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Theories of economic regulation and the development of the doctrine of "conspiracies in restraint of trade" in the labor market

Noell, Edd Sidney, Ph.D.
The Louisiana State University and Agricultural and Mechanical Col., 1989

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THEORIES OF ECONOMIC REGULATION AND THE DEVELOPMENT OF THE DOCTRINE OF "CONSPIRACIES IN RESTRAINT OF TRADE" IN THE LABOR MARKET

A Dissertation

Submitted to the Graduate Faculty of the Louisiana State University and Agricultural and Mechanical College in partial fulfillment of the requirements for the degree of Doctor of Philosophy

in

The Department of Economics

by

Edd Sidney Noell
B.A., Texas Tech University, 1976
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August 1989
CREDITS

I am indebted to the following authors and publishers for permission to quote from works published by them:


DEDICATION

This study could not have been completed without the faithful support of my wife Nancy. She has been a constant source of encouragement and strength. Her love has sustained my effort over several years, including the wonderful time of the birth and nurturing of Mary Beth and David. I will always praise our Lord for His marvelous grace in our relationship.

An excellent wife, who can find?
For her worth is far above jewels.
The heart of her husband trusts in her,
And he will have no lack of gain . . .
Her children rise up and bless her;
Her husband also, and he praises her, saying,
"Many daughters have done nobly,
But you excel them all."
Charm is deceitful and beauty is vain,
But a woman who fears the Lord,
shall be praised.
(Proverbs 31: 10-11, 28-30)
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This study owes a great deal to the direction of Dr. William Campbell. He has stimulated my interests in the English common law, and guided me in seeking connections between the history of economic thought and American jurisprudence. He has been a source of wise counsel in applying the insights of ancient political economy to a variety of topics. I truly appreciate his diligent efforts in sharpening my reasoning in regard to many arguments in this inquiry.

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ABSTRACT

THEORIES OF ECONOMIC REGULATION AND THE DEVELOPMENT OF THE DOCTRINE OF "CONSPIRACIES IN RESTRAINT OF TRADE" IN THE LABOR MARKET

by

EDD SIDNEY NOELL, B.A., M.B.A.

Supervising Professor: Dr. William F. Campbell

The purpose of this dissertation is to analyze the development of the doctrine of "conspiracies in restraint of trade" in the labor market by means of an application of two models of economic regulation. As heuristic devices, these models are utilized to explain the formation of English and American labor law in three different eras.

The market failure model posits that labor market regulators seek to remedy unequal bargaining power and asymmetric information so as to achieve economic efficiency. This model's 'liberty and virtue' component emphasizes the normative end of character formation.

According to the interest group model, organized labor and other interest groups demand various forms of regulation. This theory's rent-seeking component highlights the role of the legislature and judiciary as self-interested suppliers of regulation.

The approach to labor market regulation taken by the common-law jurist and legislator Sir Edward Coke in sixteenth- and seventeenth-century England is best understood in terms of the liberty and virtue component. Coke
validated regulation consistent with the avowed ends of guilds to promote quality workmanship and moral virtue, yet also broadened the right to pursue a trade by invalidating guild ordinances which were arbitrary restraints of trade. This distinction shapes the origins of the economic conspiracy doctrine.

In nineteenth-century England, labor legislation first included and then subsequently exempted unions from the criminal and civil aspects of common law conspiracy. This change, which reflects in part the influence of Adam Smith's arguments that both apprenticeship and combination laws were ineffectual, is best attributed to elements in the liberty and virtue component and the interest group model. The latter theory best explains the acquisition by organized labor of legal immunities in early twentieth-century British legislation.

The liberty and virtue component best describes the approach taken by nineteenth-century and twentieth-century American law towards the right of labor to organize and the 'substantive due process' Supreme Court rulings that formed the boundaries of the legitimate use of police powers in regulating labor markets. The interest group model best explains the New Deal legislation which conferred upon unions special privileges and immunities in the law.
INTRODUCTION

The purpose of this study is to analyze the development of the doctrine of "conspiracies in restraint of trade" in the labor market by means of an application of two models of economic regulation. This inquiry focuses on the barriers to entry in labor markets as they have been treated in law and public policy in England and America. It seeks to determine how the models of regulation explain the changing way in which the notions of freedom of trade, restraint of trade, and freedom of association have been perceived and applied in economic policy over time. The focus will be on the economic conspiracy doctrine as applied to the practices of guilds, trade associations, and labor unions.

Two main models of regulation will be utilized to explain economic policy as meted out in the courts and in legislation. One is the market failure model, which argues that regulators seek to remedy economic inefficiency. As will be shown, though there are a wide variety of arguments for market failure, what unifies this approach is the assumption that regulators act with "public interest" goals in mind. This model relies on the concepts of unequal bargaining power and asymmetric information as its rationale for the enactment of labor law and occupational regulation.

The other model is the interest group theory, which posits that labor market regulators respond to the demands of unions and professional groups for a legally enforceable
cartel arrangement in an industry or market that would otherwise be competitive. Legislation is geared to serve the interests of particular labor organizations.

As heuristic devices, these models are utilized to explain the formation of regulatory policy in two different countries and three different time periods: England from 1500 through 1628, and during the period of 1800 through 1906; and the United States from 1800 through 1941. The focus of the study shifts from regulation of guilds to labor law affecting unions as we move from sixteenth-century England to Britain and America in the nineteenth and twentieth centuries.

In each of these cases, the main question to be answered is, how do these models contribute to the economists' understanding of the development of the doctrine of "conspiracies in restraint of trade"? In a different period under a different set of circumstances than we observe today, were regulatory barriers to entry in labor markets designed and enforced to deal with market failure, or were they in fact implemented so as to benefit particular groups in the labor market by restricting competition?

This issue is addressed by looking at specific labor legislation. For example, one can consider the American labor statutes passed during the decade of the 1930s. Were the Norris-LaGuardia and Wagner Acts examples of enlightened labor law based on public sympathy towards unions at this time (and the alleged inability of the market to cure the x
Great Depression)? Or was it true that the events of the 1930s dramatically weakened the opposition faced by beneficiaries of the legislation who were thus able to engineer changes in the legislative environment? In a similar fashion the economic policy towards labor found in English legislation and judicial decisions dealing with restraint of trade in labor markets is considered.

These questions are treated as part of the overall explanation of the evolution of the economic conspiracy doctrine. The policies toward restraint of trade in labor markets were not the same in the three time periods. Thus, while any one model may have stronger explanatory power for a particular era, changes in economic conditions and social objectives may reduce its applicability over time.

Moreover, the doctrine of conspiracy in restraint of trade underwent changes within each of these time periods. At specific points within each time period, either model may have greater explanatory power than the other in regards to developments in labor law. To cite one example, the interest group theory more fully explains the New Deal labor legislation as the product of concerted efforts by organized labor to restrict competition by requiring closed shops; but in the late nineteenth century, a key component of the market failure model fares better as an explanatory vehicle, particularly as it applies to the American judicial understanding of labor market regulation.

These different historical periods and national
settings call for a comparative analysis of the development of labor market regulation. Thus different kinds of questions must be considered. Some of them deal with changes in economic conditions as they influence the approaches to regulation. For example, how do changes in economic conditions (such as technology, transportation facilities, and the availability of resources) lead to changes in the way people argue about the need for regulation? The seventeenth-century English common law focused on craft guilds, which largely made physical products. In the case of professional services, which are largely the object of modern occupational regulation, there is not as much tangible information as with a product. The complexities involved with labor market regulation increase over time.

There are also changes in the norms for labor law. What are the links, if any, between the goals of liberty and character formation pursued by the English common law and the goals of American labor law? How do these values relate to the 'substantive due process' judicial rulings?

My investigation considers the commonalities in the three eras and the outstanding differences. The significance of an attempt to address these questions can be seen by a brief overview of previous attempts to explain labor legislation in England and America. Two of the studies rely heavily on the private interest theory of regulation; the other major work does not explicitly recognize this theory.
I. RESEARCH ON BRITISH AND AMERICAN LABOR LEGISLATION

There have been only a few efforts in the literature to utilize the interest group theory as an explanatory device for regulation in labor markets. These studies have been limited to economic legislation in particular periods of English history. The most significant examples are the two investigations of the English Factory Act of 1833 by Marvel (1977) and Anderson and Tollison (1984). This legislation was designed to regulate the employment of children, adolescents, and adult women in the textile factories of England. Marvel rejects a standard interpretation of this law, namely that it came as a response to the popular outcry against the abuse of these particular workers. Instead he finds that this statute was designed to further the interests of the leading textile manufacturers who intended it to increase the returns on their investment and harm other textile manufacturers: "the group standing to gain was the large urban manufacturers who relied on steam engines to drive their machinery"; such steam-powered mills "employed relatively fewer very young children" than the water-powered mills of their competitors (p. 388).

Anderson and Tollison present a somewhat different finding; they argue that the legislation regulating factory employment "represented the mechanism by which skilled male operatives attempted to limit competition from alternative labor suppliers (children, adolescents, and adult women), who were becoming increasingly close substitutes as the
nineteenth century progressed." The Act was part of the Factory Movement, which was motivated "by the rents available to skilled adult male laborers (the core of the Factory Movement) resulting from parliamentary intervention [which restricted competition] in the labor market" (p. 188).

Another work dealing with labor law explores a broader range of labor legislation and its philosophical and economic rationale than do the aforementioned studies. Dickman (1987) has set forth a significant examination of the "ideological origins of national labor relations policy" as part of his efforts to explain the concept of "industrial democracy in America." His work seeks to explain and re-examine the reasons that have been put forward in favor of unions, in order to understand why American society came to favor collective over individual bargaining, and to account for the peculiar legal structure our system of collective bargaining - our system of industrial democracy - assumed as a result of the Wagner Act (p. 4).

Dickman's study focuses then on explaining the changes in approach to labor law which are the background to the American National Labor Relations Act of 1935.

Dickman discusses "three far-reaching theories which historically constituted the rationale for industrial democracy," both in the United States and in Europe: "a theory of laborers' bargaining disadvantages under competition; a theory of income redistribution through collective bargaining; and a theory of unions' proper legal relations with employers, other workers, and the state in a
modified capitalism" (p. 11). The first of these theories overlaps with the reasoning of the market failure model. Dickman argues that belief in competition in a general sense diminished during the nineteenth century. In regards to the labor market, there arose as a consequence the idea that unions were "indispensable" if workers were to obtain fair wages and working conditions. He claims that

Union proponents insisted that the 'right to organize' under the common law was not enough. The state, they urged, must also positively restrict employers' freedom not to associate with unions or their members . . . It is this positive right which the Wagner Act secures (p. 8).

My study has a different purpose from Dickman's. My goal is not to explain the ideological origins of the Wagner Act, though in dealing with the development of English and American labor law our two studies do at several points inquire into similar concerns. My work deals much more extensively with the English common law on labor relations, especially as it was formulated in the late sixteenth- and early seventeenth-centuries. It also looks more fully at the development of nineteenth-century British labor law.

My purpose is to explain the development of the doctrine of conspiracy in restraint of trade in labor markets. This leads my research to rely much more explicitly and heavily on the two economic theories of regulation than does Dickman's study. Dickman does not discuss or appear to recognize the interest group theory. Our understanding of the development of labor law in England and America can be
enhanced significantly by treating these periods with the analytical tools derived from this model. Indeed, my work discusses the two theories as applied to labor markets outside of a historical context before utilizing them in explaining labor law in three particular eras. It also delves more broadly into the philosophy underlying restraint of trade in the English common law. In short, while Dickman's emphasis on the change in the conception of the 'right to organize' from a negative to a positive right is recognized and discussed in my study, my concerns go beyond the ideological background to compulsory unionism in America to a broader application of the theories of regulation to labor market law in England and America in three particular historical periods.

In a broader sense, my work pushes beyond these earlier efforts in the literature by more fully considering the issues raised in the regulation of labor markets. One clear way in which this is seen is in a discussion of the difference between labor markets and other markets. Thus one may ask, why have legislation and court rulings in the past set up barriers to entry in labor markets and not other markets? Was it because there are problems with market failure (perhaps unequal bargaining power on the part of labor suppliers) which are especially prevalent and/or powerful in labor markets rather than in product markets? Or does the special ability of labor groups to obtain economic policy measures favorable to their interests undergird
legislation which sets up entry barriers, and court rulings which validate the legislation?

These questions are a significant part of the overall contribution of this study to the economic analysis of regulation in the history of economic thought. By applying the two models to the economic legislation and judicial rulings of England and America in three selected periods of time, this inquiry seeks to enhance the economists' understanding and appreciation of historical and ideological factors which played a role in the evolution of labor law. An outline of the four chapters in the study will help to demonstrate the thrust of this contribution.

II. AN OUTLINE OF THE STUDY

Chapter one surveys the literature and draws out the key elements of the major models of economic regulation. The focus is largely on labor market regulation. The positive and normative elements of the different models are distinguished. Particular applications of each of the models are made to labor unions and occupational associations.

The market failure theory emphasizes instances of a sub-optimal allocation of resources. This may occur due to monopoly power, imperfect information, or externalities in production. The first reason is most important in labor markets; it is exhibited where the division of bargaining power between employers and employees is 'unequal,' often due to coalitions of either buyers or sellers of labor.
A single firm which hires a large part of the labor in a market has monopsony power. The usual regulatory response is to give unions offsetting power, by means of legal sanction for their right to organize and collectively bargain with management.

The presence of each of the market failure problems indicates that there is economic inefficiency. The normative elements of the market failure model feature efficiency as a key goal of regulation, as well as equity and fairness.

This chapter also develops the liberty and virtue component of this model, which acknowledges market failure, but differs with the broader model over the extent to which it is proper to rely on the market to accomplish allocative efficiency, and to what extent it is better to rely on governmental regulation. Beyond economic efficiency, this component also focuses on character formation and moral virtue. This component emphasizes the role of police powers regulation in the labor market.

The interest group theory views regulation as a good (service) that is demanded by the regulated occupations or labor groups. Under the guise of promoting the public interest, organized coalitions pursue regulations such as barriers to entry in order to protect themselves from outside competition and enhance their incomes. Regulation is supplied by politicians/regulators who garner votes and monetary contributions which are key both for survival and acquisition of greater power in a representative democracy.
The interest group theory argues that the goals of regulation ought to be both efficiency and economic freedom. Constraints must be placed on rent-seeking regulatory activity to improve the regulatory process.

The remainder of chapter one reviews the literature on this theory of regulation, as it is developed by both the "Chicago" and public choice schools. It examines carefully the rent-seeking component of the theory, with special attention paid to the role of the legislature, executive branch, and judiciary in supplying regulation so as to optimize their own interests.

The features of this component are applied to the labor market. Guilds, licensed occupations, and unions supply a vehicle through which skilled, semi-skilled and unskilled workers obtain higher earnings. Unions in particular are seen as "rent-seeking agencies" which seek to limit entry from non-union workers. Such rent seeking is often done under a public interest cover. Trade unions and licensed occupations attempt to convince the regulators and the public at large of the benefits to society associated with their protection or licensure.

The latest developments in modern regulatory theory emphasize that regulation is often shaped by a type of compromise among the demands by competing business, labor and consumer interests, who each have an incentive to organize and lobby for protection or privileges. Both allocative and distributive concerns may matter in regula-
tion. This acknowledgement is especially significant for this study of the approaches to labor market regulation over past periods of history. It is likely that neither the market failure nor the interest group theory will completely explain any one approach to the question of restraint of trade by a particular policymaker(s) in a particular era in a particular country.

Chapters two through four utilize the models of regulation in a chronological examination of each of the three historical periods. In each of these chapters changes in economic conditions, institutions, and norms are highlighted for their effect on regulation in labor markets, especially with regards to the economic conspiracy doctrine.

Chapter two deals with the treatment of labor in the seventeenth-century English common law. The rulings, reports and speeches of Sir Edward Coke are examined for his positive and normative analysis of regulation of trade by the guild system and the Statute of Artificers. Coke's approach is set in the context of the legal and economic history of sixteenth- and seventeenth-century England.

Coke's decisions in regards to regulation set the mold for legal interpretation for the next two centuries. Coke did not try to explain labor market regulation in terms of economic theory. But as a practicing jurist and legislator he drew upon the late medieval common law conceptions of private and public trade restraints.

There was a significant tradition of common law
opposition to arbitrary trade restraints by guilds and other combinations. Guild ordinances which raised prices and arbitrarily excluded competent craft practitioners were contrary to the public interest.

The avowed ends of guilds were to promote quality workmanship and moral virtue. Often under the guise of promoting these ends, guilds became very exclusive in response to various economic changes in the sixteenth and seventeenth centuries.

In response to these developments the common law broadened the rule against restraint of trade into "the liberty of the subject to pursue lawful and established trades." In this context Coke articulated the common law distinction between legitimate regulations and artificial restrictions of trade. Coke makes use of this distinction in several court rulings and other cases he reports. Coke opposed guild by-laws by which someone who was completely qualified by apprenticeship could be denied entry into a trade on the basis of an artificial pretext.

Coke interpreted and applied the Statute of Artificers consistent with its goals of enforcing full employment and banishing idleness in the commonwealth in the face of increasing social instability. Certain guild stipulations appeared to him to be merely trade restraints, not promoting quality production, but hindering qualified craftsmen from pursuing their trade. On the other hand, Coke endorsed guild regulations which were consistent with quality in workman-
ship and character formation.

Coke acknowledged that some occupational groups made claims to the possession of a true 'mystery' when the level of skill involved in the craft was not significant or there was not a true need to limit competition in order to protect the public welfare. Coke recognized the existence of a demand for regulation on the part of well-organized groups. He was dubious of the claims of many regulatory measures, and sceptical about private claims that certain regulations served the public interest.

There are elements of each of the models of regulation in Coke's thought. Nonetheless, the liberty and virtue component best explains his approach to labor market regulation. Coke built on the common law treatment of guilds as institutions which promoted character formation; guilds were seen as the effective transmitters of civic and moral virtue, as well as being more efficient vehicles for technology transfer. Coke followed the traditional hostility in the common law towards guild ordinances which reduced product quality or shut out qualified craft practitioners. The doctrine of conspiracy in restraint of trade originates in the common law distinction between arbitrary restraints of trade and regulations of trade designed to foster certain virtues for the public good.

Chapter three explores the development of labor law in nineteenth- and twentieth-century England. It begins with a consideration of the writings of Adam Smith on guilds and
combinations. Smith argues that both apprenticeship and combination laws are ineffectual in achieving their ends. While Smith thought that employers often had superior bargaining power compared to their employees, he did not believe that labor combinations should be granted special privileges in the law.

A combination of key elements of the liberty and virtue component and the interest group model best explains Smith's approach. In regards to the latter, Smith observed that the force of self-interest led some groups to demand regulation. Smith was highly cognizant of the efforts of organized coalitions to obtain monopoly advantages.

Both Coke's common law approach and Smith's classical liberal approach shared an emphasis on character formation. Coke employed a paternalistic approach to virtue. Smith argued that virtue would be achieved by allowing individuals wide economic freedom. Unlike the common law, Smith and classical economic liberals upheld liberty as the highest good.

Chapter three proceeds to discuss the treatment of combinations in restraint of trade in nineteenth- and twentieth-century England, particularly as it is related to the rise of exclusive unionism. The key pieces of labor legislation and judicial rulings in the common law tradition are examined for their contribution to developments in the economic conspiracy doctrine.

