speaking for myself, not the Commission or my fellow commissioners. I want to recognize my paralegal Bryce Tuttle, who was my intellectual partner in preparing these remarks. And I’m deeply grateful to our law clerk, Kate Conlow, whose research has been indispensable.

**I. John D. Rockefeller and Robert Bates**

At the time of its incorporation in Ohio in 1870, Standard Oil was already the wealthiest company in America, with one million dollars in assets and ten percent of the country’s oil refining capacity. That rose to twenty-five percent just two years later. In 1882, the company’s stock was combined with the assets of three dozen other companies to form the Standard Oil *Trust*.<sup>1</sup> By 1890, it controlled ninety percent of U.S. oil refining.<sup>2</sup>

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<sup>1</sup> GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 5-9 (2020).

<sup>2</sup> *This Month in Business History: Standard Oil Established*, LIBR. OF CONG. (accessed Apr. 6, 2023), <https://guides.loc.gov/this-month-in-business-history/january/standard-oil-established>.

The fundamental idea behind John D. Rockefeller and his partners' success was that they could make more money by *not* competing.<sup>3</sup> That idea made them rich. Rockefeller would become the first billionaire this country has ever seen.<sup>4</sup>

Copycats followed. The American Cotton Seed Oil Trust, with seventy-five percent of the country's production capacity. The Sugar Trust, with eighty-five percent capacity in the eastern U.S. The Whiskey Trust. The Beef Trust, which combined the four great Chicago meatpackers.<sup>5</sup>

The public caught on, and outrage started to build, first in the state houses of New York, Kansas, Iowa<sup>6</sup> – and then in Congress. By March of 1890, when he stood on the floor of the Senate to argue for the bill we now know as the Sherman Act, John Sherman was clear on who he was targeting – and who he wanted to help. He was focused on

a new form of combination . . . called *trusts*, that seeks to avoid competition by combining . . . corporations, partnerships, and individuals . . . often under the control of a single man called a trustee, a chairman, or a president . . . [Such a combination] can control the market, raise or lower prices, as will best promote its selfish interests . . . The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to the transportation companies, *it commands the price of labor without fear of strikes*, for in its field it allows no competitors.<sup>7</sup>

Hear that last line – “commands the price of labor without fear of strikes”; Senator Sherman was driven, in part, by the need to *protect* labor. And from the beginning, American antitrust law aimed to *protect* worker organizing – not limit it.

I've been thinking a lot about those remarks after reading about something that happened 110 years later, in 1999, and that involved my own agency, the Federal Trade Commission, along with a group of truckers who worked the docks on the eastern and western seaboard, as well as the Gulf Coast.

The truckers didn't get a salary or an hourly wage. Most of them were technically independent contractors who got paid for each trailer they moved from one place to another – \$35 per trailer. Over the years, the shipping companies raised their rates to account for the rising price of oil. But the truckers' \$35 stayed the same.

After expenses, the truckers often barely made the minimum wage. According to the founder of the port truckers' association, a gentleman named Robert Bates, ninety percent of them couldn't afford health insurance for their kids and families. “These guys are on the road 50-80 hours a week, to try to bring home enough money to pay their house payment, and for

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<sup>3</sup> WERDEN, *supra* note 1, at 6, 9.

<sup>4</sup> *This Month in Business History*, *supra* note 2.

<sup>5</sup> WERDEN, *supra* note 1, at 13, 31.

<sup>6</sup> *Id.* at 7 (discussing Hepburn report commissioned by New York Assembly); 22 (discussing Kansas's 1887 law against grain price fixing); and 20 (discussing Iowa's antitrust statute).

<sup>7</sup> 21 CONG. REC. 2457 (1890), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 117 (Earl W. Kintner ed., 1978) [hereinafter LEGISLATIVE HISTORY] (emphasis added).

maintenance for their truck on the weekend,” said Mr. Bates. Some days, all they’d see would be two to three trailers a day. “How do you live on that?” Mr. Bates asked.

But it wasn’t like on slow days, the truckers could just do something else. *The truckers didn’t control their own time.* The ports they worked forced them to haul equipment for repairs, for free. They forced them to load the containers, for free. Every hour the truckers spent on call for another trailer? Also free.<sup>8</sup>

Yet every time the truckers in one port got organized to ask for an increase on those \$35, the shipping companies would just divert their ships one port over.