The eighteenth century saw the implementation of
several statutes against combinations among particular trade groups. These statutes were generalized in the Combination Acts of 1799 and 1800. Labor unions were constituted as criminal conspiracies against the public when their members sought higher wages by means of inducing others to quit their employment, or by hindering employers from hiring whatever workers they pleased.

These laws were repealed by the Combination Act of 1824, which rendered unions immune from prosecution for peaceful acts under the common or statute law of criminal conspiracy. The Combination Act of 1825 in turn repealed the previous statute and restricted the right of combination. This right was subject to the criminal aspect of the common law 'conspiracy in restraint of trade' doctrine.

Legislation in the latter half of the nineteenth century changed the legal status of unions. The Trade Union Act of 1871 sought to eliminate the application of the criminal conspiracy doctrine to unions who purposed to restrain trade in a labor dispute. The Conspiracy and Protection of Property Act of 1875 limited the number of specific actions taken by unions which were punishable as a crime under the rubric of intimidation. It declared that actions by two or more individuals in combination, in the context of a trade dispute, did not constitute them as a conspiracy if such actions done by an individual alone were not punishable as a crime.

In the remainder of the nineteenth century the courts
applied the laws of tort and civil conspiracy to union activities for such common law offenses as restraint of trade and intimidation. The liberty and virtue component best explains the late nineteenth-century court rulings.

Under the Trade Disputes Act of 1906, Parliament abolished the civil law aspect of conspiracy in restraint of trade from labor disputes. It also made unions immune from any liability for torts based on any action committed by or on behalf of the union.

This change in the treatment of unions under the conspiracy in restraint of trade doctrine is a product of the political power and persuasiveness of organized labor groups compared to other groups. That is, the early twentieth-century English legislation is best understood using the interest group theory rather than the market failure theory. While organized labor appealed to the unequal bargaining rationale as the basis for the change in their treatment in the statutory law, this statute went beyond "equaling out the bargaining power" in its grant of legal privileges. In giving unions a wide range of immunities not previously available, Parliament enacted provisions far outside the scope of legitimate regulation of trade as understood in the English common law.

Chapter four explains the nineteenth and twentieth century American approach to labor law. A central issue to be explained is the changed status of labor unions in the law and in economic policy. The social and economic policy
toward labor combinations in America went from allowing labor unions the right to organize in 1842, to a limited application of the conspiracy concept until the 1930s, to elimination of the concept of the labor union as conspiracy as expressed in the New Deal labor legislation. Initially the jurists deciding labor cases utilized the traditional common law concepts of breach of contract and tort. Under the labor law passed in the 1930s labor unions were given special privileges and immunities in the law. The liberty and virtue component best explains the approach of American statutory and common law prior to the 1930s. The interest group theory most clearly explains the enactment of the labor legislation of the 1930s. Neither model completely explains the development of labor law over the entire period.

In the first half of the nineteenth century, American common law jurists recognized the right of unions to organize workers based on the concept of freedom of association, but still scrutinized the purposes of union activities with regards to restraint of trade. After 1890 the Supreme Court applied the Sherman antitrust law to organized labor. Union activity was treated in much the same manner as actions by any other type of combination. In several key cases the Court held that the use of secondary boycotts and strikes, due to their effect on interstate commerce, could constitute a labor union as a conspiracy in restraint of trade.
During the early part of the twentieth century, employers utilized injunctions to enforce yellow-dog contracts. In overthrowing state legislation banning such agreements, the Supreme Court relied on the 'substantive (or economic) due process' principle. The use of this principle was also characteristic of many key Court rulings from 1885 until 1937 which overturned state police powers' regulation. These judicial rulings are best explained utilizing the liberty and virtue component.

During the Great Depression the legal status of unions underwent significant change. The Norris-LaGuardia Act of 1932 granted unions immunity from the application of the common law conspiracy doctrine in regards to labor disputes. In the Wagner Act of 1935, unions elected by a majority of workers were granted the privilege of being the exclusive representative of these workers in order to engage in collective bargaining. In 1937, the Supreme Court refused to overthrow this law on the basis of substantive due process. The interest group model best explains the abandonment by the Court of the principle of economic due process.

The three chapters which deal with particular historical periods are interspersed with comparisons and contrasts to the approach to labor law taken in both prior and subsequent eras in England and the United States. Each of these chapters also ends with some concluding remarks which serve as an evaluation of the relevant labor law on the basis of the norms of the liberty and virtue component.
THEORIES OF ECONOMIC REGULATION

The purpose of this chapter is to survey the literature and draw out the key elements of the major models of economic regulation. Several features of this discussion should be noted at the outset. First, the focus will be largely on labor market regulation, not regulation of all the sectors of the economy; particular applications of each of the models will thus focus on labor unions and occupational associations. This will be in keeping with the broader focus of the study, which is to examine the efficacy of the models in explaining the development of policies dealing with "conspiracies in restraint of trade" in regards to labor markets in three different historical periods. Second, the economic theories will be utilized as ideal types, or models which can be used to evaluate patterns of thought and policy that typify each of these time periods; this study is not concerned with setting forth formal hypotheses which will be statistically tested. Third, the positive and normative elements of the different approaches to regulation will be distinguished. This will be crucial, for in the study of regulation normative and positive issues tend to meld together indiscriminately without any common theoretical bond (Peltzman, 1981, p. 371).

Taken at the broadest level, economic regulation is an attempt by the state to use its legal powers to direct the economic conduct of nongovernmental bodies (Stigler, 1981, 1
In its institutional context, as Hogan (1983) explains, government control may be implemented by either the judicial, legislative, or executive branches, and administered by a regulatory agency under the aegis of the executive or legislative branches. Regulatory activity is "governed by constitutional law, statutory law, common law, and agency-made law" (p. 117).

Studies of regulation normally fall into three categories: price and entry regulation in competitive industries, price and entry regulation in monopolistic industries, and 'qualitative' regulation, "which attempts to cope with various kinds of market-failure problems that are only indirectly linked to prices, profits, and market structure." The third category includes environmental and product-quality regulation (Joskow and Noll, p. 3).¹

¹ Occupational regulation involves elements of all three areas. Economists distinguish between three types of occupational regulation: registration, certification and licensure, where the latter two are often forms of self-regulation. Registration represents control at a minimal level; it simply means "an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities" (Friedman, p. 144). Certification involves a governmental agency's acknowledgement of certain skills possessed by an individual, but not necessarily its restriction of the activity to only those with such a certificate. The agency "is empowered by statute to certify individuals to the public as having satisfied particular educational and training requirements judged (by the certifying body) to indicate competence in a particular range of professional services" (Wolfson et al., p. 203). Licensure is the strictest form of occupational control. It is an arrangement under which one must obtain a license from either a public employee or from private persons who operate under the authority of the government in order to practice the occupation. Licensure requires "some demonstration of
government regulation are usually concerned with what specific controls on prices, firm entry, taxation and subsidies a regulator should have in order to achieve maximum economic efficiency.

There are two major theories of economic regulation. The first is the market failure theory; it posits that regulators seek to serve the 'public interest,' implicitly maximizing some measure of economic welfare. 'Market failure' is the rubric which is my choice for designating a variety of economists who emphasize the need for government intervention to achieve economic efficiency. The second major model is self-identified as the interest group theory; it posits that regulators try to serve the interests of particular client groups, often by creating a legally enforceable cartel arrangement in an industry or market that would otherwise be competitive.

I. THE MARKET FAILURE MODEL

Market failure arises when the market does not bring about an optimal allocation of resources. There are several reasons why this might occur. Markets may fail in the presence of natural monopoly. A natural monopoly may exist due to the presence of scale economies or indivisibilities. That is, "natural monopoly occurs when economies of scale competence or the meeting of some tests ostensibly designed to insure competence . . ." (Friedman, p. 145), as does certification, but only individuals licensed are legally permitted to offer the relevant services.
are so extensive relative to the size of the market that only one firm can operate efficiently within the bounds of market demand" (Phillips, pp. 2-3). The well-known consequences of monopoly power for consumers may thus result; prices for the monopolist's product are too high, and output is insufficient.

Another type of market failure occurs when there is imperfect information. As Akerlof (1970) has explained, markets may exhibit information flow characteristics such as uncertainty and asymmetry in the information possessed by different individuals. Market imperfections of this type are due to costly and inexact information about the consequences of economic decisions, because there is a wide information disparity between buyers and sellers of increasingly complex goods and services. As a result consumers may not purchase products with the particular level of quality they desire.

A third type of market failure stems from externalities. This problem occurs when some of the costs and benefits of producing and consuming a product or service fall on people who neither make nor purchase it. In the absence of constraints, producers will impose costs on third parties which the producer does not have to bear. These negative externalities or spillover costs will lead to overproduction of the product. Likewise, producers acting

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2 The first large federal regulatory agency, the Interstate Commerce Commission, was established with this justification. Railroad regulation sought to remedy the deleterious consequences associated with natural monopoly.
according to rational self-interest have no incentive to bestow benefits to third parties if these benefits do not bring a corresponding compensation to the producer; positive externalities or spillover benefits lead to underproduction.

On the basis of these market deficiencies, regulation is supplied in order to ameliorate the deleterious effects of unregulated market activity. In the case of natural monopoly, the regulator will force the firm to sell at lower prices and to produce and sell larger quantities. To deal with imperfect information, the regulator licenses the production of the good or service to insure that only sufficiently qualified producers serve consumers. In the face of externalities, the regulator's optimal policy may be one of either taxation to decrease production or subsidies to increase production. Essentially the failure in each case lies in not providing for maximum economic efficiency. Thus regulation is intended to increase the efficiency of the market.

So far the discussion has been of markets in general. Do these types of market failure occur in labor markets? If so, what type of regulation is applied in the market failure model? And are there other types of rationale for regulation in labor markets?

A. REGULATION IN THE LABOR MARKET

Though there are no economies of scale or indivisibilities in production, monopoly power may still exist in
labor markets, leading to a misallocation of resources. Proponents of the market failure model claim that an sub-optimal allocation of resources exists where there is an improper allocation of bargaining power (Breyer, p. 32). This type of market failure can result from coalitions of either buyers or sellers of labor with unequal bargaining power relative to their counterparts on the other side of the market. In regards to the demand for labor, monopsony may exist in a labor market where a single firm is the sole employer of labor. In a less extreme situation, a single firm may hire such a large part of the labor in a market that it has monopsony power. In regards to the supply of labor, union groups will have monopoly power when they organize all (or most) of the workers in an industry or occupation and collectively bargain with management. In principle legislators might regulate the monopoly buyers of labor in order to offset unequal bargaining power; but the more usual regulatory response is to give unions legal sanction for their right to organize and collectively bargain in labor markets.

A second rationale for labor market failure and the legal sanction of unions has been set forth by a pair of labor economists, Freeman and Medoff (1984). They claim that certain aspects of the modern workplace involve "public goods" which individual bargaining will not fully take into account (pp. 8-9). A second problem revolves around imperfect information. They argue that "workers who are tied to a
firm are unlikely to reveal their true preferences to an employer, for fear the employer may fire them." A collective organization is required to provide "the incentive for individuals to take into account the effects of his or her actions on others" and "to collect information about the preferences of all workers" (pp. 9, 13). By means of collective bargaining, labor unions remedy these market failure problems.

There are also arguments for market failure in regards to professional services. They differ from unions in that professionals may act as business firms in selling their product to consumers, in addition to offering their services in the labor market.

Consider first the problem of the asymmetrical character of information in regards to the quality of professional services. The buyer of a professional service is at a great informational disadvantage compared to the seller. Consumers may not have enough information to assess the benefits of services professionals offer them on the market due to the costs of obtaining information outweighing the benefits of such information. This can result in nonoptimal decisions such as purchases that buyers would not make if they had perfect information.

The issue here is whether consumers have enough information to assess the benefits of professional services with accuracy; that is, are they "able to judge the value to them of the services offered on the market? If this ability
is not present, then competitive market outcomes are not optimal." This leads to a type of relationship peculiar to professional markets, as Wolfson et al. explain:

To compensate for their inability to assess the value of the services offered, consumers of professional services establish agency relationships with practitioners so that the latter can act on their behalf in making informed decisions about the purchase of services. If these agency relationships function perfectly, the consumer acts as if he were perfectly informed, and the interaction between independent supply and demand produces an optimum market equilibrium. Unfortunately, the professional agency relationship involves inherently competing interests, because the "demand agent" is often the supplier of services as well (p. 190).

This leads to the potential for demand-generation:

To the extent that practitioners exploit their agency to generate a demand for their own services greater than that which fully informed consumers would demand in their own right, the resulting level and mix of professional services provided deviates from competitive market solutions, and social welfare is reduced (p. 191).

Medicine and law are archetypes of this problem in professional markets.

A more extreme version of this form of market failure argues that "society knows better than the individual what is best for the individual." As Moore observes, this rationale itself has two forms: "According to one, the individual, if he had perfect knowledge of past, present, and future, would know what is best for himself . . . [but] the individual does not know the future, and society may have a better idea of the future than the individual." The second form of this rationale claims that "the individual,
even if he did have perfect knowledge of past, present, and future, would still not be the best judge of his own welfare." In this view, "society knows the future better than the individual," as Moore explains:

... individuals have, subjectively, a higher probability expectation of a desired result than is statistically warranted for society as a whole. Hence, while an individual may agree that, if n people go to unlicensed practitioners, there is a probability $\propto$ that any one of these persons will be disappointed or harmed, the individual himself will base his course of action on the assumption that there is a smaller probability than $\propto$ that he personally will be harmed. Therefore, the proponents of this thesis argue, welfare of individuals will be greater in the long run under licensing (p. 106).

This view is pushed to its extreme when it is is said that the ability of the purchaser to choose must be distrusted. Either the consumer of professional services is unable to evaluate available information, or if he can accurately evaluate it, "irrational human tendencies" prevent him from doing so (Breyer, p. 33).

Serious informational problems do not appear to exist in some markets in which consumers are relatively sophisticated and do not, in general, need to establish agency relationships with practitioners. While accounting, architecture, and engineering do not suffer as much from this problem, pervasive externalities are nonetheless present. For example, "the purpose of auditing is to lend credibility to the client corporation's financial statements (which are used by third parties in making investment decisions)."

Likewise, there are evident 'neighborhood' effects in
building design. In virtually every branch of engineering, "the potential effects of bad design on public health and safety are dramatic." In these cases, if "some of the costs of producing services are not borne by the producers" or "some of the benefits of what is consumed do not accrue to the consumers," production and consumption decisions will not be socially optimal. For example, if producers ignore the interests of third parties, then the level of services produced "would be lower than what would be socially optimal if all interests were taken into account," because "the clients who purchase professional services would demand only enough to satisfy their own needs . . ." (Wolfson et al., pp. 193-194).

In sum, market imperfections in the provision of professional services may yield either too high or too low a level of both quantity and quality. As Wolfson et al. observe,

Unscrupulous or negligent practitioners may deliver services of poor quality without being detected. Moreover, the needs of third parties may dictate modifications in the nature of services provided, as well as in their number. If the legitimate interests of clients and third parties are not taken into account, the resulting quality of services provided could be too low. On the other hand, it is possible to find quality standards too high to be justified from a cost perspective . . . Practitioners may make more money by providing only high-priced, high-quality services (p. 196).

Occupational regulation must ensure that enough of the right kind of services are purchased.

In regards to the imperfect information problem, this
model argues that occupational regulation should reduce the transactions costs involved with consumer search for professional services. To deal with the asymmetrical character of information in regards to the quality of professional services, occupational certification, and more often, occupational licensing will be required. Public provision of information (as in the case of certification) will likely be more costly and less effective than licensure "where difficult probabilistic judgments are required" of consumers of professional services "to avoid mistakes" (Thompson and Jones, p. 82).³

Where informational problems are significant, regulatory policy must address the potential for demand-generation yielding excessive use of services. As Wolfson et al. argue, what is needed is regulation of "the suppliers of these services to ensure that practitioners do not take advantage of unsophisticated clients by exploiting the professional agency relationship" (p. 195). They contend that occupational associations should be encouraged to foster "strong allegiances to the profession and its norms," which would be "developed by members as part of their education and training," and which would "serve to enhance compliance with quality standards" (p. 212).

³ Leland (1979) offers a formal proof that the certification process entails elements of economies of scale and/or natural monopoly characteristics (i.e., externalities thwart the marketplace). These factors militate for compulsory licensing by a government agency.
In dealing with the presence of significant externali­ties, regulatory policy seeks to ensure that sufficient services are purchased to protect third-party interests. Regulation of the demand-side of professional services attempts to ensure that the appropriate quantity of services are purchased. Examples of demand-side regulation include statutory audits in accounting; the requirements of an architect or an engineer for the construction of certain kinds of buildings; and statutes concerning public safety and health in engineering (Wolfson et al., p. 195).

The discussion so far has highlighted features of labor markets in which they fail to achieve the optimal allocation of resources; this is implicitly uplifting a standard of economic efficiency (which would include both technical efficiency and allocative efficiency). This leads to a consideration of the normative elements of the market failure model. Economic efficiency refers to "the maximization of the value of total output." In the occupational labor market, this value can be maximized only if professionals are supplying services "in accord with consumer preferences and minimizing production costs in so doing" (Elzinga, 1977, p. 1192). Taking production technology, consumer preferences, and the distribution of income as given, efficiency as a goal of regulatory policy in regards to the professions means "the allocation of factors of production and professional service outputs that achieves a social Pareto optimum in which no individual can be made
better off except at someone else's expense" (Wolfson et al., p. 186).

Economic welfare is sometimes said to also involve the concept of equity. Under the rubric of equity are policies which seek to use regulation as a device for balancing social power or moving the income distribution in a less unequal direction. If there is an unequal allocation of bargaining power among parties in the market, "regulation may be justified in order to achieve a better balance" (Breyer, p. 32).

This model also posits fairness as a normative element. Fairness is a part of the issue of due process, both legal procedural fairness and substantive due process. There are at least two dimensions to this concept. Wolfson et al. emphasize that fairness in the context of occupational services means that "people in similar circumstances must be treated according to the same standard. Applicants for licensure, for example, ought to be judged on the basis only of qualities relevant to the practice of the profession for which they are seeking to be licensed." In addition, "policy enforcement cannot be arbitrary: decisions in individual cases must be taken in accordance with due process of law" (Wolfson et al., p. 187).

Two assumptions lie underneath the version of the theory of market failure that has been set forth so far: one is that "markets are extremely fragile and apt to operate very inefficiently (or inequitably) if left alone"; the
other is that "government regulation is virtually costless" (Posner, 1974, p. 336). There are some economists who acknowledge the possibility of market failure but nonetheless do not find it as palpable or remediable as has been suggested. They also hold out some different normative ends for regulation in labor markets. We turn now to an examination of this perspective as a separate component of the market failure model.

B. THE LIBERTY AND VIRTUE COMPONENT

Within the framework of the market failure model, there are those who would argue that nonetheless much economic regulation is undesirable. Adam Smith set forth the classic apologetic for the value of reliance upon a largely uninhibited marketplace to achieve social norms such as 'natural liberty.' While Smith recognized instances of market failure in the case of public goods and externalities, he laid much more stress on the role of consumer sovereignty and the discipline inherent in the market mechanism to deal with problems which certain groups in the economy claimed government intervention was required to solve. The 'liberty and virtue' component of the market failure model has several key features consistent with these themes.