So Mr. Bates called up truckers in Baltimore, Charleston, Galveston, Jacksonville, Los Angeles, Long Beach, and Seattle and organized what he described as the first gathering of its kind: a meeting to try to get the port truckers a union contract.<sup>9</sup>

Then, ten days before the meeting, and two days before Thanksgiving, Mr. Bates and his colleagues were issued subpoenas to testify before the FTC. According to press reports, the subpoenas explained that the Commission was investigating whether the truckers “are engaging in unfair methods of competitive pricing.”

Speaking a year later, Mr. Bates explained that he didn’t think they’d be able to get that union contract, “[b]ecause we have to abide by the anti-trust [sic] laws in America, according to the FTC, because each of us, as they say, is an *independent business*, because we’re *independent contractors*.”<sup>10</sup>

Truckers used to earn a solid, middle class living. Now, their earnings are a shadow of what they used to be.<sup>11</sup> What happened to trucking is part of a much broader trend where companies demand more and more control over their workers while taking less and less responsibility for them. They do this, typically, by hiring or misclassifying them as independent contractors. This trend has disproportionately affected lower paid and more dangerous jobs.<sup>12</sup>

Unionizing might give these workers a way out. A way to fight for better wages, better benefits, better working conditions. Unionized truckers, for example, typically earn twenty percent more than their non-union counterparts.<sup>13</sup> But as Mr. Bates discovered, when

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<sup>8</sup> Mariana Wertz, *Interview: Robert Bates*, 27(3) EXEC. INTEL. REV. 66, 68 (Nov. 3, 2000), [https://larouchepub.com/eiw/public/2000/eirv27n43-20001103/eirv27n43-20001103\\_066-robert\\_bates.pdf](https://larouchepub.com/eiw/public/2000/eirv27n43-20001103/eirv27n43-20001103_066-robert_bates.pdf).

<sup>9</sup> Wertz, *supra* note 8, at 67 (emphasis added); see also Mark Gordon, *Truckers Union Boss Ordered to Testify FTC Investigating Alleged Price-Fixing*, FL. TIMES-UNION, Dec. 4, 1999, at E-1 (reporting on truckers barely making the minimum wage).

<sup>10</sup> Wertz, *supra* note 8, at 67.

<sup>11</sup> See generally STEVE VISCELLI, *THE BIG RIG: TRUCKING AND THE DECLINE OF THE AMERICAN DREAM* (2016).

<sup>12</sup> David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 147, 152 (2019), <https://www.rsfsjournal.org/content/5/5/147>.

<sup>13</sup> VISCELLI, *supra* note 11, at 22.

independent contractors organize, they are often accused of breaking our nation’s antitrust laws.<sup>14</sup>

In other words, *because of antitrust*, the people most vulnerable to mistreatment are the ones least capable of organizing to stop it.

We need to ask ourselves: Is this really what Congress intended?

We are here to talk about *antitrust*: A body of law born to rein in John D. Rockefeller and the oil trust, the beef trust, the sugar trust.<sup>15</sup> Did Congress really mean for that law to target Robert Bates? Did it really mean to target uninsured truck drivers barely making the minimum wage? And did it really aim to block their union contract?

And if not, what do we do about that? That is what I’d like to discuss with you today.

## II. Three wins in Congress, three losses in the courts

The need to protect worker organizing was at the center of congressional antitrust debates for forty years. In 1890, 1914, and 1932, Congress amended the law to make sure it wasn’t used to stop worker organizing. But courts turned each effort on its head.

Let’s talk about that back and forth.

As early as February 1889, during a debate around the predecessor bill to the Sherman Act, Senator James George of Mississippi warned that, as written, the bill could be turned against “farmers and laborers.” Language in the original bill banned any combination that raised prices to consumers. Senator George thought that this language could be turned against “workingmen” organizing for better wages since increased wages may increase the price of goods.<sup>16</sup>

And it wasn’t just Senator George who issued this warning. The same warning also came from Senator George Vest, Senator Henry Teller, and Senator William Stewart. And each of

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<sup>14</sup> See, e.g., Chamber of Com. of United States v. City of Seattle, 274 F. Supp. 3d 1140 (W.D. Wash. 2017); see also Sandeep Vaheesan, *How 37 Puerto Rican Jockeys Created an Opening for Gig Worker Unionizing*, NEW REPUBLIC (May 2, 2022), <https://newrepublic.com/article/166253/gig-worker-labor-rights-antitrust> (describing the impacts of such lawsuits on worker organizing).