Many economists recognize that the avowed objective of regulators in dealing with market failure is to promote economic efficiency. Noll (1985) observes that economists
have taken note of the fact that the actions of regulatory agencies themselves must be evaluated by this standard as well:

Despite their variety, all regulatory agencies make many decisions that, in principle at least, affect economic efficiency. The economics literature as well as regulatory law emphasizes the effects of regulation on static efficiency - that is, the effect of regulatory decisions on costs, prices, and product quality, given unchanging technology and consumer tastes. By controlling prices, profits, entry, and the attributes of products or processes, regulators directly alter the net economic benefits derived from the regulated industry. To the extent that regulatory rules counteract market imperfections, they contribute to economic efficiency; to the extent that they reduce production efficiency or confer monopoly market positions on regulated firms, they reduce efficiency (pp. 10-11).

Some economists contend that while there may be instances of market failure, the frequency of their occurrence and their impact are questionable. Moreover, the costs of governmental regulation have to be taken into account as well. Curing a market failure by regulatory intervention generates costs as well as benefits.

Much research on the effects of governmental regulation pictures regulatory agencies as "ineffective in dealing with market-failure problems such as environmental externalities and monopolistic control of markets." In addition the agencies are said to thwart technological and economic changes,4 "impose significant costs on consumers without

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4 Kirzner contends that regulation tends to interfere harmfully in the entrepreneurial process, and thus government failure is more significant than market failure:

Even if current market outcomes in some sense are
producing many benefits," and protect businesses from competition (Noll, p. 11).

Before considering these arguments more closely, it should be recognized that some might argue that these criticisms of regulation do not take account of the peculiarities of the market for professional services or the labor market. Thus the question might be asked, are there not features of these markets that give rise to acute forms of market failure?

Considering the market for professional services first, it can be argued that, while externalities and imperfect information or other market failure problems may exist, these characteristics alone do not differentiate "professional" markets from other types of markets. Even though there are recognized instances of market failure, the conditions for market failure apply equally to product markets as well as to professional services markets. In judged to be unsatisfactory, intervention, and even intervention that can successfully achieve its immediate objectives, cannot be considered to be the obviously correct solution. After all, the very problems apparent in the market might generate processes of discovery and correction superior to those undertaken deliberately by government regulation; deliberate intervention by the state not only might serve as an imperfect substitute for the spontaneous market process of discovery, but also might impede desirable processes of discovery the need for which has not been perceived by the government. Again, government regulation itself may generate new (unintended and undesired) processes of market adjustments that produce a final outcome even less preferred than what might have emerged in the free market (p. 13).
regards to the natural monopoly rationale, there is no reason to believe that the production function for occupational services should result in firms subject to increasing internal economies of scale, with the outcome being ever-declining cost curves. Likewise there is no reason to suppose that "firms supplying professional services are especially prone to market failure because of externalities in either the production or the consumption of the services." The potential for externality is not exclusive to the services market. In addition, the problem of consumer ignorance "is not endemic to professional services"; products may be subject to high search costs in order for consumers to satisfy their preferences just as well as personal services might be (Elzinga, 1980, pp. 108-109). Thus it has been concluded that

The bottom line is that there is no conceptual difference in markets for goods and markets for personal services. Either sector of the economy may have components subject to market power, externalities, or substantial information costs, there being no presumption that professional services are more disposed to market failure, and therefore less congenial to the discipline of the market mechanism, than markets for goods (Elzinga, 1980, p. 109).

The regulation of professional services can claim no special justification not applicable to product markets as well.

A similar argument may be made about the existence of unequal bargaining power in labor markets. It is questionable whether one can posit the presence of widespread monopsony power in labor markets. There is no reason
to suppose that workers are especially ignorant of alternative employment opportunities in any given bargaining relationship with management. Nor are there compelling reasons to suppose that workers are prohibited from seeking out these other job possibilities. Thus there is no special justification for regulation in this context.

Thus it is argued that the real question is one of fact; are labor markets characterized by market failures? If so, can government regulation improve on the results of the marketplace? If regulation is to serve the "public interest" in the sense that there is a maximization of the value of society's output, the rise in market efficiency (i.e., benefits) must exceed the costs of regulation.

What are the costs of regulation? It often leads to the restriction of output and the constraint of consumer choice. Consider each of these results in regards to professional services. Occupational licensing "imposes higher costs of entry into the occupation than would exist if the occupation were not licensed." These higher entry costs lead to a reduction in "the quantity of services produced in that occupation" and a higher price for these services (Rottenberg, p. 3).

How are entry costs raised in the labor market for professional services? Requirements for licensure such as experience and apprenticeship "extend the period necessary for entry; they make it more costly to enter, and more difficult to enter" (Rose, p. 194). Moreover, the regulatory
laws occupational groups obtain are often quite exclusionary. Shimberg and Roederer note that they include requirements such as "age, years of formal education, citizenship, high license fees, and residency - which bear little or no relationship to effective performance on the job." A state-approved licensing board, by erecting barriers to keep out practitioners from other states, in effect establishes for the licensed group "monopoly conditions which enable it to control the availability and cost of services and restrict competition by prohibiting advertising and competitive bidding" (p. 6). The rules that limit competitive behavior characterize such practices as "unprofessional conduct."

Such results run counter to the stated intentions of the advocates of occupational licensure. Kahn observes that

The avowed purpose of licensing doctors, barbers, prize fighters and drugs is not usually to have the government substitute its judgment for that of the market in determining, on economic grounds, how many or who should be permitted to enter the market, but only to assure that those who do enter are qualified - on professional, scientific, or technical grounds. But in point of fact, . . . the licensure is often economic, in motivation or effect, and does effectively limit the force of the competitive market (1, pp. 8-9).

By limiting competition, higher incomes are generated for the producers of professional services.5

5 It should also be observed that those who are excluded by licensing "make their way into other occupations; they are less productive in those second-best occupations than they would be in the licensed occupation from which they are excluded" (Rottenberg, p. 9).
Occupational licensure often fails to achieve its avowed purpose of improving the quality of services. Joskow and Noll argue that this can be seen by asking "whether service quality is higher in states with stricter regulation and, if it is, whether consumers are being denied access to lower-quality services, which, with the relevant information, they would prefer to purchase"; they claim that on a priori grounds one would suspect that quality is not improved by entry restrictions, because so little of the regulatory effect is in fact directed at issues of quality. Occupational licensing is usually for a lifetime, whereas a system designed primarily to ensure that practitioners were competent would subject professionals to periodic examinations (p. 33).  

Furthermore, it is not clear that either quality or safety are enhanced by licensure. Rottenberg (1980) argues that another deleterious impact of entry restrictions which raise the price of occupational services and reduce the number of practitioners is that "some consumers resort to do-it-yourself methods, and this sometimes results in lower-quality work and less safety than would occur if there were no licensing" (p. 6).

It is significant to note that occupational regulation differs from other types of regulation in that it tends to be self-regulation by means of licensure. One of the key

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6 It is also argued that examinations may not accurately test competence to practice the particular occupation. In addition, those who are targeted for disciplinary action are often industry "mavericks" or persons who have engaged in competitive conduct (such as advertising) rather than deceptive behavior (Rose, p. 192).
market failure rationales for occupational licensing is the protection of poorly informed consumers from incompetent practitioners. However, due to the principal-agent problem described here, occupational self-regulation may in fact be inadequate to deal with the demand generation problem associated with licensure.

Regulation can impose greater costs on the community than non-regulation. There are no market checks on allocative or productive inefficiency if a regulatory committee administers the pricing and resource allocation decisions. In addition, there is a continual problem of the licenser "being and remaining informed about consumer desires." The 'information-generating quality' of the market system is one feature that is most difficult for public regulation to duplicate (Elzinga, 1980, pp. 116, 122, n.39).

There are also costs associated with the regulation of labor markets so as to ameliorate unequal bargaining power. Regulation may take the form of legal support and protection for the process of collective bargaining between labor unions and management. The inefficiencies associated with this process are highlighted if we follow a definition of the labor union such as that provided by Reynolds: it is

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7 In addition, it is argued that the monopolistic position enjoyed by most regulatory agencies can lead to organizational slack (internal or X-inefficiency). Noll observes that "The insulation of agencies from markets for their outputs or equities should leave them with less incentive than a private monopolistic firm has to operate efficiently" (1985, p. 23).
"a group of labor suppliers who individually have little or no market control over wages and working conditions but who want to control (raise) compensation as a group." He notes that this particular definition makes unions no different from other forms of cartels (producers who attempt to act as monopolies): "... there is nothing different in principle between combinations of workers and combinations of sellers in other markets (businessmen, farmers, oil producers, physicians) who attempt to restrict supply and push up the prices of their services" (1984, p. 44). By granting labor unions special privileges in the law, such as exclusive representation via majority-rule voting by the employees of a unionized firm, wages are raised above the competitive level and production costs for the firm rise. Labor relations law which grants unions immunities from damages caused to non-union workers and to business firms also leads to reductions in economic welfare. In sum, restriction of entry has certain implications and tendencies wherever it is practiced, whether it deals with trade unions, or whether it deals with gas pipelines, radio stations, doctors, or barbers (Kahn, 1, p. 13).

The thrust of each of these arguments is that regulation in labor markets creates barriers to entry and, consequently, there is a reduction in consumer welfare. In the liberty and virtue component of the model, such barriers are seen as harmful restraints on trade which are quite often not justified.
If regulation is to serve the 'public interest' in the sense that the efficiency of the entire social system is increased, the rise in market efficiency (i.e., benefits) must exceed the costs of regulation. Making a comparison of the costs and benefits of regulation and non-regulation, the liberty and virtue component claims that economic welfare will be enhanced if employers and workers are given freedom to negotiate individually as well as bargain collectively where they voluntarily chose to do so. Likewise, greater output of professional services will be provided at lower prices if consumers are allowed a full range of choice among all occupational practitioners. Along these lines, Elzinga contends that both technical and allocative efficiency are achieved if the 'economic rules of the game' bar output restriction. That is, for the liberty and virtue component, economic freedom accompanied by output expansion is a key goal; competition is the means to this end, but not a goal in and of itself. The question revolves around what form the competition for the provision of professional services will take. This model prescribes a policy of preventing "restrictions of output without barring efforts to expand the market" for professional services (1980, pp. 110, 119).

The proponents of this view claim that certification, instead of licensing, can deal with the problems of market failure by allowing the forces of competition to operate. Elzinga argues that certification can be consistent with free competition and carry the potential for ameliorating
the asymmetric information problem. For example, "a group of professionals may elect voluntarily to establish a code of conduct which sets the quality standards they will maintain"; they might agree to "hire inspectors who can impose penalties on anyone in the association violating the terms of the agreement." By implementing such performance standards, "these firms are internalizing the externality of shoddy performance." Moreover, the professionals can "advertise that their behavior offers customers a superior buy relative to noncertified professionals." Thus certification has some quite attractive features: it "can be a means of economizing on information for consumers and internalizing on externalities for producers. As a result, it can efficiently expand the market . . ." (1980, p. 113).

Certification is an appealing alternative to licensure because it maintains the existence of substitutes for the consumer (both certified and non-certified practitioners). In contrast to licensing, under certification the number of persons who may practice a trade or occupation is not limited by state intervention. Accordingly, one clear benefit of certification is that supply of a service will most likely be greater than under licensing. And if we assume constant demand in both licensing and certification, prices should be lower in the certification case.

Certification is clearly more consistent with the principle of economic liberty. As Elzinga observes, "Unlike registration and certification, the licensing of pro-
professionals, by its nature, is inconsistent with a free-market allocative system." Can a case then be made for licensing under the liberty and virtue component of the market failure model? Only under the restrictive conditions that "market failure cannot be remedied by private exchange (such as by certification and advertising) as costlessly as it can be remedied by government identification and the outlawing of incompetent and unscrupulous practitioners." Such a case would have to be verified on cost-benefit grounds (1980, p. 114).

The liberty and virtue component claims that the discipline of the market mechanism often insures that product quality will be maintained. Along these lines, Davis and Helfand (1985) assert that "Accountability and responsibility is fostered by the demands of consumers, by competition in the marketplace, and by the competition of professionals for high-quality labor and management." The ultimate sanction against a wayward practitioner is the nonsponsorship of the market and the resulting failure of his or her practice (p. 12). The market system itself can be largely relied upon to deal with the various forms of market failure. It has a self-correcting mechanism to deal with these problems in professional services markets; it is a mechanism that works well enough to not require in most instances the measure of instituting occupational licensing.

In general, the market failure model features the normative end of regulatory policy of economic efficiency
(allocative efficiency). So far, we have seen market failure narrowly construed in terms of failing to meet some criterion of efficiency; for example, what consumers would buy of professional services if they were optimally informed. The liberty and virtue component acknowledges market failure, but differs over to what extent it is proper to rely on the market to accomplish these ends, and to what extent it is better to rely on governmental regulation. These are differences dealing with the positive aspect of the model: how do labor markets and markets for professional services work? In sum, proponents of the market failure model do not all agree that certain industries or occupations require regulation, but they agree that externalities and imperfect information are reasons for intervention within certain constraints.

The broad market failure model posits efficiency as a common goal that regulators are striving for, and should be striving for. Joskow and Noll call this emphasis on efficiency in the market failure model a "normative analysis as a positive theory." Its essence is that "one begins an analysis of a regulatory process with the assumption that its purpose is to maximize some universal measure of economic welfare, such as consumers' surplus or total surplus" (p. 36).

The liberty and virtue component takes market failure to involve more than just a failure in relation to economic efficiency alone. What distinguishes this key constituent
part from the broader market failure model is its focus on character formation. Thus my designation for this component highlights its focus on intrinsic normative values, the kind of substantive ends that characterized political economy as conceived in antiquity; it is a discipline dealing with regimes or ways of life. Thus the issue in labor market regulation is not merely fairness as substantive due process, but the "substance" underlying regulation; is a prudential way of life for man promoted by the institutional arrangements?

In this component of the market failure model, the politics of regulation are evaluated according to the criterion of "public spirit." Kelman (1987) describes public spirit as "behavior motivated by the desire to choose good public policy." He argues that "if the political process functions as it should, the process will serve as a school that helps mold character" (p. 81). The liberty and virtue component evaluates different forms of regulation in the labor market as to the kind of character formed; it asks, what are the laws which regulate occupations promoting in terms of industriousness and propriety? The reason why the exclusionary aspects of licensure are so harmful are not simply because they generate allocative inefficiency; they are deleterious because they take away an occasion for the promotion of moral virtue. This is the opportunity cost of not having full employment.

In this study 'substantive good' and 'public good' are
used interchangeably in reference to the liberty and virtue component. It should be noted that advocates of the broader market failure theory would claim that they are arguing that the 'public good' is promoted by regulation; efficiency and equity are in the 'public good' or 'public interest.' Likewise, those who hold to the interest group theory would contend that the 'public good' lies in deregulation which fosters greater economic freedom. Yet neither group would subscribe to character formation as the ultimate end of regulation. Thus when some advocates of market failure argue that occupational regulation should foster allegiance to the profession and its norms, they are utilizing an appeal to ethical standards, but for utilitarian ends. My usage of the term 'public good' in connection with this component refers to the substantive notion of the inculcation of virtue as an end in itself.

Certainly this component involves a measure of paternalism in labor market regulation. As was seen earlier, the informational problem is sometimes cast in quite an extreme light when it is posited that the individual is in a position such that he or she does not know their own best interests. This leads to a call for paternalistic measures that rely on the use of police powers by the state. Paternalism can be described as the view that it is justified to restrict a person's liberty of choice, without his consent, even when the person's action would affect himself only, when the person is not considered to be in a position to know his own best interests and
the behavior imposed is believed to be in those best interests (Kelman, 1981, p. 220).

Paternalism can also be necessary even if full and adequate information about a professional service is available in the marketplace. It is argued that individuals make irrational decisions. The regulator knows better than individuals what they want or what is good for them.

The use of police powers in regulating labor markets does not mean that all regulations are thereby lauded. For example, a judicious distinction can be made between the need for regulation of physicians and of beauty culturists; registration, certification, or licensure can each be scrutinized as to their efficacy in promoting substantive ends. The liberty and virtue component invokes a prudential consideration of the appropriate form of labor market regulation.

II. THE INTEREST GROUP MODEL

Another theory of economic regulation has arisen out of a perceived dissatisfaction with the market failure model. Posner (1974) has noted that the model contains no mechanism providing a link between the public interest and statutory enactments; there is no "articulation of how a public perception as to what legislative policies or arrangements would maximize public welfare is translated into legislative action" (p. 340). The existence of market failure is sufficient to generate a demand for regulation, but there is no mention of the mechanism that makes that demand effective.
This led to a re-examination of the purposes of regulation; is it truly designed to remedy market failure? What came to be questioned was not whether regulation serves the public interest (as those who hold to the liberty and virtue component of the market failure model might ask) but whether regulation in many instances is actually intended to serve the public interest. Many economists claim that regulation is often beneficial to regulated industries. They argue that the weight of the evidence suggests that regulatory agencies in many instances have not been pursuing in any systematic way the "public interest."

Consequently, economists began to view regulation as being procured by the regulated firms rather than being thrust upon them (McKenzie and Tullock, p. 220). Beyond just questioning the overall capability of government to compensate for market failure, it was thought that perhaps politicians and regulators were in fact endogenous actors in economic processes. That is, political agents, as economic actors, "respond to incentives created by political institutions and administrative processes" (Joskow and Noll, p. 36).

In sum, for many economists, "the traditional role of regulation in economic analysis as a deus ex machina which eliminated one or another unfortunate allocative consequences of market failure" was found to be wanting. Because regulation seldom seemed to work this way, the discipline came to focus on the influence of the regulatory powers of
the state "on the distribution of wealth as well as on allocative efficiency" (Peltzman, 1976, p. 211).

The interest group theory claims that regulation is a 'good' that is supplied and demanded much like other political goods. Politicians will supply government monopoly privileges and regulations to their constituents, individual firms or labor groups whose self-interest leads them to demand regulation. Regulation can take various forms, among which are the control of entry into the market by outside competitors, thus securing a greater income for the regulated party. Regulation is a device for transferring income to groups who actively demand it; well-organized groups will obtain it if they provide votes and contributions to politicians (Joskow and Noll, p. 36). Regulation is designed and operated primarily for the group's benefit.8

Thus, instead of claiming that regulatory mechanisms appear in response to market failures, this theory argues that regulation comes about as a means of wealth transfer.

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8 As Owen and Braeutigam observe, there are at least two different versions in which this purpose for regulation predominates. One version claims that "regulatory agencies are established for 'public interest' purposes, but subsequently they become the tools of the industry they regulate" (p. 11). Along these lines, Bernstein (1955) has argued that regulatory agencies have a life cycle of their own. As Joskow and Noll explain this version, the agencies "age," moving from "active advocates of generalized consumer interests to passive conduits of the interest of organized groups" (p. 37). The other version claims that "regulatory agencies are in fact created to serve the interests of the industry they regulate, as a direct response by congressmen to the demands of industry for cartel management" (Owen and Braeutigam, p. 11).
Where the market failure model is concerned with the allocative consequences of regulation, the interest group theory is occupied with the distributive effects of regulation.

Having stated in summary form the interest group theory, the outline of the rest of this section is as follows. First, the literature on this theory will be reviewed for a fuller understanding of the development of this model. We will consider how it applies both to unions and to occupational groups. We will also look more closely at the rent-seeking component of the theory, and also look at the role of the legislature, executive branch, and judiciary in supplying regulation. After considering the normative goals of the model, we will briefly discuss some of the most recent developments and extensions of the model, and conclude by describing how these models will be applied to the study of the economic conspiracy doctrine.

A. THE DEVELOPMENT OF THE INTEREST GROUP THEORY

It should be noted that Adam Smith also "deserves paternity" for this theory in its earliest form (Peltzman, 1981, p. 375). Smith observed the significance of interest group pressure for regulation in the eighteenth century. He recognized the role of guilds and corporations in demanding regulation, so as to effectively reduce competition and gain a higher price and higher incomes. The interest group theory utilizes the principles of self-interest and competition first articulated clearly by Smith. This is consistent with
Smith's conception of the discipline of political economy, where economics is seen as part of a broader social and political inquiry.

As noted, the interest group theory arose out of a sense of the perceived shortcomings of the market failure model. Its most primitive form is as the 'capture theory' of regulation. In this view regulation is a process by which interest groups seek to promote their private interests. As Tollison (1982) describes the capture theory, "there are a small number of producers who are able to overcome free riding costs and organize to wield complete (wealth-maximizing) influence over regulators." Though they suffer losses from monopoly-enhancing legislation, consumer interests "have no rational incentive to organize to resist regulations in favor of producers"; simply put, "it costs more than it is worth" (p. 591).

This version of the interest group theory is essentially the same as that of the Marxists, with some modifications. They argue that big business controls regulatory agencies; they are set up to serve the businesses they regulate. American government is an instrument for protecting capitalist interests; regulatory agencies are agents for increasing the wealth of producers, usually by establishing a legally enforceable cartel which aids the capitalist in his exploitation of his labor force. Kolko (1965) uses the Marxist argument to explain the birth of the Interstate Commerce Commission and the regulation of railroads.
The Marxist regulatory theory has several fatal flaws. The flaws in the Marxist theory "arise from its simple dichotomization of society into two interest groups, capitalists and workers. Only by adopting a model of society as a complex combination of numerous interests can one explain the diversity of regulatory institutions." Moreover, oftentimes "regulatory agencies deal with policy issues having far more complexity than a straightforward conflict between capitalists and workers" (Noll, p. 26).

Stigler (1971), Posner (1974), and Peltzman (1976) have set forth a much more sophisticated version of the interest group theory. Stigler's article is the seminal work for the theory. As Romer and Rosenthal observe, what Stigler sought to do was "to develop a theory of government intervention in economic affairs that would approximate the same level of generality as neoclassical microeconomic theory" (p. 75). As we have previously noted, Stigler defines regulation quite broadly: it is an attempt by the state to use its legal powers to direct the economic conduct of nongovernment bodies; it includes virtually all economic acts of government (1981, p. 73). Stigler's definition includes all public interventions in resource markets, including labor markets.

In essence, Stigler explains regulation as a good (service) which is allocated by means of demand and supply. The demanders of regulation face costs and receive benefits from acquiring regulation. Ekelund and Hebert highlight a
key feature of this model; they point out that Stigler recognizes that "regulation is almost never an unmixed blessing." Regulated occupations must submit to certain rules, regulations, 'standards of conduct,' or other interferences. These are costly and reduce the net return to the regulated firm, but as long as the net benefit is positive and lobbying costs are not prohibitive, those who stand to gain from the regulatory process will demand it (p. 532).

In regards to the demand for regulation, Stigler notes that an industry or occupation may seek a direct cash subsidy, control over entry by new rivals, the suppression of substitute and encouragement of complementary goods and services, and price controls which buttress their ability to practice price discrimination (1971, pp. 4-6). Since we are concerned with restraint of trade in this study, it is particularly important to note that Stigler sets forth the general hypothesis that "every industry or occupation that has enough political power to utilize the state will seek to control entry" (p. 5).

Stigler observes that as the demand for regulation works out, it becomes a question of which group has the highest effective demand. As Peltzman has summarized Stigler's model, the producer interest tends to dominate because producers as a small group "have a large per capita stake," while consumers as a large group have "more diffused interests." Regulations are enacted that harm these numerous consumers by only a small amount but benefit the few producers by a large amount. How does Stigler explain this regu-
larity of small group dominance in the regulatory process? The answer lies essentially in "the relationship of group size to the costs of using the political process" (Peltzman, 1976, p. 212).

Stigler observes that the political process in a representative democracy leads to dominance by a small group. Stigler notes first that political decisions "must be made simultaneously by a large number of persons (or their representatives) . . ." This condition of simultaneity "makes voting on specific issues prohibitively expensive." As a result, the voters rely on a representative democracy (p. 10). Hence, "only those groups that can provide enough political returns to be represented get their agendas enacted" (Romer and Rosenthal, p. 77).

Stigler also argues that "the democratic decision process must involve 'all' the community, not simply those who are directly concerned with decisions . . . the political decision process cannot exclude the uninterested voter . . ." This presents a problem because "the political system does not offer good incentives like those in private markets to the acquisition of knowledge" (p. 11). As Peltzman further explains, voters then may be willingly ignorant about the significance of an issue: "the voter must spend resources to inform himself about its implications for his wealth" and the likely stance of a particular politician on the issue itself (p. 213). Ekelund and Hebert draw out the implications of this feature of the model:
Information acquisition is a good with costs and benefits. An individual has no incentive to acquire costly information on issues of no concern to him or her, but the individual votes on these issues anyway, ordinarily through a full-time representative affiliated with a political party (p. 533).

Politicians may then vote for economic policies that injure the large group of voters (consumers) without a great deal of fear of not being reelected.

The effective size of groups which compete for regulation is limited by the costs of organization. As Peltzman describes Stigler's theory, "It is not enough for the successful group to recognize its interests; it must organize to translate this interest into support for the politician who will implement it" (1976, p. 213). This is very difficult for large, diffuse consumer groups to accomplish, but much easier for small, concentrated producer groups to achieve.

Stigler argues that the political power of producers (industries) greatly exceeds that of individual citizens. He explains that the industry seeking regulation provides "two things a [political] party needs: votes and resources." These resources include "campaign contributions" and "contributed services" (p. 12).

In return for these provisions, Stigler argues that politicians as regulators supply regulation in the various forms mentioned earlier. This regulation often entails deadweight losses (higher prices and lower output than in competition). The implication from Stigler's theory, as
Romer and Rosenthal note, is that the regulator must recognize that regulation will not "generally pass by a direct majority vote, even if the industry that receives the benefits is in a majority." They further observe that

Indeed, the number of losers from most regulation of the type Stigler deals with (rate and entry regulation, e.g., of transportation, or occupational licensing) significantly exceeds the number of gainers. So even without deadweight losses, we would not expect majority rule to support regulation (p. 77).

Taking account of this feature of the political environment, political parties act as the entrepreneur in Stigler's model. In effect, they "aggregate political producers by forming winning coalitions" (Romer and Rosenthal, p. 78).¹⁰

Some have interpreted Stigler's model as a theory of "producer interests," thinking that Stigler portrays this group as most often tending to prevail over the consumer interest. But it is more than a refined version of the capture theory; Stigler's model admits the possibility of capture by interest groups other than the regulated firms.

Moreover, Stigler's theory is only superficially similar to the Marxian model depicting capitalists directing political institutions for their own gains. As Ekelund and

¹⁰ Romer and Rosenthal also observe that Stigler makes "no distinction between the political arena (legislature) and the administrative arena (regulatory agency). In this view regulatory agencies are merely neutral reflections of the political process." The regulatory agency and the political entrepreneur are conflated into one agent (p. 78). Peltzman (1976) and Becker (1983) also fail to make a distinction between the different institutions which supply regulation.
Hebert observe, in Stigler's model the capitalists do not always win out: "Groups of any kind, e.g., labor, farmers or consumers, may institute or take over the regulatory system at different times. In Stigler's view regulation benefits politically effective groups" (p. 532). Tollison adds that under certain configurations of costs and benefits some larger producer groups (e.g., farmers and union members) will find it feasible to seek wealth transfers from the state, while some small producer groups (e.g., automobile firms) will organize mainly to resist negative regulation. Moreover, any group of sellers or buyers potentially qualifies as an interest group in this theory. Labor and capital can form potent interest groups in Stigler's theory and will sometimes (often?) find themselves allied in the pursuit of a wealth transfer for a particular industry (1982, p. 591).

Thus the model insists that economic regulation serves the private interests of various politically effective groups.

Recognizing the supply and demand elements in Stigler's model, Posner (1974) utilizes the economic theory of cartels to highlight features of both sides of the market for regulation. Posner argues that in the political market the essential commodity being transacted is a transfer of wealth. Constituents are on the demand side and their political representatives are on the supply side. The effect of a regulatory device as an entry control "is the same as that of cartelization," i.e., raising "prices above competitive levels" - hence the demand for regulation (p. 344). The market will distribute more of the good (regulation) to those whose effective demand is highest.

The members of the coalition demanding regulation must
The members of the coalition demanding regulation must agree on the form of regulation. As Posner observes, any one member "will have some incentive to avoid joining in the efforts of his group to obtain the regulation" (pp. 344-345). Posner adds that

If the regulation is forthcoming, he will benefit from it - he cannot be excluded from the protection of a general regulation, just as a seller cannot be excluded from the benefits of his competitors' charging a monopoly price - but, unlike the active participants in the coalition, he will benefit at no cost (p. 345).

This reluctance to cooperate in the cartel is more easily overcome the fewer the prospective beneficiaries of a regulation - it is easier to coordinate their efforts and it is also more difficult for any one member to refuse to participate in the collective efforts. Posner notes that the homogeneity of interests of the members is also significant: "The more homogenous their interest in the regulation in question, the easier (cheaper) will it be for them to arrive at a common position and the more likely will it be that the common position does not so disadvantage one or more members as to cause them to defect from the group" (p. 345).

In regards to the supply side of regulation, the political system must be accounted for. Following Stigler, Posner asserts that in a democratic system, "legislation is awarded by the vote of elected representatives of the people." Posner observes that

Willingness to pay is also important in the democratic as in the entrepreneurial political system, since legislators are elected in campaigns
in which the amount of money expended on behalf of a candidate exerts great influence on the outcome. However, unlike the case of an entrepreneurial system, in a democratic system the free-rider problem remains a serious one: it may limit the ability of an industry or other interest group to make substantial campaign contributions (p. 347).

This leads Posner to argue that one of the characteristics which normally discourages cartelization ("a large number of parties whose cooperation is necessary to create and maintain the cartel") in fact encourages regulation. He contends that

Large numbers have voting (and, potentially, coercive) power and also increase the likelihood of an asymmetry of interests that will encourage broad participation in the coalition seeking regulation. In addition, large numbers, and other factors that discourage private cartelization, increase the demand for protective legislation (p. 347).

Private cartelization is not so feasible in areas like labor and the professions, and thus instances of protective legislation are more often observed in these sectors of the economy.

Posner goes on to describe some of the other institutional features of the supply of regulation. He notes that legislators "delegate much of the regulatory function either to the courts or to administrative agencies. In the area of economic regulation the legislative choice has generally been the administrative agency rather than the court" (p. 346). This falls in line with the interest group theory, because the court is more insulated from political control than the agency. Posner says that
The terminal character of many judicial appointments, the general jurisdiction of most courts, the procedural characteristics of the judicial process, and the freedom of judges from close annual supervision by appropriations committees, all operate to make the courts freer from the interest group pressures operating through the legislative process, and more disposed to decide issues of policy on grounds of efficiency, than any other institution of government - specifically the administrative agency, where these features are absent or attenuated (p. 351).

Posner makes some key observations in regards to the interest-group explanation of regulation. He contends that the simple capture theory would be supported if one showed that the licensure of physicians benefited them rather than their patients, for this simply demonstrates "that interest groups influence public policy." For this type of case study to support the interest group theory it would have to show "that the characteristics and circumstances of interest groups" were of such a type that this theory "would have predicted that they, and not some other groups, would obtain the regulation" that they are observed benefiting from. Posner adds that "Otherwise any legislation that benefited some group at the expense of the general public would count as support" for the interest group theory (p. 352).

Noll elaborates on the need for clarification of the interest group theory. He explains that to avoid tautology, a theory of regulation "must include an explanation of why certain groups receive benefits as successful purchasers of institutional protections while others receive no benefits at all but bear some costs through the economic ineffi-
ciencies of administrative management . . . " The theory must also "describe the factors that determine the relative sizes of these amounts." This will inevitably involve a theory of "the relationship between interest-group characteristics and the effectiveness of groups in the political decisionmaking process" (Noll, 1985, p. 27).

Peltzman (1976) addresses some of these concerns and makes a quite important contribution to the interest group theory by generalizing Stigler's model to include the role of opposition groups in determining regulatory behavior. The simple goal of the contending interest groups is wealth redistribution through the regulatory process.

Instead of following the Marxian notion that "regulatory agencies were created with the purpose of serving a single economic interest," Peltzman takes account of the fact that regulatory controls have been "sought by consumer as well as producer groups" (Thompson and Jones, p. 98). In Peltzman's analysis politicians gain support from both producer and consumer groups.

Peltzman provides a more extensive explanation of the supply side of the market for regulation than Stigler. Peltzman portrays the regulator as essentially equivalent to an elected politician. He arbitrates among the interest groups in seeking to maximize his majority - that is, his probability of election or re-election. Peltzman assumes that politicians want to maximize vote margins (p. 214). As Owen and Braeutigam explain, the politician utilizes "the
redistributive powers of regulatory agencies to benefit groups that can supply these vote margins." They add that Peltzman's model thus becomes "a special case of the general proposition that government will seek to redistribute income to benefit majorities of the electorate . . ."; the model "is a framework in which the purpose of regulation is to redistribute incomes in favor of groups that will supply electoral rewards to the politicians who engineer the redistribution" (p. 11).

Peltzman develops a model in which there is no market failure. As Keeler points out, Peltzman assumes "constant returns to scale with no externalities . . . the regulator sets rates above costs for at least some of the users of whatever service is regulated and then uses the resulting profits to pay off other groups" (p. 107). Peltzman goes on to describe a political or regulatory equilibrium in which the regulator maximizes political support by distributing the benefits from regulation among different interest groups. As Hirshleifer observes, it is a outcome "where a balance is struck among the marginal costs and benefits of the different interest groups affected . . ." (p. 243).

Peltzman then analyzes how the regulator's maximizing behavior is affected by changes in different parameters. He looks at the impact of a change in the political support function, the function describing opposition to regulation, and the cost of organizing a group for political support (pp. 220-221). He also considers the significance of
exogenous changes in such factors as technology and demand for "price-entry regulation" for regulatory equilibrium (pp. 222-227). As Hirshleifer notes, the impact of these changes is such that "It is then generally in the political interest of the regulators, given certain diminishing-returns conditions, to 'correct' the new market solution that would ensue." The regulatory solution will tend to allocate some benefits "to all interest groups involved, if there is a social gain to be distributed" (p. 243).

Though some benefits are likely to be distributed to all interest groups, regulation is more likely to be applied to certain industries. As Keeler notes, these industries tend to be the ones "where firms have the most to gain by forming political coalitions." In atomistic industries, such as the medical professions, "there may be an especially strong incentive to coalesce and seek regulation, because in competitive industries the potential for monopoly rents is greatest" (p. 107).

Peltzman finds several key results from his model. He notes that "the costs of using the political process limit not only the size of the dominant group but also their gains." This result has important implications "for entry into regulation and for the price-output structure that emerges from regulation" (p. 213). In addition, the intragroup equilibrium aspects of Peltzman's model generate some implications of entry, both for regulators and for regulated firms:
there is a clear incentive for regulators to limit entry (or seek the power to do so) quite apart from considerations of the producer interest. This stems directly from the fact that the politically appropriate price structure is invariably discriminatory (in the economic sense) when costs differ among customers . . . (p. 239).

Peltzman finds that the vote-maximizing regulator trades off the benefits he gives to producers relative to the costs imposed on consumers in the process of setting regulated prices. Finally, Peltzman contends that regulation will tend to be weighted more heavily toward producer protection in periods of depressed economic activity and toward consumer protection in expansionary periods (p. 227).

Peltzman's regulator is very similar to a representative in a legislature. Hirshleifer argues that "this identification of the regulator with the elected politician is too radical a simplification." He observes that different types of constitutionally empowered agents on the political scene - bureaucrats, judges, legislators, and elected executives - each bring different motivations, authorities, and constraints into the process of political exchange that leads to the final regulatory outcome (p. 242).

The public choice school of analysis more fully recognizes these distinctions; it assumes that "agents in the political arena, as in the economic arena, are rational individuals, optimizing in the context of institutional environments that define constraints and opportunities" (Romer and Rosenthal, p. 77). The public choice school lends a rent-seeking component to the theory by recognizing that "politicians" of various forms (members of each of the three branches of
government) obtain wealth redistribution through the regulatory process.

B. THE RENT-SEEKING COMPONENT

James Buchanan and Gordon Tullock are the leading figures in developing the public choice school in economics. This school of thought has an interesting relationship to the Stigler-Peltzman model. In developing a theory of regulation, Stigler's goal has been described by Romer and Rosenthal as "nothing less than the construction of a price theory of political economy"; they add that by calling for this type of analysis, Stigler joined "the already developing public choice school's approach to the study of political processes" (pp. 75, 77). Similarly, Peltzman's contribution is consistent with the public choice emphasis on constitutional politics. Peltzman "goes beyond the conventional limits of economics to show how politics in the form of regulation changes the rules of the contest in the market arena"; it is a game "played to change the rules or conditions of market rivalry" (Hirshleifer, p. 244).

Further comparisons can be made between the "Chicago" and public choice schools. Both seek to explain regulation based on a supply and demand model in which interest groups compete for regulatory favor. In the Stigler-Peltzman version, the underlying preferences of the interest groups are weighted more heavily; the regulator is concerned to deal with deadweight loss among the interest groups. In the
rent-seeking version proferred by those utilizing the public choice approach, the regulator is not so concerned with all the various interest groups; producer groups are relatively stronger in influence.

Two key areas in which the rent-seeking component makes a distinctive contribution to the interest group theory are (1) the significance of the social loss due to rent-seeking, and (2) the role of political agents in rent-seeking. The Stigler-Peltzman model only points to the deadweight consumer losses due to entry control and other monopoly privileges given by the state to labor and occupational groups. The rent-seeking model highlights even greater social waste due to the competition for rents by interest groups and the rent dissipation that occurs as a process of this competition. Furthermore, the Stigler-Peltzman version basically fails to specify the role of the politician in the voting process; the politician is basically treated as a passive broker among private rent seekers, redistributing wealth in response to competing private demands.11

11 Ben Zion and Eyton (1974) develop a similar model; they show that "via political contributions, there is at least a limited market in which political power can be 'bought' by economic resources" (p. 2). They depict contributions made by organizations like business firms, labor unions, trade and occupational associations, and other organized "pressure groups" as "investment expenditures" (p. 4). In their view, "pressure groups serve as intermediaries between individuals and the government." These groups "try to influence the policy formation in a manner advantageous to the individuals belonging to the pressure group." They are successful in their endeavors by means of monetary contributions and encouragement to politicians "to vote in a certain way." In exchange, they get "a policy
contributors to the interest group theory from the public choice school make the politician's role much more explicit. In seeking to optimize their own interests, politicians impact upon the entire economic system, through the supply of economic regulation. Each of these distinctives of the rent-seeking component will be discussed in turn.