<sup>15</sup> WERDEN, *supra* note 1, at 19-39 (describing trusts as a political issue motivating passage of the Sherman Act); see also, e.g., 21 CONG. REC. 2606 (statement of Sen. William Stewart discussing beef trust); *id.* at 2726 (statement of Sen. George Edmunds discussing sugar trust and oil trust); *id.* at 2901 (statement of Sen. George Vest discussing standard oil, the beef trust, and the sugar trust).

<sup>16</sup> 21 CONG. REC. 1459 (“[T]his bill . . . would (though not so intended by the framers) embrace combinations among workingmen to increase the amount of their wages. For an increase in their wages would tend to increase the price of the product to the consumer, and thus the combination would come within the express terms of the bill.”); see also Amendment to S. 1, 51st Cong. (as reported by S. Comm. on Fin., Mar. 18, 1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 11 (setting out bill language on “advanc[ing] the cost to the consumer”).

those senators was specifically concerned that the language on price to consumers would be used to stop worker organizing.<sup>17</sup>

Senator Sherman shot back that organizing workers “are not affected in the slightest degree, nor can they be included in the words or intent of the bill.”<sup>18</sup> Nevertheless, in response, the bill was amended twice to clarify that it would not apply to combinations of workers trying to reduce hours or increase pay.<sup>19</sup>

The bill was then referred to the Judiciary Committee. There, that language around consumer price – again, the key language that had driven Senator George, Senator Vest, Senator Teller, and Senator Stewart to warn that the bill might be read to cover labor – that language was *dropped*. And so, logically, were the labor exemptions intended to protect workers against that language.<sup>20</sup>

The law passed the Senate on April 8, 1890, by a vote of 52-1. Who voted for it? Senator George, Senator Vest, Senator Teller, and Senator Stewart.<sup>21</sup>

Unfortunately, courts effectively ignored that legislative history. Instead, they looked at the statute, saw no express labor exemption, and proceeded to turn the Sherman Act into a “savage weapon” against working people trying to organize.<sup>22</sup>

The Act was used against longshoremen in New Orleans. In 1892, they organized Black workers, white workers, “printers, hearse drivers . . . musicians and carpenters” into a 20,000-

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<sup>17</sup> See 21 CONG. REC. 2468 (1890) (Sen. Vest: “Every organization which attempts to take control of the labor that it puts into the market to advance its price is interdicted by this bill.”); *id.* at 2561 (Sen. George: “[I]ncreasing the price of wages has a tendency, in the language of this bill, to increase the price of the product of their labor. Are [the Knights of Labor] not included, then, in the bill of [Sen. Sherman]?” Sen. Teller said in response, “In my judgment they are in both [the civil and criminal provisions].”); *id.* at 2565 (Sen. Stewart: “[I]t is very probable that if this bill were passed the very first prosecution would be against combinations of producers and laborers whose combinations tend to put up the cost of commodities to consumers.”).

<sup>18</sup> 21 CONG. REC. 2562.

<sup>19</sup> *Id.* at 2611 (discussing Sen. Sherman’s amendment on Mar. 25, 1890); *id.* at 2654-55 (discussing Sen. Aldrich’s amendment on Mar. 26, 1890).

<sup>20</sup> S. 1, 51st Cong. (as reported by S. Comm. on the Judiciary, Apr. 18, 1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 7, at 275-77.

<sup>21</sup> 21 CONG. REC. 3153 (1890). Some scholars say, despite this record, that Congress *did* want the Sherman Act to rein in worker organizing. Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 950-51 (1988). They argue that Senator George Edmunds opposed the labor exemptions, quietly orchestrated their removal – and then persuaded his colleagues to vote for it without a word. In fairness, Senator Edmunds was one of the only people who critiqued the labor exemption, and the most credible historical accounts have Chair Edmunds dictating the text of the final bill as passed and give Edmunds outright authorship of Sections 1 and 2 of the Act. See 21 CONG. REC. 2727 (opposition to labor exemption); WERDEN, *supra* note 1, at 35-36 (authorship). Respectfully, as someone who sat in Senate debates every week for five years, I have to say that U.S. Senators are not in the habit of mutely accepting something that they loudly opposed two or three weeks prior. The simplest explanation is that Congress did not want labor covered by the Sherman Act.

<sup>22</sup> Hovenkamp, *supra* note 21, at 928.

person strike.<sup>23</sup> Federal prosecutors indicted the organizers under the Sherman Act.<sup>24</sup> A federal judge saw that the law was focused on “the evils of massed capital” – and then upheld the injunction anyway.<sup>25</sup>

The Act was used against people working sixteen hours a day for the Pullman Palace Car Company in Illinois. In 1894, their wages were cut by twenty-five percent. They started running out of food. They asked to meet George Pullman. He fired them instead. So they went on strike.<sup>26</sup> Prosecutors used the Sherman Act against the union organizers. And the Supreme Court voted 9 to 0 to uphold the contempt of court conviction based on that injunction and sent the lead organizer, Eugene Debs, to prison.<sup>27</sup>

And the Act was used against 250 hatters in Danbury, Connecticut. Hat-making may seem quaint and harmless; in reality, industrial manufacture of felted fur hats required extensive use of mercury. A study would later find that of one hundred union hatters in Danbury, forty-three had mercury poisoning. The report said that “[b]oys 20 and 21 years old are already so badly poisoned that their hands shake continually, while many of the men who have served longer at the trade cannot even feed themselves.” People often accused the hatters of being drunk.<sup>28</sup>

In 1902, these men sought to unionize D.E. Loewe & Company. Mr. Loewe sued the men, along with national union leaders, under the Sherman Act.<sup>29</sup> The Supreme Court sided with Loewe, 9 to 0. The Court focused on the fact that the men had worked with *non-employee* union leaders to call for boycotts of anyone who did business with Mr. Loewe.<sup>30</sup>

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<sup>23</sup> Bernard A. Cook, *The Typographical Union and the New Orleans General Strike of 1892*, 24 LA. HIST. 377, 377-79 (1983), <https://www.jstor.org/stable/4232306>; WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 95 (1991) (quoting New Orleans labor leader Peter Agnew’s description of the protests).

<sup>24</sup> Cook, *supra* note 23, at 380.

<sup>25</sup> *U.S. v. Workingmen’s Amalgamated Council of New Orleans*, 54 F. 994, 996 (E.D. La. 1893). A local labor leader said: “[W]e were summoned to [Judge Billings’] courtroom and he told us that the strike was outlaw [sic] and we would all go to jail and have the U.S. Army here again besides if we didn’t call it off.” FORBATH, *supra* note 23, at 95.

<sup>26</sup> Melvin I. Urofsky, *Pullman Strike*, ENCYC. BRITANNICA (Sept. 2, 2022), <https://www.britannica.com/event/Pullman-Strike>.

<sup>27</sup> *In re Debs*, 158 U.S. 564 (1895). While the Supreme Court did not address labor and the Sherman Act directly, it was an issue on appeal. Counsel for the Petitioners Clarence Darrow eloquently argued for the exclusion of labor strikes from the scope of the Sherman Act, relying in part on the legislative history cited above. Brief and Argument for Petitioners at 5-24, *Debs*, 158 U.S. 564 (1895)

[http://moses.law.umn.edu/darrow/documents/Pullman\\_strike\\_BRIEF\\_Supreme\\_Court.pdf](http://moses.law.umn.edu/darrow/documents/Pullman_strike_BRIEF_Supreme_Court.pdf).

<sup>28</sup> Shirley T. Wajda, *Ending the Danbury Shakes: A Story of Workers’ Rights and Corporate Responsibility*, CONN. HISTORY.ORG (2020), <https://connecticuthistory.org/ending-the-danbury-shakes-a-story-of-workers-rights-and-corporate-responsibility>.

<sup>29</sup> Law Library Services, *The Danbury Hatters Case*, CONN. JUD. BRANCH (accessed Mar. 16, 2023), <https://www.jud.ct.gov/lawlib/history/Hatters.htm>.