Public choice theory claims that democratic governments act through a particular set of institutional arrangements. As in our previous discussion of the "Chicago school" version of the interest group theory, the key elements in the regulatory process in a representative democracy include political parties, bureaucracies, and special-interest groups. Political actors within these institutions are assumed to act according to their own self-interest. Public choice theory contends that, unlike the market, "the political setting is a non-proprietary setting where individual agents do not always perceive the full benefit and cost of their decisions." The constraints on behavior in the market and political settings are different (Tollison, p. 589).

The concept of principal and agent relationships described earlier are often utilized by public choice theorists. In a political setting the agent (politician) agrees to perform a service for the principal (voter). It is likely that the agent will not always act in the beneficial to their constituency" (p. 4, n.10).
interest of the principal, particularly if the behavior of the agent is costly to monitor. Politicians are competitors maximizing returns (power, position, votes, etc.) under certain constraints (reelection, for instance). Managers of political firms (bureaucracies) do not have as great an incentive to control costs as do managers of private firms; it is costly for voters to delimit shirking by political managers (for example, through recall). In sum, as Tollison notes, political agents face different constraints on their behavior than do private agents because the principals in the two cases "face different incentives to control the behavior of the agents" (p. 589).

These elements form the framework for the rent-seeking component of the interest group theory. Politicians distribute wealth or "rents" to various producer (and consumer) groups. The pursuit of these benefits is known as rent seeking, which may be defined as "the expenditure of scarce resources to capture an artificially created transfer" (Tollison, p. 578).

The pursuit of monopoly rents by various interest groups has been shown to be part of the social cost of monopoly in an important paper by Tullock (1967). Tullock distinguishes between "the existence of widespread government-sponsored monopoly and detailed regulations of an inefficient character" (static inefficiencies), on the one hand, and "the activity of getting a monopoly or some other government favor", on the other, which is known as rent
seeking (1984, p. 224). Rent-seeking activity is the means by which an individual or group seeks to change regulation in their favor or protect themselves against undesirable regulation. Tullock contends that the costs of monopoly to society are greater than the familiar welfare triangle which measures static inefficiency (deadweight consumer loss); they also include the resource investment devoted to acquiring a monopoly position involved in rent-seeking activity. The welfare loss from monopoly includes not only "the lump-sum transfer from consumers to the monopolist" (Tollison, p. 581); if resources are spent in the pursuit of a government monopoly which generates rents, these resources are wasted from a societal standpoint. Tollison adds that expenditures on lobbying and other methods of obtaining rent "add nothing to social product (they are zero-sum at best)," and "their opportunity cost constitutes lost production to society" (p. 576).

According to the rent-seeking component producers demand regulation "if the expected political rents net of the cost of organizing and procuring favorable legislation are positive . . ." (McChesney, p. 103). However, securing a monopoly by influencing the government is essentially a competitive industry. This means that, as Tullock has observed, "resources will therefore flow into the activity of getting the monopoly and will continue their flow until the present discounted value of the resource investment equals the present discounted value of the monopoly, taking
account of risk" (1984, p. 228). The profits which were once seen as a transfer from consumers to the monopolist are better seen as "something which the monopolist has obtained by investment of resources and, hence, is a net social waste . . ." (p. 228) in addition to the deadweight loss.12

The rent-seeking component also highlights the fact that politicians have a monopoly of their own. They are not passive brokers in the process, but rather are out to gain rents for themselves. This is in contrast with the "Chicago" version of the interest group model, which assumes that politicians "respond to private demands for rents with a supply of regulation but do not actively enter the market for rents with their own demands." McChesney has observed this is consistent

with the consumer-sovereignty model of private markets, but the applicability of that model to the political market is questionable. Clearly a politician himself actively seeks votes, campaign contributions, and other forms of recompense, contracting to receive a supply of goods or services from private parties in response to his own demands (p. 104).

McChesney considers the opportunities for political gains from activities other than rent creation. He pictures politicians as "independent actors making their own demands to which private actors respond." He develops a model which demonstrates "how politicians reap returns first by

12 Benham (1980) argues that the demand for occupational regulation involves more than merely rents. Security is also an important goal; professionals are trying to "hedge against a fall in their career earnings" by supporting different forms of regulation (p. 14).
threatening and then by forbearing from extracting private rents already in existence. These private rents . . . represent returns to their owners' entrepreneurial ability and firm-specific private investments" (p. 102). The gains from restriction of competition (rents) are then dissipated in lobbying or legal fees.

So far we have seen that the interest group theory does not consider government to be a "monolith," but a "complicated network of individuals, each with an incentive to maximize his own interest" (McChesney, pp. 101-102). We now turn to a survey of how these insights are applied to the role of the legislative, judicial, and executive branches in supplying and enforcing regulation.

C. REGULATION AND THE DIFFERENT BRANCHES OF GOVERNMENT

The interest group theory makes some specific claims about economic legislation; it argues that statutes are often enacted in the interest of organized coalitions who expect to obtain specific benefits from these same laws. Following this theory, we would anticipate that legislation regulating the conduct of a professional group or union would benefit the laborers in these groups, "since they would have the most to gain from such legislation," as well as other interest groups (Kau and Rubin, 1979, p. 366).

There have been several empirical analyses of the interest group theory in relation to legislation. In particular, these studies focus on the question of the
behavior of politicians in relation to the "public interest" and constituent interest. Kau and Rubin (1979) seek to distinguish between three potential explanations for the vote of a legislator on a particular bill: the influences of self-interest, logrolling, or ideology. That is, "the bill may be in the economic interests of his constituents"; or the congressman may vote "for this bill in return for the vote of another congressman on a bill which is important to the first congressman"; or, "the representative (or his constituency) may be ideologically in favor of the bill."

Kau and Rubin describe this last motivation as based on the belief that "the bill will make the country a better place to live, independently of any direct self-interest motivation" (p. 366).

They find empirical evidence that ideology plays a key role in explaining voting by congressmen on bills with primarily economic elements; "there appears to be something that is significantly and systematically associated with voting which correlates with the ratings given to congressmen by ideological groups" (p. 384). However, they acknowledge that the ideological variable may reflect some economic interest in some unmeasured way. It should be noted that they find that on many issues, unions have a significant influence on the votes of congressmen.¹³

¹³ Kau and Rubin (1981) undertook another study which more specifically explored the impact of labor unions and campaign contributions on the voting behavior of congressmen. They examined eight bills that bear on labor issues.
In another study, Kau, Keenan, and Rubin (1982) look more closely at the question of whether economic factors alone affect legislation. They examine the roll call voting behavior of congressmen, seeking to relate this variable to "economic and other characteristics of constituents and of donors to campaigns" in order to better understand "the characteristics of economic agents who favor or oppose various laws" (p. 271). They are concerned with the patterns of laws favored and opposed by various interest groups.

Their study sought to discover "the impetus for laws that serve to increase the role of the government in regulating the economy." One of their findings raises questions about the implications of the interest group model; they report that "most of the force behind such laws may come from ideology." On the other hand, they also find that "unions seem to be active in the political sector of the

They determined that unions "use political contributions in a systematic and coordinated manner" (p. 133) to influence congressional votes on minimum wages and wage-price controls, and that "both union membership and contributions received from unions are significant in explaining the voting behavior of representatives . . ." (p. 144).

They hypothesize that "voting by Congressmen is a function of constituent characteristics and campaign contributions," while voting by constituents for Congressmen is "a function of voting by the Congressman on bills affecting constituents, seniority of the Congressman and money spent in the election campaign." They further assume that "contributions by donors are assumed to be a function of the voting behavior of the Congressman and his seniority." An empirical test generates results that support this specification (p. 288).
economy and seem to favor regulation and increased govern­ment intervention; business seems to oppose such laws" (p. 289). The first result was challenged by Peltzman in an article employing a different type of modeling strategy.

In this study, Peltzman (1984) analyzed congressional voting behavior with a simple principal-agent model. Voters are principals and legislators are their agents; "political competition constrains legislative agents to serve the interests of those who 'pay' for their services." Payments take the form of votes, campaign funds, and "other forms of political currency" (p. 181).

Peltzman seeks to show, contrary to previous studies, that party and ideology have much smaller roles in deter­mining legislative voting behavior, while the interests of constituents plays "a far larger, even dominant, role" (p. 183). Based on an empirical study, he concludes that "generally, the larger and more well defined the wealth stakes in a vote, the more important are constituent characteristics in explaining their agents' behavior" (p. 184). Thus he writes, "The tendency for legislators to shirk serving their constituents' interests in favor of their own preferences (ideology) seems more apparent than real" (p. 210).15

15 Denzau and Munger (1986) seek to modify the interest group theory to more fully account for the supply side of regulation. They argue that the attempts by Kau and Rubin, Peltzman, etc. to explain the effects that interest groups have in influencing legislators and legislation by using "district-level aggregate data to measure the effect of
We have seen that in the interest group theory, legislation (such as a law restricting entry into an occupation or the labor market) is supplied to organized coalitions that provide votes and campaign contributions. In order for interest-group politics to operate in the legislative arena, there must be stability. Landes and Posner (1975) argue that stability is provided by granting the judiciary independence, that is, giving judges tenure for life. The value of legislation obtained by interest groups is enhanced if these jurists rarely nullify past legislative enactments (pp. 878-879). Landes and Posner thus contend that "the existence of an independent judiciary and the constitutive rules of legislative bodies (such as the requirement of a majority vote to enact legislation) are methods of imparting durability to an initial legislative
demographic and other regularities of constituency on roll-call voting behavior" are limited by the fact that this kind of data is unable "to measure accurately lobbying activity, constituent interests, and the preferences of legislators." Thus, "rather than explicitly modeling these disparate but important influences, the economic studies have simply identified regularities in the characteristics of interest groups and legislative voting behavior or policy outcomes." They propose a theoretical model of the American supply of public policy, and show that "it yields testable implications about which interest groups and which sets of voters are likely to be served" (p. 90). Assuming that legislators seek to maximize votes, they derive an explicit "supply price" (or cost) for policy. They find that "the amounts interest groups must offer a legislator for his services" depend on "that legislator's productivity and the preferences of the voters in his district" (p. 91).
judgment protecting some group" (p. 892).16

In their analysis, legislation passed in a previous legislative session could be nullified by jurists who are subservient to the current membership of the legislature. As they explain, "Judges which are merely agents of the current legislature" could damage or weaken the 'contract' between the enacting legislature and the group that procured the legislation by using their "interpretive leeway to rewrite the legislation." On the other hand, an independent judiciary would "interpret and apply legislation in accordance with the original legislative understanding . . . " (p. 879).17

This reasoning is based on the fact that it is in the interest of independent jurists to interpret statutory law

16 Crain and Tollison (1979) explain executive vetos as another means of enhancing the durability of legislation, functionally equivalent to the independent judiciary. They see an analogy "between the veto power of the chief executive and the nullification power of the independent judiciary" which Landes and Power have overlooked. They contend that "the veto power raises the costs of reneging on previous legislative contracts." Thus they expect "to observe more vetoes in cases where attempts are being made to renege or to alter substantively previous legislative contracts with special interests" (p. 557). Moreover, the veto power increases the returns from these contracts by making them harder to repeal (p. 560). As they point out, "The fact that vetoes are sometimes overridden provides a rationale for the role of the independent judiciary in serving as a longer-term guarantor of legislative bargains" (p. 561).

17 Landes and Posner argue that administrative regulatory agencies are examples of the "dependent" judiciary; the ICC "has some indicia of independence but many fewer than the federal courts" (that is, "its members serve for limited terms" and there is rapid turnover) (pp. 887-888).
according to its original import, for "the legislative and executive branches do have means of coercing the [independent] judiciary." Landes and Posner assert that

The value (both social and private) of courts is a function in major part of the predictability of their decisions, and decision according to the original meaning of a statute rather than according to the evershifting preferences of successive legislatures is probably an important source of that predictability . . . the ability of the courts to maintain their independence from the political branches may depend at least in part on their willingness to enforce the 'contracts' of earlier legislatures according to the original understanding of the 'contract' (p. 885).18

The interest group perspective on the judiciary presents a stark contrast to the view of judicial interpretation held by the other major theory of regulation.

The market failure model and its liberty and virtue component would understand an independent judiciary to mean jurists who are committed to certain principles and not driven by interest-group pressures. In the interest group model of the judiciary set forth by Landes and Posner, jurists "do not enforce the moral law or ideals of neutrality-

18 Landes and Posner argue that the more a given legislature's jurisdiction is localized, "the less scope it will have for enacting protective legislation. Citizen mobility limits the effectiveness of schemes of redistributing wealth from one group to another at the state and local levels." In addition, "the regulation of a product or service is less effective the more limited the jurisdiction of the regulatory authority, because the providers are more mobile within a more limited area." Independent jurists are less important in regards to the durability of legislation for regulation that is more confined to a given area. As Landes and Posner point out, "The interest groups will seek durable compacts from state and local legislatures anyway, so why should the political branches pay the price of an independent judiciary?" (p. 891).
ty, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures." (p. 894). That is, the judiciary is "indifferent to the ethical content of the legislative or constitutional provisions that the court is being asked to enforce" (p. 895, n.40). Landes and Posner do concede that "since the judges are independent, an appeal to principles may be effective courtroom or law-review advocacy" (p. 894).

The insights into regulation afforded by the interest group theory have some significant implications for understanding the behavior of unions and occupational groups in relation to public policy.

D. REGULATION IN THE LABOR MARKET

As applied to the actions of various labor groups in the political marketplace, the interest group theory regards unions as "rent-seeking agencies." Unions are pictured as attempting "to redistribute income in their favor at the expense of other groups in society." Applying Stigler's insights into the benefits of regulation, Hirsch and Addison further explain that union gains may accrue through "direct money subsidies, control of entry, control of production of complements and substitutes, and control of market price." Correspondingly, in the pecuniary marketplace, unions can gain at the expense of (respectively) taxpayers, consumers, and other workers. The latter are generally non-union workers, but the gains could conceivably be won at the
Control of entry is especially significant. As Hirsch and Addison explain, monopoly rents obtained by unions can be eroded through two means: "the rising price of unionism and the incentives provided firms and consumers to make substitution in production and consumption." Therefore unions turn to governmental powers for help in preventing such an economic reaction: "The strength of this market escape route to labor cartels may be attenuated or even blocked if unions can gain the assistance of the state" in barring competition (p. 274).

Union membership or collective bargaining coverage can be treated as a public good; once it has been provided, it is nonrival in consumption so that use by one person does not prevent its use by another. Along these lines, McKenzie and Tullock observe that

Any effort that a union makes to restrict the labor supply and raise wages in a particular labor market is a public good to the workers in that labor market. If the wage is increased through labor supply restrictions, some workers must bear the cost of bringing about those restrictions; some group of workers must refuse to work (strike) and must be willing to bargain. However, if the group of striking workers retains their jobs and receives higher wages, all workers in the market benefit from the group's actions (p. 276).

They note that collective action of this type is much more likely to be achieved within a small group of employees than in a large one. A worker in a large group "represents a very small fraction of the total labor supply." His individual actions (such as participation in a strike) are "insignifi-
cant in the context of the labor market" (towards the goal of raising the wage rate). Thus they observe that

The market wage will be the same with or without the person's participation in the large union movement. Therefore, although all workers in a labor market may sense the benefits of unionization, they may fail to participate in any movement toward that end. They have insufficient private incentive to incur the implied costs (lost income, etc.) of participation in the large union movement; their incentive is perverse — to take a 'free ride' on the activities of other workers (p. 276).

Hirsch and Addison note that the implications of group size mean that "rent seeking will be relatively more attractive to small, homogeneous unions (e.g. craft unions) because unions with a large and heterogeneous membership face substantial costs in first constructing and then policing the cartel" in the pecuniary marketplace (p. 274).

However, this difficulty is offset by a compensating advantage of large membership in the political marketplace, because, as Hirsch and Addison observe,

... the union may be able to offer a critical mass of voting support to 'accommodating' governments and politicians. Not only is such a union likely to evince a higher demand for state assistance because of the costs of private cartelization, then, but the government is likely to supply greater amounts of regulation where the voting rewards are greatest (pp. 274-275).

As we saw previously, the characteristic which discourages cartelization (a large number of union members "whose cooperation is necessary to create and maintain the cartel") in fact encourages regulation (Posner, 1974, p. 347).

Unions seek after regulation which overcomes the free
rider problem. McKenzie and Tullock note that "the government can impose a cost on workers who do not wish to participate in union activities." This reduces the cost of organizing the employer's workforce. If a firm is organized as a union shop, there is a substantial disincentive to free-riding created, as McKenzie and Tullock point out:

In a union shop all workers, once employed, must belong to the union if a simple majority of the workers votes for unionization. If 51 percent of the workers have voted for a union and a worker refuses to join the union, he or she is simply denied employment in that firm; this is a rather substantial cost for nonparticipation (p. 277).

These same laws that facilitate the expansion of labor unions by reducing organization costs also give these coalitions greater market power. All unions, large and small, have an incentive to obtain governmental protection from non-union workers. As Hirsch and Addison observe, this protection "often involves measures that buttress bargaining power in the economic marketplace through decreasing the cost of organizing or stimulating the demand for union labor" (Hirsch and Addison, p. 275).

Likewise, we might consider an occupational group such as a professional association. It too faces a free rider problem. Professional groups will wish to limit the benefits of their behavior to only participating members. Becker argues that "Free riding can be partially controlled by policing behavior, punishing deviant members with ostracism, intimidation, and fines, and by implementing rules for sharing benefits and costs that reduce the incentive to
shirk." Free riding increases the cost of producing pressure on government for legislative favors, but political success is determined by relative, not absolute, degree of control over free riding (pp. 377, 380).

Once the group is organized, its representatives will go to the state legislature and seek a legally sanctioned cartel (such as self-regulation through licensure). The group will put their argument in public-interest terms, appealing to the need to protect quality or to ensure an orderly marketplace. The interest group theory argues that rent seeking is often done under a public interest cover; that is, the professional group must cover its intentions if it is to get legislation through Congress which will injure the average man but benefit their particular group.

Trade unions and licensed occupations must be able to convince the public at large of the benefits to society associated with their protection or licensure. Benham suggests that this task requires "the cultivation of the public perception of 'market failures'" in their own occupation, and the acknowledgement of the ability of regulation to successfully cope with these failures. Many resources are expended on research which focuses on the services provided by members of the trade or occupation and on discovering the deleterious consequences of relaxing controls on its membership (p. 17).

In regards to the need for occupational regulation to remedy market failures in the 'public interest,' it has been
observed that "Requests for licensure seldom come from an outraged public seeking to end some intolerable abuse"; rather they most frequently come from "occupational associations acting on behalf of practitioners," who contend that "regulation is needed to protect the public health, safety, and welfare" (Shimberg and Roederer, p. 3). One outstanding example is the American Medical Association, which has obtained limitations on the practice of medicine (and hence boosted the incomes of their members) under the guise of enhancing the quality of medical care.

The interest group theory exhibits a great degree of scepticism towards claims by labor groups of the need to remedy market failure. Accordingly, one might ask, just where do 'public interest' considerations come into play in the theory? Ekelund and Hebert observe that in this model, they are seen through the lens of all the individual interests competing for regulatory favors:

Politics and the voting process are thus a gross filter of individual preferences. Regulations of all kinds are simply the result of interactions of self-interested demanders, i.e., effective coalitions of individuals who stand to gain from regulation and political suppliers who must endure periodic reelection constraints (p. 533).