<sup>30</sup> *Loewe v. Lawlor*, 208 U.S. 274, 295-96 (1908) (excerpting letters placing D.E. Loewe & Company on other unions’ “unfair lists” of businesses to be boycotted). The Court read the legislative history and concluded that efforts to exempt farmers and laborers from the Act had “failed.” *Id.* at 301.

Mr. Loewe won a settlement of \$6.8 million in today's money. Mr. Loewe seized the hatters' family homes. They were only saved after union members across the country donated an hour of their wages to support the men.<sup>31</sup>

These narrow readings of the Sherman Act infuriated Congress; that fury crested in the passage of the Clayton Act in 1914. One senator said that the Sherman Act had been “tortured into a meaning” that transformed a law “intended for the relief of the plain people . . . into an instrument for their oppression.”<sup>32</sup> Another member of Congress, Thomas Konop of Wisconsin, declared: “We are aiming at the gigantic trusts and combinations of capital. We are aiming at the dollars and not at men.”<sup>33</sup>

Congress had seen in the Danbury Hatters case how courts were drawing lines between employees and non-employees.<sup>34</sup> So they drafted language to protect labor organizing by both groups. Section 6 of the Clayton Act insists that “[t]he labor of a *human being* is not a commodity or article of commerce . . .” Section 20 establishes protections for employees, and then sets out an additional set of protections for “any person.” No antitrust injunctions “shall prohibit *any person or persons*” from stopping work, from telling others to stop work, from telling others to boycott a business; the list goes on.<sup>35</sup>

This time, federal courts read the Clayton Act's labor exemptions so narrowly that they effectively deleted them from the law.<sup>36</sup> Courts in the 1920s enjoined over 2,100 strikes.<sup>37</sup> One scholar concluded that the Clayton Act did not stop *any* injunctions from issuing under the Sherman Act.<sup>38</sup>

Of those cases, the one that stands out to me the most took place in Mingo County, West Virginia. In the early 1920s, coal miners there tried to unionize a historically non-union coal field. Their wages had been increasing, but they hadn't kept pace with inflation, nor had they kept up with the 600 percent earnings increase for the mine's owners, the Red Jacket Coal Company.<sup>39</sup>

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<sup>31</sup> Law Library Services, *supra* note 29; ROWLAND HARVEY, SAMUEL GOMPERS 163 (1935).

<sup>32</sup> 51 CONG. REC. 13967 (statement of Sen. Hollis); *see also, id.* at 9558 (Sen. Hamlin: “Under the influence of judges who had no personal knowledge of industrial affairs, no sympathy with workers in industry, and no understanding of the difference between property rights and personal rights,” the courts issued injunctions that “transform[ed] the agencies of justice into engines of injustice and oppression.”).

<sup>33</sup> *Id.* at 9545 (statement of Rep. Konop).

<sup>34</sup> *Id.* at 9087 (Rep. M. Clyde Kelly: “It is to remedy such a flagrant injustice that this this provision is included in this measure.”); *see also, id.*, at 13663 (Sen. Henry Ashurst stating that the Danbury Hatters decision made it “especially” necessary to directly exempt labor from the Sherman Act, and identifying specific provisions of the Clayton Act that intended to do that).

<sup>35</sup> 29 U.S.C. § 52.

<sup>36</sup> Hovenkamp, *supra* note 21, at 964 (explaining that *Duplex Printing* “effectively killed the Clayton Act by emasculating its basic labor exemption”) (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)).

<sup>37</sup> FORBATH, *supra* note 23, at 158.

<sup>38</sup> Hovenkamp, *supra* note 21, at 964-65 (citing JF Christ, *The Federal Courts and Organized Labor*, 5 J. BUS. 103, 283 (1932)).

<sup>39</sup> Special Collections, Archives and Preservation Department, *West Virginia Coal Strike Records*, U. CO. BOULDER LIB. (accessed Apr.9, 2023), <https://archives.colorado.edu/repositories/2/resources/179>; *Int'l Org., United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 841 (4th Cir. 1927).