They add that in the interest group model, the idea of the 'public interest,' which is to correct perceived market failure, is not "some abstract legalism," but it is "merely a summation of individual's interests on some issue" (p. 533).

However, the interest group theory is not simply a
positive theory; it does have normative elements as well. Efficiency considerations are part of its normative goals. For example, Stigler (1978) argues that as long as a person is "free to choose methods of earning and spending, increases in these sums imply widening domains of choice" (p. 214). A wider range of options leads to a greater earnings potential in general, as Stigler observes:

He may well find it most productive to specialize, say as a physician, but unless he is free to enter this (and other) occupations he cannot exploit his most favorable opportunities. If by luck or inheritance he is admitted to a sheltered, highly paid occupation, then most other people must be excluded from this occupation, and on average earnings in the society will be smaller than with free choice (because it is a condition for maximum output that men of equal ability earn equal amounts) (p. 213).

Stigler further explains that "A wider domain of choice is another way of saying that a person has more freedom or liberty" (p. 214). In this view, the distinction between wealth and liberty is not easily drawn.

It is further argued that, given this view of wealth, any increase in the wealth of individuals in a society will "increase the range of options available to the people in that society." Furthermore, if efficiency is equated with wealth maximization, then policy ought to be evaluated by its effect on the freedom of choice of individuals. Inefficient policies in this view constrain the range of options available to members of society, and thus reduce the aggregate wealth (p. 217). As Buchanan has put it, "The market economy's socio-political function is that of
minimizing the necessity of resorting to internal ethical constraints on human behavior and/or external legal-governmental-political restrictions" (1974, p. 486).

The interest group theory argues that the goals of regulation ought to be both efficiency and liberty. However, the model finds that in practice allocative efficiency is not the goal of regulators. Rather, they implement regulations which redistribute income to various interest groups at the expense of the larger segments of society who find it either not rewarding enough or too difficult to organize and resist the enactment of the regulatory legislation. Given this outcome that is unsatisfactory from a normative standpoint, constraints must be placed on rent-seeking regulatory activity to improve the regulatory process. There could be changes in the political rules, for example by changing "the reward structure of the regulators" (Elzinga, 1980, p. 119), making their compensation unrelated to their services to the regulated professionals or labor groups; or this might be achieved by constitutional changes that circumvent the capture problem by modifying the pattern of interest group representation. Or it could be argued that the special interests are too strong for democratic forms of government so that regulators should be replaced by a strong scientific commission to regulate the provision of professional services or the activity of labor groups.
III. THE INTERACTION OF THE MODELS

More recent studies in the literature have raised some questions about the relationship between the market failure and interest group theories of regulation. Is there any allowance for public interest regulation in any form in the modern approach?

Several recent studies suggest there is some movement towards reconciliation of the two models. Peltzman (1981) contends that there is a "creeping realism" in modern approaches to regulation, arising out of a dissatisfaction with the interest group model in explaining some aspects of the behavior of regulatory agencies (particularly with regards to the new 'social' regulation). This new attempt at a synthesis seeks "to integrate some of the newer economics of political decisionmaking with some of the elements of the older normative economics of regulation" (p. 372).

In the more recent studies of regulation, the older "welfare economics" or market failure approach is called upon to justify regulatory intervention, but "the resulting real-world institution then must bend to the realities of politics." In this case Peltzman observes that "nothing so simple as a 'public' interest or a 'producer' interest is going to predominate" (p. 372). There is a pattern then to the new research on regulation, as Peltzman explains:

Select an area where producer protection has seemed important (for example, licensing, minimum price, or entry regulation); then show that there is a potential market failure that makes it credible for a coalition of producers and consu-
mers, not merely the producers alone, to seek regulation. Or, reverse the pattern: Select an area, such as pollution, where market failure had seemed the most compelling force for regulation; then show how regulation of the market failure can be structured to serve a producer interest at the same time, and thereby enhance the survival value of the regulatory institutions (p. 375).

The theoretical grounding of this new approach to explaining regulation lies in the implicit insertion of "specific allocative outcomes into the relevant objective function of regulators" (p. 381).

This new research into regulation is consistent with the developments in the modern interest group theory we have observed thus far, namely that labor, business and consumer groups each may have an incentive to organize, "both to obtain the gains and to avoid the losses from a whole menu of government enactments." As the underlying costs of (and demand for) regulation shift, there will be corresponding changes in the gains and losses going to these different groups. As one example, new technology "may render existing government regulations undesirable to their prior beneficiaries or make current regulations useful to groups previously not benefited" (McChesney, p. 101).

Becker (1983) utilizes a model that is consistent with the desire of private interests for new regulation along the lines of the synthesis which Peltzman has described. While in Peltzman's generalization of the interest group theory the active agent is the regulator, Becker sees the active agents as interest groups. Interest groups (made up of
individuals defined by characteristics such as occupation, industry, income, geography, and age) "use political influence to enhance the well-being of their members" (p. 372). In Becker's analysis "groups compete within the context of rules that translate expenditures on political pressure into political influence and access to political resources" (p. 374). The political instruments that are used to raise the welfare of the more influential pressure groups include taxes, subsidies, and regulations; "competition among these groups for political influence determines the equilibrium structure" of these political favors (p. 372).

These groups recognize that gaining a favor from the state "almost always imposes a cost on some other group(s), both in direct transfers and in deadweight losses" (Romer and Rosenthal, p. 80). Becker contends that deadweight costs, "the distortions in the use of resources induced by different taxes and subsidies," play a major part in "the competition for political influence" because they "stimulate efforts by taxed groups to lower taxes, but discourage efforts by subsidized groups to raise subsidies" (p. 373). He adds that taxpayers have an "intrinsic" advantage in terms of impact on the structure of regulations as a consequence of the fact that "deadweight costs encourage pressure by taxpayers and discourage pressure by recipients" (p. 381).

Becker finds that political equilibrium depends on several factors: "the efficiency of each group in producing
pressure, the effect of additional pressure on their influence, the number of persons in different groups, and the deadweight costs of taxes and subsidies." The cost of controlling free riding among group members partly determines the level of efficiency in producing pressure:19 "Greater control over free riding raises the optimal pressure by a group and thus increases its subsidy or reduces its taxes" (p. 395).

As Romer and Rosenthal observe, the heart of Becker's argument is that "competition for political influence will lead to a policy bundle that accomplishes a given level of redistribution in such a way that deadweight losses are minimized." Becker assumes that political groups are fully informed about the true costs and benefits of all policies; as they explain, "Since deadweight losses increase opposition to any particular group's subsidy, without increasing that group's gains, it is in the interest of pressure groups to lobby for subsidies that have, ceteris paribus, low deadweight losses." Political competition in equilibrium eliminates the most wasteful policies, but not all deadweight losses (p. 80).

Consistent with the new synthesis, Becker argues that his model "does not emphasize political redistribution of income at the expense of political increases in efficiency."

19 Besides its impact on free riding, the size of a group also influences efficiency "because small groups may not be able to take advantage of scale economies in the production of pressure" (Becker, p. 395).
In regards to market failures, Becker argues that "political policies that raise efficiency are more likely to be adopted than policies that lower efficiency." Policies that increase efficiency are likely to be the winners in the competition for influence "because they produce gains rather than deadweight costs, so that groups benefited have the intrinsic advantage compared to groups harmed." He thinks his model "can unify the view that governments correct market failures and what has seemed to be a contrary view that governments favor the politically powerful" (p. 384); his model shows that both outcomes "are produced by competition among pressure groups for political favors" (p. 396).

Keeler (1984) offers another example of a modern approach which claims that regulation is motivated by a combination of public interest and special interest concerns. He utilizes the Peltzman version of the interest group theory and extends it to integrate several market failure considerations. He argues that his version explains both regulation and deregulation in three industries (railroads, airlines, and telecommunications) better than the simple interest group theory alone (p. 105).

Keeler observes that the market failure theory points to the exhaustion of scale economies as a reason for deregulation, but takes no account of the special-interest considerations emphasized by the interest group theory. As we have noted, Peltzman's model "explicitly assumes constant returns to scale with no externalities or indivisibilities."
Thus, as Keeler observes, "an unregulated marketplace will generate the most efficient results and a regulator will likely reduce efficiency" (p. 122). Moreover, Peltzman pictures various interest groups vying for economic wealth by trying to control the regulatory process: "It is in this way that, de facto, Congress and its appointed regulators maximize political support"; any one regulator will utilize regulation "to redistribute income, reducing economic efficiency in the process" (pp. 123, 137).

Keeler posits a situation in which a regulator faces market failure, such as economies of scale, "so that marginal cost pricing would not necessarily recover total costs without subsidies" (p. 137). In this case, Keeler shows that a regulator striving to maximize political support can enhance economic efficiency through enacting regulation (or harm it; the harm "depends on the extent to which political support is concentrated among users of particular products, making inefficient transfers attractive"). But the point Keeler emphasizes is that both economies of scale and voter coalitions matter to this regulator; under increasing returns, he could "behave remarkably like a public-interest-oriented regulator" (p. 128). Keeler explains the distinctives of his model in this regard:

... it is as if the governmental authority is aware not only of the political support available from redistributing rents but also of the extra support it will get from enhancing economic efficiency through increasing either consumer or
producer surplus. Since it is well-known among economists that, in the presence of scale economies or externalities, well-being can be enhanced by government intervention, it follows immediately that an economically rational regulatory policy, even if it maximizes support among interest groups, will not ignore the extra surplus which can be gained by scale economies and externalities, as would a public-interest-oriented regulator (p. 123).

Keeler focuses on deregulation of the three industries using these results, and goes on to show that even a regulator behaving under the case of no market failure "will have an incentive to reduce regulation if the efficiency cost of regulation increases (because of shifts in costs, demand, or technology)" (p. 138). A regulatory system which strives to maximize political support "will not throw away producer or consumer surplus without political gain, and efficiency considerations are not irrelevant" (p. 136).

The acknowledgment that both allocative and distributive concerns may matter in regulation is one key feature of our survey of theories of economic regulation. Other facets of the discussion stand out as well. They can be highlighted as we consider the key elements to be applied to our explanation of the development of the conspiracies in restraint of trade doctrine in England and America in three different historical periods.

In applying the model of market failure, we will seek to discover in what ways the concepts of imperfect information and externalities find application to regulation, particularly in regards to guild behavior. We will consider
the utilization of the concept of unequal bargaining power in explaining how labor law approached the questions of the right of labor unions to organize, the means which unions could utilize to achieve their purposes, and the place of collective bargaining. Along with these issues, we also consider other legal and economic principles which were used in the regulation of combinations of workers, such as restraint of trade and freedom of association, in light of the normative value of character formation set forth by the liberty and virtue component.

In addition, we consider the features of the demand and supply for regulation as found in the interest group theory. How well do the particular characteristics of labor markets and organized labor coalitions in relation to other interest groups explain statutory and common-law labor market regulation in the three periods? We will also utilize the elements of the rent-seeking component in regards to the role of monarchs and legislators in supplying regulation and the function of the judiciary in providing durability to the "deals" reached between legislators and organized interest groups in the labor market.

These elements of our survey then are some of the salient points of the models of economic regulation which will be utilized in our explanation of the development of the economic conspiracy doctrine as applied to the labor market. Since we have seen that regulators may be driven by both allocative and distributive concerns, it is likely that
neither the market failure nor the interest group theory will completely explain any one regulatory approach by a particular policymaker(s) in a particular era in a particular country. Yet our discussion of the two models, especially as they apply to the regulation of labor market combinations, leads us to expect they will find fruitful application in analyzing the changing ways in which the concepts of restraint of trade, legal privileges, and legal immunities were related to the economic conspiracy doctrine over time.
The models of economic regulation described in chapter one give some alternative frameworks to explain the approach taken in the English common law to labor market regulation. This chapter will apply the models to late sixteenth- and early seventeenth-century English labor legislation and court rulings. The primary focus will be on the legal and economic viewpoint of Sir Edward Coke, the most significant common law jurist of this era. In his approach we see the development of the concept of restraint of trade from its late medieval origins. It supplies a key element to the doctrine of conspiracy in restraint of trade which is applied in the eighteenth and nineteenth centuries to labor combinations.

The common law treatment of labor evolves over the period from 1400 until the middle of the seventeenth century. During this period the common law doctrine relating to restrictions of trade reflects economic developments as well as changing ideas of public policy.

In this chapter, various aspects of the guild system are examined, including the economic factors affecting the operations and status of guilds in sixteenth- and seventeenth-century England. Guild behavior was regulated by means of the common law; it punished guilds which raised prices too high or were unnecessarily exclusionary. These were practices which violated the substantive ends that
guilds were supposed to serve. The concepts of conspiracy and restraint of trade and their merger into a common law doctrine originate in such concerns. This is part of the treatment of common-law rulings and legislation addressing guilds and corporations from the 1300s until the 1600s.

The common law exhibited an inherent hostility against trade restraint. As Holdsworth observes, from the middle of the fourteenth century onwards there is legal authority "for the principle that all persons ought to be allowed to carry on their trades freely," subject only to any regulations "which might be imposed by the common law or by statute law." The common law gave every man the right to practice his trade as he pleased, "free from arbitrary restrictions not recognized by law, whether those restrictions were imposed by the illegal actions of officials of the local or central government, or by the lawless acts of rivals in trade." At the same time, the state found it necessary to impose regulations in order to secure the honest manufacture of goods and skill among artisans in order to promote the public interest (1934, p. 369).

In the context of certain restrictive guild practices in the late sixteenth century, the common law right to pursue one's trade was broadened in a series of cases associated with Sir Edward Coke (1552-1634). Coke is known as the outstanding jurist and statesman of the common law in his day. As Little notes, Coke "struck the path along which
the law would move for some time to come" (p. 173). More specifically, his decisions on the law of guilds and corporations in relation to freedom of trade and monopoly set the mold for legal interpretation for many generations to come. The approach taken to labor market regulation by the common law, and Coke's particular application of the principles of the common law, thus take on added significance for an understanding of the development of this field of economic thought.

No little controversy has brewed over the basis for Coke's rulings and the implications for the common law approach to economic regulation. He has been seen as the promoter, either indirectly or directly, of economic liberalism in England. Heckscher (1935), Nef (1940), and Lipson (1961) argued that Coke's views foreshadow the rise of classical economic liberalism. They most often appealed to his narrow interpretation of laws regulating apprenticeship, his use of the concept of 'free trade,' and his disapproval of monopolies.

Wagner (1935, 1937) went further and interpreted Coke's legal decisions as the work of a self-conscious economic liberal. Responding to Tawney's (1925) claim that the common law contributed to "the rise of economic individualism in

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1 According to the legal historian Thorne, there was no other English judge "whose absence would have had more serious effects on the course of English law" (pp. 237-238). Following Coke, Lord Mansfield and Sir William Blackstone were important eighteenth-century jurists of the common law.
England" (p. 13), Wagner claimed that what Coke and many common lawyers of his time in fact did was reshape the common law in conscious anticipation of laissez-faire precepts. Wagner argued that the medieval common law had sanctioned monopolies, and Coke purposely misrepresented common law precedent in order to hold them illegal.  

Hill (1965) followed Wagner's understanding of Coke's rulings, and pictured Coke in league with other members of Parliament and the Puritans who sought common law sanction for their demands for free trade. Hill argued that "Coke's unspoken assumption that men have a right to do what they will with their own persons and skills represents the thread of continuity running through all his decisions. It explains his campaign for economic liberalism" (pp. 236-237).

Malament (1967) has challenged all of these related interpretations of Coke's thought. She affirms that Coke must be understood as a man of the Tudor age, concerned to maintain stability and not to introduce laissez-faire notions into the legal system. She feels that Wagner in particular mistakenly evaluated Coke's citations of precedent in terms of preconceived, modern notions of 'free

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2 Thorne (1957) endorsed the notion that Coke set forth 'new' views on the regulation of trade "disguised in the clothes of the past" (p. 230). Following this same line of thought, Letwin (1965) has argued that Coke directed a fundamental change in the common law away from an economic order based on privilege and the exclusive powers of guilds. Letwin contends that the common law changed direction beginning in the late sixteenth century, when jurists such as Coke began to nullify trade restraints.
trade.' Coke did not purposely attempt to weaken the enforcement of statutory regulations, distort precedent or arbitrarily impose his own views of 'liberty' in opposition to monopolies. Instead, Coke "drew upon the common law bias against individual forms of trade intervention and applied it to exclusive privileges conferred by the Crown" (p. 1345).

Little (1969) has claimed that Coke's appeal to the common law in support of his objection to monopolies reflects an inherent tension in his thought. Little argues that there was not one consistent set of ideas at work in Coke's mind; indeed, there is a larger measure of ambiguity in the provisions Coke makes for guild regulation than Malament allows for.³ Coke decided in many cases against

³ Little argues further that the ambiguities reflected in the opinions of Coke "cannot properly be understood apart from the deep-seated antagonisms between Anglicanism and Puritanism and the divergent patterns of order they represent" (p. 30). Coke, though a strong Anglican, personifies both of these opposing tendencies. His rulings, in line with a spirit of free economic activity, are congruent with the Calvinist emphasis on the virtues of voluntary labor. Nonetheless Coke believed he was upholding the traditional order of society in line with Anglican thought.

Little has contributed some powerful suggestions for further study of the common themes in the views of labor promulgated by Coke and English Puritans such as William Perkins. Coke had a passion equal to that of Perkins for an economic society in which men are not constrained in the exercise of their calling. In the English Puritans, who followed in the theological footsteps of Luther and Calvin, one finds a similar appeal to the virtues of voluntary labor. Another English Puritan, John Hooper, wrote that "unto every man is appointed his vocation: to one this, to another that; one to private, another to a public vocation; and each of them either is lawful or unlawful" (p. 456). Little has shown how this emphasis on Christian freedom appeared to be closely aligned with the movement towards
"the long-existing political and economic controls."

However, he also tried "to find a basis for these decisions in the feudal traditions of English corporation law and to harmonize his revolutionary 'Elizabethan ideas' with remnants and vestiges of medieval group life" (p. 31).

White (1979) focuses primarily on the parliamentary activity of Coke from 1621 to 1628 rather than his court rulings. He finds that Coke "was more generally opposed to monopolistic trading practices than Malament suggests" (p. 119, n.144). White believes that Coke made the concept that 'trade should be free' into "a common-law maxim," while at the same time holding to the necessity of 'government of trade' (p. 113).

A recent study of economic activity during the 'mercantilist era' in England and France relies upon the rent-seeking component as an explanation of the internal economic regulation practiced in these countries. Ekelund and Tollison (1981) focus on the gains to economic agents of using the Tudor and Stuart state to acquire monopoly rents by obtaining royal patents. They understand Coke's rulings in regards to monopoly patents as "a telling example of the duplicity with which common law jurists approached free trade" (p. 54). In their view, Coke was especially concerned

more economic freedom in early seventeenth-century England. Hill has noted the closely related development of the doctrine of the dignity of labor in Puritans such as Perkins, John Preston, Dod and Clever, and Richard Baxter (1975, p. 234).
to insist that rights over trade were reserved to Parliament and not to the crown; he acknowledged the legitimacy of rent seeking, and sought to insure that Parliament be the recognized regulator of trade with the authority to collect rents, rather than the monarch.

There is no doubt some degree of viability in the interest group interpretation of the common law regulations. Coke was not a rigorous economic analyst. He was not trying to explain regulation in terms of economic theory. Rather, he was a practicing judge and legislator, and as such not an impartial observer of market or government behavior. His understanding of regulation promoting the 'public interest' must be considered carefully in this light.

Thus one must be cautious in examining Coke's treatment of labor market regulation. One obtains Coke's approach to regulation by examining his court rulings and statements in Parliament on guild by-laws and royal patents of monopoly, not by analyzing any lengthy discourse on the topic. At the same time, as White observes, throughout much of his career, "Coke was frequently involved in the process of economic administration." He became "well acquainted with the affairs of various London trade companies while acting in the capacities of private counsel, administrative arbitrator, and legal officer of the crown." Moreover, he investigated many economic problems as advisor and then member of the Privy Council, some of which involved manufacturing and marketing disputes over the trade privileges of boroughs and
corporations (pp. 284-285).4

There is a greater measure of coherence in Coke's writings than several of these interpretations are willing to concede. Coke did legitimately find 'a bias against trade restraint' in past common law precedents which he applied to private trade restrictions and royal grants of privilege outside the guild system. Coke's rulings do not represent a radical departure from precedent, but instead are consistent with the regulations in the late medieval common law prohibiting attempts by guilds to artificially restrain trade to their own advantage.

Moreover, Coke cannot be set in the mold of forerunner to classical liberalism, nor is he correctly seen as simply an agent of Parliament defending its right to be the source of labor market regulation. Instead, it is better to understand Coke as a common law jurist utilizing the distinction between arbitrary restraints and legitimate regulation of trade which is imbedded in the late medieval common law. Coke recognizes the efforts of guild artisans as organized coalitions to convince public authorities of the benefits to society of regulation and/or the deleterious consequences for the public health, safety, and welfare of relaxing controls on whoever may practice their trade. Coke invalidates guild ordinances which utilize such arguments to arbi-

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4 Some examples include the making of glass, salt, and sail cloth, and abuses in the licensing of butchers and poulterers (White, pp. 286-287).
trarily exclude craftsmen from trades. But he upholds guild ordinances which are made for the 'good order and governance of trade.' Coke endorses the Statute of Artificers with its regulations designed to promote full employment, a lowering of the rate of vagrancy, and high standards of industriousness and craftmanship. These features of character formation shape Coke's contribution to the development of the common law right of freedom to pursue one's trade.

In the eighteenth century, common law jurists began to hold that combinations entered into with the intention of depriving persons of freedom of trade were indictable conspiracies at common law. A consideration of Coke's approach to labor market regulation will enable us to better understand the late sixteenth- and early seventeenth-century origins of this doctrine. We begin with an examination of the guild system and its relation to the late medieval common law.

I. THE ECONOMIC AND LEGAL BACKGROUND TO RESTRAINT OF TRADE

The English "common law" takes its name from the fact that as the law of the royal court, it superimposed a unity on nearly all of the petty local and tribal peculiarities of which the law at the time of the Norman Conquest was full. It became the one law common to all the realm. It is the law based on customs of the realm, embracing "those rules of civic conduct which originated in the common wisdom and experience of society, became in time established customs,
and finally received judicial sanction and affirmance in the decisions of the courts of the last resort" (Maitland and Montague, p. 213).

In regards to the common law treatment of economic activity, it is especially significant to observe its characteristic of flexibility. The evolution of the common law doctrine relating to restrictions of trade reflects economic developments, as well as changing ideas of public policy (Thorelli, p. 13). The common law evolved as the guild system changed over the period of the fourteenth through the sixteenth century.

A. THE GUILDS

In late medieval England, economic activity was organized around several different types of guilds. There were frith guilds (associations to promote stability in the private ownership of land); social-religious guilds; ecclesiastical guilds; and trade guilds. The four classes are not exclusive; for example, all guilds possessed religious and fraternal elements (Davis, l, p. 130). Trade guilds consisted of merchant guilds and craft guilds. Kahl explains that a guild merchant was "an association of local craftsmen and of owners of the land on which the town was built." The craft guild was composed of artisans who "made

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5 The merchant guilds were either replaced by the craft guilds, or were merged into the borough during the fifteenth and sixteenth centuries (Cooke, p. 31).
or processed goods with their own hands and offered them for sale in shops or at the weekly fair of the town." Such craft guilds "produced luxury wares or cloth and leather goods"; they were "goldsmiths, skinners, drapers, tailors, and saddlers." They raised capital, hired workmen, provided raw materials, and marketed the finished products (pp. 1-2).

Clarkson notes that these guilds had grown up and flourished in the Middle Ages; and "by 1500 every borough in England possessed at least one such guild and sometimes a dozen or more" (p. 103).

Guilds obtained their authority from one of two sources: either "from charters of incorporation granted by the town" or from charters gained "directly from the monarch" (Clarkson, p. 103). The grants from the king "often merely confirmed existing guild privileges for which there was independent authority in law or immemorial custom" (Thorelli, p. 21).

As an example, in the reign of Henry VI, it became a common practice to grant charters to the London craft guilds. The charters "endowed the corporate structure, which the fourteenth-century craftsmen had developed through

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6 Guilds were not always composed of the same type of craftsmen, as Clarkson explains: "In the larger towns most crafts had their own gilds but in smaller places kindred occupations shared a common organization; and sometimes, when the total number of craftsmen was very small, completely different crafts combined together into a single gild" (p. 103).

7 Thorelli observes that "Sometimes, however, such grants represented an enlargement of existing privileges or the creation of new ones" (p. 21).
a tradition of piety and charity, with privileges of regulating apprenticeship, prices, wages, and the quality of production . . ." (Kahl, p. 2). Guilds had the right to issue by-laws which were for the proper 'ordering' of a trade; in this manner many trades were governed by self-regulation.

By obtaining their privileges from the king, guilds had an exclusive jurisdiction over their crafts within the limits of the town. The right to regulate the affairs of their members "by means of by-laws and resolutions had been attached to corporations in Roman law and appeared in English law at a very early period. The by-laws of a town were binding on all within its limits," and similarly guild by-laws were binding on all its members (Cooke, p. 69). The ordinances of craft guilds were aimed at promoting the 'good order and government' of their trade. There were ordinances drawn up to protect the public from poor quality and high prices; these stipulations governed standard of quality, apprenticeship, conditions of sale, and the position of foreigners.

Under their by-laws guild officials monitored workmanship and punished poor craftsmanship (Cooke, p. 29). They would issue seals of approved work. They also had the

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8 The perpetual, corporate character of the craft guilds was retained by regulated companies such as the Merchant Adventurers' Company of 1567 as well as "joint-stock companies like the Russia Company, first chartered in 1555 . . ." (Kahl, p. 3).
authority to search houses, shops, and stalls of all who practiced their trade for inferior or fraudulent wares, short weights and measures, and evidence of forestalling and high prices (Kahl, pp. 2, 15). The workshop of every guild member was to be open to the guild officers at all times (Cooke, p. 29). Thus the guilds regulated the production and marketing of the town workshops.

Guilds strived to provide for the training of future generations of craftsmen; they were the guardians of craft tradition. Nearly all craftsmen maintained one or two apprentices who gave cheap labor in return for the secrets of the craft. Prospective craftsmen faced apprenticeship rules. As originally instituted apprenticeship was often seen as an efficient means of what might be designated 'technology transfer'; knowledge of the techniques of the 'mystery' could be readily conveyed in the guild. Morris notes that "the indentures of apprenticeship obligated the master to employ the apprentice in his trade, generally narrowly construed, and to teach him its 'mysteries.' In turn the apprentice promised not to reveal his master's trade secrets" (p. 378). The requirements of apprenticeship served as a more efficient means of transfer of technical skills than simple employer-employee relationships.

This system was intimately linked with the guild desire to maintain the quality of their product and thus maintain the integrity of the craft, as well as to limit competition between its members. Gregg explains some aspects of craft
ordinances in this regard:

The use of good materials was enjoined, and satisfactory conditions of production were insisted upon. Night work was prohibited - in the uncertain light of candles faults would escape notice and bad work pass for good; nor was holiday work permitted, perhaps on the grounds that the disgruntled or tired worker would not produce his best, perhaps to prevent the over-industrious from stealing a march on his more pleasure-loving competitors, perhaps for religious observance, perhaps merely to protect the rights of the apprentice (p. 131).

Not only did guilds seek to safeguard their trade's prosperity by ensuring proper materials and working conditions, they also prohibited "workmen whose capacity was unknown to work in the town until their efficiency had been proved" (Hibbert, pp. 45-46).

'Freemen' were allowed to participate in the city's privileges, while 'foreigners' were not. Freemen were those who had finished their apprenticeship in the town and were citizens as well, while foreigners did not meet this criterion (Heckscher, 1, p. 224, 305). Ashley argues that the clause in guild charters prohibiting any person from interfering with the mystery did not originally have an exclusionary purpose, but it could be put to that use:

It is very likely that at first the terms of admission were easy, and that the clause was inserted not in order to exclude rival craftsmen, but in order to force all craftsmen to join the association; although as early as 1321 the London weavers were accused of misusing this power to demand heavy entrance-fees, and thereby unduly limit the number of licensed workmen (2, p. 75).

Postan observes that the guilds also gave preference to sons of members as a means of limiting entry, but the apprentice-
ship rules constituted the central limitations. Achievement of the freeman status was not easy: after the long (typically seven years) apprenticeship period, an examination (the 'master' test) had to be passed, and "in the later Middle Ages young men without connections or funds often found it difficult to set up as masters even after they had passed their tests, and stayed on in their professions as 'journeymen' or 'yeomen'" (p. 216). Of course, those who had not achieved such a status in a town were in an inferior position, being denied the ability to practice their trade; the disabilities imposed on 'foreigners' served to hinder the mobility of labor and capital, "by placing impediments in the way of those who sought to follow their occupation in another locality" (Lipson, 3, p. 344).

There are several ways to understand guild behavior. One can focus on the control of membership, conditions of apprenticeship, and hours and standards of work (Palliser, p. 240) as typical cartel behavior. Guilds preserved trade for themselves by being "slow to admit new members and quick to harry non-members who tried to trade in areas or goods regarded by the gilds as their own preserve" (Clarkson, p. 103). In this view guild practices were designed to secure the incomes of its members by regulating the supply of labor and the level of wages.

While recognizing that guild ordinances served these ends, they also should be seen in the light of a broader rationale. They were fashioned in a framework in which the
various members of society were understood to be organically dependent upon each other. Limitations on competition from within and outside the guild were thought to best uphold this relationship. As Appleby has observed, guild by-laws recognized the artisan's function as critically interrelated to others in the community:

A body of craftsmen was first of all a body of household heads whose families and apprentices depended upon a regular and regularized trade. The pitting of skilled workman against skilled workman would neither promote the practice of their craft nor the well-being of their households. Restrictions drawn up by companies of craftsmen and honored by the law supplied the direction sure to be lost if every one looked out for himself (p. 28).

The broader purpose of the guild ordinances was often seen in terms of the organic body analogy. It was used to support the notion of order and certainty in feudal life. McNulty describes the main metaphor of this viewpoint: "Society was seen as a functioning organism in which each individual and group, like the various parts and organs of the human body, had its own function to perform" (p. 16). Tawney adds that this perspective saw society as "held together by a system

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9 The operation of the guild was consistent with what Thorelli calls "the quasi-feudal principle of status." Individuals could "acquire a status by learning a particular trade"; and within the status "the customs and rules of the guild governed his activities" (p. 13). The economic changes of the sixteenth century eventually led to significant institutional disruption in regard to status. This great change in English society has been famously described, first by Sir Henry Sumner Maine (1901), as the movement from the status to contract form of organization; the decay of the guild organization in the fifteenth and sixteenth centuries comes within the scope of this rule (Cooke, p. 29).
of mutual, though varying, obligations" (1962, p. 25).

The guilds were seen as performing certain integral functions in this body beyond economic sustenance. Guild by-laws were originally fashioned "in the light of a public service." Their "industry" was essentially an "art," or a "profession." Compulsory training was seen to protect "both the interests of the public and the interests of the skilled worker" (Lipson, 3, pp. 292-293). But the 'public good' was not understood to be simply sufficient product quality. The guild was also understood to be a training ground for obedience to God. While the guild satisfied economic needs, it claimed to subordinate them to spiritual interests. To the members of the guild "the social and spiritual were inextricably intertwined" (Tawney, 1962, p. 27).

The institutional roots of the English craft guilds can be traced to the parish guilds, which were unions of parishioners organized around their churches for miscellaneous activities of mutual interest. Postan has noted that

In urban conditions the territorial scope of the parish gilds could easily be professionalized, since medieval craftsmen belonging to the same occupation tended to reside in the same neighbourhoods. In dealing with matters of common interest urban parish gilds would therefore find it only too easy to take action in matters concerning the parishioner's occupation, and in this way provide the cell from which the craft gilds proper were to develop (p. 217).

Various facets of craft guild life reflected its roots in the parish guild. Kahl has observed that the members of craft guilds were typically devoted to a patron saint; "they
regularly attended mass and thereafter dined together. They assumed the responsibility of mutual assistance and provided for their aged, poor, and disabled brethren" (p. 2). Sylvia Thrupp further explains that

many trade gilds were based upon a fraternity life similar to that of the parish gilds. In common with the latter they gave expression not only to religious faith and conviviality but also to certain social needs and ideals . . . Industrial gilds, for example, were at pains to cultivate a spirit of thrift and temperance and to discourage idleness. Brethren of their fraternities were eligible for relief only if their need were the result of circumstances beyond their control (p. 172).

Idleness meant one was not sustaining their calling from God. The discipline and rigor expected of guild members was part of their spiritual duties to God and their obligations to the community.

In sum, it is important to recognize that while guilds were units of functional economic organisation, they were also the "social foci of civic ceremony and ritual" (Coleman, 1975, p. 20). Guilds supplied their vocational training in an atmosphere that nurtured the cultivation of civic and moral virtues.10 Guild practices designed to deter sloth and wastefulness not only inculcated skill in producing quality products, but also dutifulness towards God and others. As will be seen, in their decline guilds moved away from these ends to fashion ordinances which were strictly restrictive in purpose. In doing so guild by-laws came to clash with the

10 Bernard Bailyn (1972) has shown how this was also true of early American craft apprenticeship.
common law, which found some of the ordinances to be arbitrary restraints on trade and not legitimate regulation in line with the true ends guilds were designed to serve.

B. REGULATION OF GUILD ACTIONS PRIOR TO THE 1560S

Guild activity from an early stage was subject to statutory and common law regulation. The common law regulation was based on the customs of the realm. The statutory regulation often reflected the responses of legislators to economic events or circumstances. Legislation sought to promote order and stability in the face of economic change.

One way to understand the treatment of guilds in the common law is based on what is seen as a particular understanding of liberty in the Middle Ages. The medieval idea of liberty meant guaranteed privileges for certain estates, groups or corporations. In fact, some students of the law have gone so far as to maintain that each and every trade everywhere in ancient England was a privilege. According to Boudin, when the common law was first "embodied in written records (the Year Books) in the later Middle Ages," trade was seen as a privilege; the king "was the only one who had a right to trade, unless he gave part of that right to someone in particular as a special privilege" (p. 15).

It is true that privilege was the rule where trade was "narrowly regulated by explicit provisions or immemorial custom recognized by law" (Thorelli, p. 21). Nonetheless, as Holdsworth observes, one of the principles of the medieval
common law, though stated somewhat vaguely and infrequently, was that "prima facie trade must be free" (4, p. 350). Every subject had a 'common law right' in the use of his trade. While this right typically "was both protected and regulated by bodies on which the average individual exercised but little influence," as Thorelli contends, the same person "was not bound by arbitrary restraints not recognized by the law, and in the absence of explicit restrictions known to the law freedom was presumed to prevail. This is the essence of the economic liberty enjoyed by Englishmen from time immemorial . . ." (p. 21). The principle of 'freedom of trade' as understood in this sense constituted part of an "age-old Anglo-Saxon heritage" going back to the Magna Charta (Thorelli, p. 20).

The principle that trade ought to be free from arbitrary restraints was implied in the clauses of Magna Charta which related to the liberty of the subject. As reflected in various judicial decisions, medieval jurists were hostile to arbitrary restrictions on personal liberty for which no legal justification could be shown. One of the means that the common law adopted to safeguard this principle was by application of the law (or doctrine) of conspiracy in restraint of trade.

The concept of 'restraint of trade' as applied in the seventeenth-century common law is best understood in light of its medieval origins. Thorelli has argued that the term itself "originally referred to stipulations not to compete
constituting a part of a major transaction or contract."
Covenants in restraint of trade could be ancillary to a main contract such as an employment or partnership contract. One common use was as an agreement among craftsmen in which an artisan would agree not to use his craft within a geographical area. In order to enter in the contract, perhaps to gain needed training or raw materials, the artisan would have to endorse the non-competing provision. From the fourteenth century on such contracts were viewed with suspicion in England, and generally regarded as unenforceable. They were objected to on the grounds that they led to the loss of the livelihood of the individual agreeing not to practice their trade, and that the public would be deprived of another practitioner of the craft (Thorelli, p. 17). In the fourteenth and fifteenth centuries, it was quite difficult to practice one's trade in another municipality without being apprenticed to the guilds in that locale. As Letwin argues, if the artisan sought to practice another trade, "he would have to pass through an apprenticeship for seven years, or with great difficulty and expense satisfy a guild that he was a master of its craft . . . ." (1965, p. 41).

The common law doctrine of conspiracy first began to be formulated during the fourteenth century. It originally dealt with "certain crimes whose common characteristic was concerted action, agreement or plotting among several individuals with the purpose of either affecting the rights of a third party or interfering with the functions of
government or with the course of justice" (Thorelli, p. 28).

The conspiracy concept was only tangentially linked with restraint of trade in the fourteenth century. Over the next two hundred years the doctrine of "conspiracy in restraint of trade" evolved. The principle form of non-ancillary restrictions addressed by the doctrine involved agreements among combinations which limited, obstructed, or eliminated competition (Thorelli, p. 20). In regards to the labor market, the linkage came with the common law applying the doctrine to combinations of workers which agreed together not to sell their services at less than a certain price (Hutt, 1975b, p. 97). But it was in the eighteenth century that the doctrine became widely applied to such combinations.

Statutory and common law regulation of concerted economic activities by workers and employers began in the Middle Ages. The Statute of Laborers\textsuperscript{11} was the first English legislation regulating labor markets. Passed in 1349, it was aimed against the increase in wages which followed the Black Death. Workers were forbidden from accepting more than the statutorily stipulated wage, and employers were likewise forbidden from paying more than this wage (pp. 165-166). Fourteenth and fifteenth-century cases in the English courts involving trade restrictions by concerted action were generally decided against the combinations, whether of

\textsuperscript{11} The complete text is found in Bland et al., pp. 164-167.
masters or laborers. These agreements might involve price or wage fixing, as well as limitations on output, working hours, or "other material restrictions on trade not sanctioned by statutory law or guild privileges." At the extreme such restrictions were seen as criminal; but generally they were held to be against public policy and thus unlawful and void. The common law condemned restraints on trade "arbitrarily engineered by private parties" (Thorelli, pp. 27-28).