One of the union miners, Frank Ingham, would later testify before the Senate about the tricks the coal company used to keep their wages low. The men were paid by the carload of coal – but they weren’t paid in cash; they were paid in scrip redeemable only at the company store.<sup>40</sup> When the men asked for a ten-cent increase over their rate of sixty-six cents per car, the company gave them nine cents. But then, the next time the men came out of the mines, every item in the company store had been marked up by five to twenty-five cents.<sup>41</sup>

The men called a strike. The company sued under the Sherman Act. The Fourth Circuit said the union leaders involved in the dispute “are neither ex-employees nor seeking employment,” and that therefore the labor exemption in the Clayton Act did not apply.<sup>42</sup>

Yet again, Congress was outraged. Congressman Fiorello LaGuardia denounced the “few . . . Federal judges” who had “willfully disobeyed the law.” He continued: “[T]hey emasculated it; they took out its meaning as intended by Congress; they made the law absolutely destructive of the very intent of Congress.”<sup>43</sup> So Congress passed the Norris-LaGuardia Act of 1932.

Now, the *Red Jacket* opinion had relied on a Supreme Court case called *Duplex Printing*, where the Court had said that the Clayton Act labor exemption did not protect people who weren’t “standing in [the] proximate relation” of employer and employee.<sup>44</sup> So Congress literally took those exact words and said the opposite. Thus, Norris-LaGuardia expressly directs that the antitrust exemption for labor disputes applies “regardless of whether the disputants stand in the proximate relation of employer and employee.”<sup>45</sup>

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<sup>40</sup> Special Collections, Archives and Preservation Department, *West Virginia Coal Strike Records*, U. CO. BOULDER LIB. (accessed Apr. 9, 2023), <https://archives.colorado.edu/repositories/2/resources/179>.

<sup>41</sup> *West Virginia Coal Fields: Hearing Before the S. Comm. on Educ. & Lab.*, 67th Cong. 29 (1921) (testimony of Frank Ingham).

<sup>42</sup> *Red Jacket*, 18 F.2d at 849.

<sup>43</sup> 75 CONG. REC. 5478.

<sup>44</sup> In *Duplex Printing*, the Supreme Court was presented with almost a mirror of the Danbury Hatters case – a national union calling for a national boycott of a company refusing local efforts to establish a union shop. 254 U.S. 443, 462-63 (1921); *id.* at 464 (acknowledging that, on appeal, the Second Circuit saw that the case involved the workers attempting a secondary boycott, “the very thing” at the center of *Loewe v. Lawlor*). *Id.* at 479. The Court seized on the language in Section 20 about “employees,” and then insisted that the union leaders were not “proximate” to the employer-employee relationship. And so the Court upheld, 6 to 3, a Sherman Act injunction in that case. In fairness, the Court cites to floor speeches by Congressman Webb, manager of the House bill for the House Judiciary Committee, who reassured members that the Clayton Act would not protect secondary boycotts. *Id.* at 475, 475 n.2 (citing 51 CONG. REC. 9652-58). Webb repeated this claim elsewhere in the debates, although the Court did not cite those other instances. *Id.* at 9660. That said, the express text of the law – combined with other members’ insistence that the Clayton Act would reverse the “flagrant injustice” of *Loewe v. Lawlor* – has to hold more weight than two colloquies by a single House member, albeit one of the leaders of the bill. *See supra* notes 34, 35, and accompanying text.

<sup>45</sup> 29 U.S.C. § 113(c); *see also*, 75 CONG. REC. 4916 (statement of Sen. Robert Wagner explaining this provision was aimed at undoing *Duplex*).



Like in the Clayton Act, Congress also broadly declared as policy that the Norris-LaGuardia Act aimed to restore “actual liberty of contract” to the “individual unorganized worker.”<sup>46</sup>

In contrast to what happened after the Clayton Act, here the courts were more restrained; the *Lochner* era was coming to an end. But the narrow readings still followed.

In *Columbia River Packers*, the Court excluded from the protections of the labor exemption a group of fishermen on the grounds that they were “*independent businessmen*” selling commodities, not their labor.<sup>47</sup> That decision would be used to exclude from the exemption a range of other workers classified as independent contractors, some of whom did *not* sell commodities. In at least two circuit courts, this allowed for antitrust suits against people like the port truckers and Mr. Bates.<sup>48</sup>

But I’m not here to critique a twenty-three-year-old agency decision, nor am I here to critique FTC staff. As I hope is clear from my remarks today, my critique is of the courts who interpreted the labor exemption so narrowly that its language was repeatedly used to stop worker organizing, rather than to protect it.

I suspect that, today, a lot of people like Mr. Bates may be technically classified as contractors, but they are not independent. Fifty years ago, “owner-operators” were much more likely to haul for multiple clients, with multiple trucks, and multiple employees. By the late ’90s, the vast majority of them had *one* client, *one* truck, and *one* employee – themselves. In fact, ninety percent of them had permanent leases that required them to haul *exclusively* for one company.<sup>49</sup> The control exerted through those exclusive leases is exacting: “They can tell you when to breathe,” said one trucker.<sup>50</sup>

That control matters when we apply the labor exemption. Why? Because when the Supreme Court declined to protect fishermen organizing in *Columbia River Packers*, it did so not just because they sold commodities, and not just because they were “independent businessmen.”

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<sup>46</sup> 29 U.S.C. § 102. Interestingly, this language appears to be derived from an opinion by Chief Justice Taft in *Am. Steel Foundries v. Tri-City*, where, in contrast, the Chief Justice wrote that “[a] single *employee* was helpless in dealing with an *employer*.” 257 U.S. 184, 209 (1921). See *Defining and Limiting the Jurisdiction Of Courts Sitting in Equity: Hearing on H.R. 5315 before H. Comm. on the Judiciary*, 72nd Cong. 57 (1932) (testimony of James Easby-Smith, Counsel, American Federation of Labor suggesting Chief Justice Taft’s language as a base “upon which this section 2 might be built”).

<sup>47</sup> *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 144-47 (1942).

<sup>48</sup> See *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124 (3rd Cir. 1974); *Armco Steel Co., L.P. v. Tackett*, 925 F.2d 1462 (6th Cir. 1991) (unpublished opinion).

<sup>49</sup> In the mid-1970s, thirty-three percent of owner-operators owned more than one truck and sixteen percent owned more than five; those figures were fourteen percent and two percent in 1997. VISCELLI, *supra* note 11, at 110-11. Only one of the owner-operators of seventy-five surveyed by Steve Viscelli in 2005 to 2007 had employed another driver. *Id.* at 111 (one of seventy-five); *Id.* at 216 (timing of the seventy-five interviews).

<sup>50</sup> VISCELLI, *supra* note 11, at 151.

The Court declined to protect them because they were “independent businessmen, *free from such control as an employer might exercise.*”<sup>51</sup>

### III. Thirty-seven jockeys in Canóvanas

I want to end on one last case that offers a different way of approaching these questions. It takes place at a horse track about an hour outside of San Juan, Puerto Rico.

Like hat-making, horse racing may seem harmless. Consider that racehorses can weigh almost 1,500 pounds, sprint at 55 miles an hour, and hit the ground with as much as 3,000 pounds of force. The average jockey is sidelined by injuries multiple times a year.<sup>52</sup>

If you want to work as a jockey in Puerto Rico, there is one place you can do it: the Camarero racetrack in Canóvanas. And when you race, unless you finish in the top five, you only get paid what’s called a “mount fee.” In Puerto Rico, it’s \$20, a fifth of what jockeys are paid in the U.S. – and that hasn’t changed since 1987.<sup>53</sup> These rates keep most jockeys in poverty.<sup>54</sup> For years, the jockeys’ association had demanded “pay and benefits that do justice to their dangerous profession.”<sup>55</sup>

In June 2016, the jockeys threatened a strike and demanded higher pay.<sup>56</sup> The horse owners wrote the jockeys a letter informing them that “they are independent contractors and as such, they are not a union and therefore they cannot go on strike as that would violate antitrust laws, in particular the Sherman Antitrust Act.”<sup>57</sup>

Thirty-seven jockeys went on strike for three days. The horse owners and the racetrack sued under the Sherman Act. The jockeys lost in district court. The judge awarded the horse and racetrack owners treble damages of well over one million dollars.<sup>58</sup> Like with the Hatters one hundred years earlier, however, the owners didn’t just hold the jockeys liable. They also sued each jockey’s spouse or domestic partner – making that award recoverable against not just the jockeys, but also their families.<sup>59</sup>

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<sup>51</sup> *Columbia River Packers*, 315 U.S. at 147 (emphasis added). It repeated similar language later in the decision, calling the fishermen “independent entrepreneurs, *uncontrolled* by the petitioner or other processors.” *Id.* at 144-45 (emphasis added).

<sup>52</sup> PBS, *A Jockey’s Hard Life*, PBS: AM. EXPERIENCE (accessed Apr. 9, 2023), <https://www.pbs.org/wgbh/americanexperience/features/seabiscuit-jockeys-hard-life>.

<sup>53</sup> *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 311 (1st Cir. 2022), *cert. denied*, 214 L. Ed. 2d 370 (Jan. 9, 2023); Defendants’ Brief in Opposition to Preliminary Injunction (“Opposition to PI”), Exhibit 5 at 1, *Confed. Hípica v. Confed. de Jinetes*, 419 F. Supp. 3d 305 (D.P.R. 2019), ECF No. 173-5, *vacated and remanded sub nom. Confed. Hípica v. Confed. de Jinetes*, 30 F.4th 306 (1st Cir. 2022) (“[N]o han sido revisadas desde el año 1987.”).

<sup>54</sup> Opposition to PI, *supra* note 53, Exhibit 7 at 1, ECF No. 173-7 (“[E]l esquema de pago de las montas existente en la Isla ha tenido el efecto de mantener a esta clase trabajadora oprimida y bajo niveles de pobreza, sin poder contar con unos ingresos dignos para el sostén de sus respectivas familias.”); *id.* Exhibit 5 at 1, ECF No. 173-5 (“Esto es el pago más bajo del continente norteamericano.”)

<sup>55</sup> *Id.*, Exhibit 5 at 2, ECF No. 173-5.

<sup>56</sup> *Confed. Hípica*, 30 F.4th at 311.

<sup>57</sup> Complaint, Exhibit 5 at 1, *Confed. Hípica*, 419 F. Supp. 3d 305, ECF No. 1-5.

<sup>58</sup> *Confed. Hípica*, 30 F.4th at 312.

<sup>59</sup> Complaint at 1, *Confed. Hípica*, 419 F. Supp. 3d 305.

On appeal before the First Circuit, Judge Sandra Lynch didn't dwell on whether the jockeys were correctly classified as independent contractors, pointing to language in *Norris-LaGuardia* saying that this did not matter. She focused instead on what she saw as the core question in *Columbia River Packers*: Whether what's at issue is compensation for labor – not commodities.<sup>60</sup> She and her colleagues nullified the judgement and dismissed the case, and, in my view, followed the letter *and spirit* of the labor exemption. The jockeys and their families won.

I'll ask it again: *Antitrust*. A law written to rein in the oil trust, the sugar trust, the beef trust. A law aimed at “the gigantic trusts and combinations of capital,” a law aimed at “dollars, and not at men.” Did Congress really mean for that law to target twenty-year-old hatters with mercury poisoning? Coal miners paid in worthless scrip? Three dozen jockeys risking their lives for \$20 a ride? Is that really what Congress intended?

I think the answer to that question is a very obvious “No.” And I think Congress answered that question not once, not twice, but three times, each time in a louder and clearer voice.

Now for those of you itching to cite Justice Scalia's famous aversion to legislative history, I see your Scalia and raise you a Holmes – then-Judge Oliver Wendell Holmes Jr., whom the Supreme Court quoted in 1941 for the very question of how broadly they should read the labor exemptions in *Clayton* and *Norris-LaGuardia*:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you're driving at, but you have not said it, and therefore we shall go on as before.<sup>61</sup>

When it comes to antitrust and the labor exemption, we know the history. We know what Congress was “driving at.” Congress meant to strengthen labor's hand when it fought the trusts, not weaken it. And so we cannot “go on as before.” Congress has made it clear that worker organizing and collective bargaining are not violations of the antitrust laws. When I vote, when I consider investigations and policy matters, that history will guide me.

Thank you.

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<sup>60</sup> *Confed. Hipica*, 30 F.4th at 314-15.

<sup>61</sup> *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) (citing *Johnson v. United States*, 163 F. 30 (1st Cir. 1908)).