Beginning in the fourteenth century, guild ordinances invalidated as "restraints on trade" are found in both the records of court proceedings against certain guilds for agreements to fix prices, and the statutory enactments along the same lines. Jones notes several examples of complaints against restrictive guild trade practices in the courts:

In London the weavers were in the early part of the fourteenth century indicted for restricting output. In 1327, complaint was made that the Saddlers 'by conspiracy and collusion among themselves have ordained ... that no one of the aforesaid trades shall be so daring as to sell any manner of merchandise that unto their own trade pertains either to freemen of the city or to other persons, but only to themselves in the business of saddlery.' In 1435, the ironworkers gild was dissolved because it monopolized the supply and lowered the quality of the iron, to the injury of the other crafts using it (1926, p. 928).

Several statutes prior to the sixteenth century prohibited conspiracies to raise prices or wages, or otherwise interfere with trade in a manner not publicly sanctioned. Under Henry VI, an act of Parliament was passed in 1437 on the national level to deal with guilds in a broader fashion. It stated that the guilds "make themselves
many unlawful and unreasonable ordinances . . . for their singular profit and common damage to the people." This act "provided that all gild ordinances must be submitted to the justices of the peace or the municipal authorities" (Jones, 1926, pp. 928-929). This law resulted in a strict supervision of guild practices in many municipalities. Guilds could pass ordinances regulating the economic practices of their members; but, as Jones explains, "the town authorities could refuse approval to rules which were unduly restrictive of the rights of individuals, or prejudicial to the public interest" (1927, p. 370).

In 1504, there was a re-enactment of this bill under Henry VII. A law12 was passed condemning the unreasonable ordinances of the guilds and directing that all such ordinances should be submitted to certain judicial officials who were national officers. All the ordinances of crafts, mysteries, guilds, or fraternities were disallowed unless they were approved by the chancellor, treasurer, the chief justices or any three of them, or by both the judges of Assize for that county in which the ordinance had been made (p. 102).13 The king's court of law began to exercise control over guild regulations; the guilds and corporations

12 The text is found in Tawney and Power, 1, pp. 101-102.

13 In his position as a judge, Coke was often involved in the affairs of trade companies on the basis of this statute; in accordance with this act, he confirmed the ordinances of the Salters, Saddlers, and other companies (White, p. 285).
acted under the authority of the State (Clark, pp. 85-86).

Thorelli has observed that prior to this time, the prohibitions of conspiracies to interfere with trade in a manner not publicly sanctioned were part of the general regulatory scheme of trades under the direction of guilds. Beginning with the sixteenth century, as combinations grew more frequent, such measures were increasingly set forth as separate enactments. For the most part, they were "declaratory of the common law" (p. 28). An important example was the Bill of Conspiracies of Victuallers and Craftsmen (1549). It provided that cooks and any related mystery or craft which combined to fix prices would be fined or imprisoned. In fact, the statute dealt with most types of economic agreements to restrict prices, output, or hours of work. It applied to

.. . any artificers, workmen or laborers [who] do conspire, covenant or promise together, or make any oaths, that they shall not make or do their works but at a certain price or rate, or shall not enterprise or take upon them to finish that another hath begun, or shall not do but a certain work in a day, or shall not work but at certain hours and times (p. 291).

Section 2 stated that any such group of craftsmen which combined to raise prices would find its charter immediately dissolved.

Section 4 dealt with private restraints on the practice of a trade. It stated that no one was to interfere with the

14 The complete text is found in Appendix 2, Dickman, pp. 291-292.
right of a skilled craftsman to practice his trade:

... no person or persons shall at any time interrupt, deny, let or disturb any free-mason, rough-mason, carpenter, bricklayer, plasterer, joiner, hardwearer, Sawyer, tiler, paver, glasier, lime-burner, brick-maker, tile-maker, plummer or labourer, born in this realm or made denizen, to work in any of the said crafts in any city, borough or town corporate, with any person or persons that will retain him or them, albeit the said person and persons so retained or any of them do not inhabit or dwell in the city, borough, or town corporate where he or they shall work, nor be free of the same city, borough, or town; any statute, law, ordinance, or other thing whatsoever had or made to the contrary in any wise notwithstanding (p. 292).

The violation of this provision led to a fine. The common law set forth rulings on restraint of trade consistent with these provisions in the sixteenth century.

Restraint of trade was considered unlawful because, as Boudin observes, "trade was regulated either by custom or by statute as far as the common law was aware." For that very reason it was particularly opposed to an understanding of liberty of contract "which would permit people to impose or enforce regulations not imposed by the law, customary or statutory, but by agreement among private parties." Boudin explains that there were two reasons such regulations were considered harmful to the public:

first, because the community was interested in everyone having a chance to make a livelihood by the exercise of his 'lawful' trade, that is to say, the trade which the law or custom gave him the privilege or right to exercise. And, second, because combinations or conspiracies in restraint of trade had the baneful tendency to raise the price of commodities (p. 23).
Thus consideration of the 'public interest' was part of the common law rule against restraint of trade from its origins. In the fourteenth and fifteenth centuries it was invoked in respect to the skill of men of various trades. Handicraft was the main feature of these trades:

The smith, the schoolmaster, the carrier, the barber-surgeon, plied their callings; the baker, the tailor, the dyer, the furrier received materials from their customers and to their 'order' fashioned articles . . . The rule against restraints was an assertion that skills, occupations, mysteries, callings were affected with a public interest (Hamilton, 1940, p. 27).

In this era the public interest essentially meant that some limited right of craftsmen to compete in the provision of their services must be insured. It is no doubt true that, as Boudin observes,

the interest which the common law evinced in competition was not some abstract notion of the rights of individuals either to trade or to contract, but the practical concern, based upon solid experience, that the lack of competition among traders meant high prices to the public (p. 24).

The common law rule against restraint of trade originally had this very practical and fairly narrow consideration in mind. Gradually the rule was broadened into a more complete liberty of the individual, though this freedom was never grounded in an abstract foundation of absolute "freedom of trade."

Thus another facet to the rule against restraint of trade was its connection to the broad animus against the withholding of necessary goods and services by individuals.
or groups in the economy. These practices made them less readily available and expensive. This attitude against private attempts to manipulate the market was consistent with the traditional medieval teachings of the Scholastics. They had argued that attempts at artificial restraint on trade transgressed the norms of the organic, corporate view of society. While the Scholastics acknowledged the role of guilds in promoting spiritual concerns and inculcating virtue, they were also suspicious of guilds as combinations which could engage in monopolistic practices.

In Scholastic thought, any good could be subject to regulation in the public interest. Private commodities, the indifferent goods, were set by the competitive price, that is, the going market price.\(^\text{15}\) The boundaries of what were construed to be public commodities widened and narrowed to include or exclude particular goods (bread, corn, etc.) due to economic determinants (such as factor endowments in a particular area). Laws against forestalling, regrating, and

\(^{15}\) Viner rightly contends that the Scholastics maintained a largely favorable attitude toward markets: "... it was a violation of commutative justice to sell at a higher price or buy at a lower price than the 'just price,' which they explained as the price according to 'common estimation.'" That is, this price was determined by "common estimation in or by the market." The "market" they referred to was a competitive market, operating under normal circumstances. This understanding is shown by the Scholastic condemnation of monopolies. It is also seen in various "exceptions they made for appeal to official or non-market determination of prices when abnormal conditions, such as famine or siege, or unusual absence of business skills or lack of bargaining power, made particular individuals unable to cope adequately with market processes" (1960, p. 53). On this issue, see Baldwin (1972) and De Roover (1951, 1955).
engrossing reflected these concerns.

Each of these three economic offenses against the public was largely concerned with the market for "essential commodities." Forestalling took place when one bought up food items or other products before they reached the market in order to obtain the commodities more cheaply than in the market itself. In this way one avoided "competitive bidding by means of private dealing." The prohibitions on forestalling were designed to limit the sale of goods to "open markets" so as "to insure effective competition among both buyers and sellers." Engrossing was the act of "buying-up of the whole or a large part of a commodity by one or by a number of persons," so as to curtail its supply and enhance its price (Mund, pp. 43-45). Regrating was the act of buying a good and reselling it at a higher price in or near the same market in which it was originally purchased (Thorelli, p. 16).

These offenses were prohibited due to the fear, "founded on practical experience," that since transportation conditions were limited, there might arise "local 'corners' in vital commodities" (Thorelli, p. 16). The poor communications, road conditions, and other irregularities in the late medieval economy certainly enhanced the viability of such activities. Statutes prohibiting these actions were typically "enacted in times of great scarcity and then remained in force after the immediate crisis" (Malament, pp. 1333-1334). Guilds in particular were regulated with
these concerns in mind, and the engrossing of trade was the primary offense that was penalized:

... despite the professed ideals of the guilds there was always the possibility of the craft as a whole, or a group within the craft, succumbing to the temptation to engross trade and raise prices in a period of scarcity. In the brewers', the butchers', or the bakers' trades the guilds could not exercise their monopoly without considering the interests of the public. The notions of just price, the Church's injunctions on engrossing, and the more primitive and immediate demands of townspeople operated very forcefully to bring the activities of these guilds under the scrutiny of government (Kahl, p. 13).

Thus there was a significant tradition of common law opposition to arbitrary trade restraints by private groups. Guild by-laws could be invalidated by the common law where they were seen as the means to engrossing the labor market in a craft to a certain group to the arbitrary exclusion of others. Economic changes in the sixteenth century which produced increased guild efforts in this regard led to further statutory and common law regulation.

C. THE STATUTE OF ARTIFICERS AND THE DECLINE OF THE GUILDS

National legislation came to be applied to guild activities in the 1560s, due to the increasingly significant role of labor in the economy. In the sixteenth century, the guild's function in the economy was affected by various types of economic forces, many of which led to increasing underemployment and inconstancy of employment. A population growth approaching 1 per cent a year at its peak created a surplus of labor that agriculture proved unable to absorb
Short- and medium-term forces led these workers to turn to urban areas for employment. Enclosure played a key role in this regard, as Furniss has underlined:

The supply of labor was increasing as men ceased to work their holdings; the larger farm unit proved more economical of labor than had the form of organization it superseded; and in many cases enclosure was the occasion of the change from tillage to pasture with a lessened requirement of day labor. For all of these reasons a mass of labor for which no local employment was forthcoming began to accumulate in the villages; the industrial population of the rapidly growing manufacturing centers of the north was recruited from these sources, the shift in the center of the population which took place at this time recording how the laborer who had lost his hold upon the land sought in distant markets for employment (pp. 220-221).

Other forces that led to inconstancy of employment included trade depressions, growing international competition, and warfare. But it would be a mistake to attribute the prevalent concern with labor on the part of Tudor policy-makers to merely short- or medium-term forces, especially to the exclusion of the enduring long-term forces (Coleman, 1956, p. 292).

Coleman (1956) has emphasized that during the late sixteenth century and throughout the seventeenth century, a key feature of the English economy was that "labour was easily the most important factor of production" (p. 287). This is evident when one considers the nature of production in both the primary and secondary sectors of the economy. Most forms of industry were labor-intensive. Coleman describes the key features of production processes:

Not only in food production, but in the all-important cloth industry, labour was the most
Labor in the sixteenth-century was increasingly employed in the putting-out system. In this system, a merchant would give out raw materials (such as raw wool) to individuals who labored in their own homes, and later collect the product (such as cloth) from them "for sale or for further processing" (Cipolla, p. 73). As Clarkson notes, it was "a feature of a wide range of industry, especially the woollen industry and many branches of metal-working." He emphasizes its significance for the English economy:

The prevalence of putting-out underlines the importance of labour in so many branches of manufacturing. It enabled employers to tap supplies of cheap underemployed labour in rural areas and reduced the need for fixed capital. Employees usually owned their own tools, although in a few occupations where machinery was expensive ... employees rented machines from their employers ... Putting-out facilitated the division of labour (p. 101).

These different economic forces meant much work had the character of casual labor, given the problems of irregularity of employment and chronic under-employment (Coleman, 1956, pp. 288-292).

It was in this context that the need for full employ-
ment came to be emphasized as a social goal. This is evident in the major piece of labor legislation of the era, the Statute of Artificers. This law, passed in 1563, represents a significant attempt to deal with the dynamics of economic forces affecting labor in the sixteenth century. The fact that wages lagged behind prices, the concern about pauperism due to enclosure, and "the mounting fear of over-population" all would suggest that the growing supply of labor "was absorbed into employment only with difficulty" (Fisher, p. 3). The major provisions of the law reflect a concern with these conditions in light of "the medieval obligation to work" (Minchinton, p. 11). The Statute of Artificers was an expression of the desire to prevent the engrossing of indispensable necessaries; that is, it was believed that "labor ought no more to be held back than food or raw materials" (Heckscher, I, p. 228).

This Act was a consolidation of previous labor laws. Most of the provisions of the foregoing statutes were retained and elaborated. Its new features included the abandonment of wage-fixing by direct statutory regulation (to be replaced by wage levels set and administered by local justices), and provisions for a careful regulation of apprenticeship. While it contained no provisions against

16 The text is given in Bland et al., pp. 325-333.

17 For a discussion of the background and actual enforcement of the statute, see Bindoff (1961), Davies (1956), Gay (1967), and Ramsey (1965).
labor combinations, nonetheless this law "marks the highest point attained by state regulation of labor in England" until the end of the eighteenth century (Bryan, p. 116).

The Statute of Artificers was concerned to regulate the course of job training by establishing nationally the principle of apprenticeship for at least seven years, a practice which had previously been subject to municipal or guild control. The law attempted to raise the level of craftmanship in declaring that it was unlawful for any person to exercise any art, mystery, or manual occupation at that time exercised in England, unless they had previously served to it an apprenticeship of at least seven years (p. 331). The law explicitly sought to promote the advancement of virtues similar to those held in high esteem by the guilds. A commentary on it in Parliament declared that the provisions for apprenticeship would be a "very good means and help to advance husbandry, to banish idleness, to reform the unadvised rashness of licentious manners of youth, . . . [so that] the commonwealth will not be in such short burdened, as it now is, with lusty beggars, rogues and vagabonds . . ." (Tawney and Power, 1, p. 363).

As we have seen, guild regulations at the local level had previously controlled entry into trades. This law "attempted to codify and strengthen these detailed regulations." It outlined "the detailed enforcement duties of local justices of the peace, aldermen, and local administrators" (Ekelund and Tollison, p. 31). Indeed, the various
aspects of the statute all stemmed from the application nationally of local regulations; as Adam Smith explained, "what before had been the bye-law of many particular corporations, became in England the general and publick law of all trades carried on in market towns" (WN. I. x. c. 8). The law "treated the training of apprentices as a national question," disallowing local exclusiveness by not "requiring apprenticeship inside the same town where the trade was to be exercised" (Heckscher, 1, p. 230).

While recognizing the powers of the guilds to promote quality in craftsmanship, the Statute also dealt with various abuses in the guild rules governing apprenticeship, such as those designed "to perpetuate the monopoly of trade in privileged families" (Jones, 1926, p. 930). As Heckscher notes, "One of the abuses which the guilds obstinately and persistently practiced was to admit sons of master-craftsmen to the craft without any apprenticeship" (1, p. 236).

What were the goals of this legislation? Students of

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18 Ekelund and Tollison see an economic motivation behind the extension of local controls to a national level. It was an attempt by merchants and administrators of towns to prevent unapprenticed "interlopers" from practicing their trade in the local area; restrictions on competition were better enforced by uniformity in regulations, as they explain:

... the more immediate economic reason for the move to national regulation was the inability of the towns to restrict cheating on local arrangements. Towns, in other words, attempted to buy a nationally uniform system of regulation from the king, and local monopoly rights were to be protected against encroachment, especially by 'foreigners' (p. 36).
sixteenth-century England have taken different approaches towards this question of economic policy. Some writers, such as Cunningham, Heckscher, Lipson, and Nef, saw government policy as operating with great consistency in changing the nature of the economy in accordance with 'mercantilist principles.' Nef, for example, argued that the monarchs of this era looked at industrial problems in light of certain clearly established goals: strengthening the authority of the crown, promoting social justice, and improving the quality of industrial wares (p. 137). Palliser elaborates on the goals of Tudor economic policies as seen from this perspective: they included "ensuring sufficient native production of basic foodstuffs at reasonable prices, protecting urban industries from rural competition, and enlarging and strengthening urban guilds" (p. 320). Thus it is argued that the regulations imposed on the economy during this period reflect a government which was clear about the direction it wished the economy to proceed in (Clarkson, p. 191).19

The makers of social and economic policy in Tudor England were especially concerned with social stability. While economic intentions were part of this pattern, it should be understood, as Minchinton observes, that "... Tudor governments were more concerned to regulate industry

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19 Stone argues that the relentless pressure of war was key: "Security, not prosperity, was the main object of Tudor economic policy" (p. 119).
in the name of public order than to establish any unified set of economic objectives" (p. 27). Having acknowledged this qualification about policy, it nevertheless remains true that the employment of as many people as possible was a primary goal of legislators, both for social and economic reasons. Sybil Jack argues that such a goal was consistent with the perceived need "to control factors which lead to social instability." Regulations of the number of laborers in the marketplace were consistent with this end:

... given a situation in which there was limited technological advance, regulations limiting the size of units, preventing masters from taking too many apprentices for fear they should find themselves lacking employment in later life, maintaining adequate standards of quality, all have an integrated and defensible rationale (p. 54).

This legislation can be interpreted under the interest group theory as a product of the efforts of guilds to obtain economic privileges and the supply response of Parliament in offering protective legislation. Artisans, merchants, and other groups sought regulation in order to obtain monopoly privileges. Artisans possessed "inherent organizational advantages in lobbying for state regulatory protection from competition . . . relative to other groups, such as consumers in general" (Ekelund and Hebert, p. 45). In this view the legislative authorities were not so much concerned with promoting the goal of full employment and social stability, nor were they acting shortsightedly and irrationally in a pursuit of power. Instead, the state was " . . . a unified,
revenue-seeking leviathan, where fiscal needs (defense, court expenses, and so forth) prompted the sale of protective legislation" (Ekelund and Tollison, p. 24).

Such an approach has several commendable features. It seeks to avoid the facile identification of a 'homogenous' mercantile trade, employment, or population policy; it recognizes the role of economic interests in the actions of economic policymakers. Yet there is a fallacy in this explanation. It would be simplistic to ignore the social and religious preconceptions and motivations that animated Tudor economic policy. One must consider the dynamics of the social assumptions in which economic legislation was formulated. Economic problems were not considered apart from religious and political ends. The organic conception of society was explicitly upheld in Tudor England, as Bindoff explains:

> When early Tudor writers felt the need of a word to denote this aspect of national life they adopted one with a distinctly political flavour. This word was 'commonweal' or 'commonwealth.' It originally meant either the body politic or the general good, and in the second of these senses it had been the leitmotiv of many early sixteenth-century treatises (1955, p. 129).

Promotion of the 'commonweal' in Tudor England meant the guarantee of social stability and full employment. Moreover, it is clear that the sixteenth-century legislator was following the long-standing desire to have orderly trade, which in part entailed the manufacture of honest goods, and skill in the workmen. There was a consistent desire to
obtain, as Holdsworth observes, "a reasonable supply of labour for the various callings which were necessary to secure the health and strength of the nation" (4, p. 319). The provisions of the law reflected the conception of the "public good" in Tudor society.

During the period when the Statute of Artificers was passed, the decline of the guild system was becoming increasingly evident. Economic historians generally recognize that guilds became essentially very exclusive due to various economic changes in the sixteenth and seventeenth centuries. Such factors as the integration of national life, the widening of markets, and the mobility of the population began to transform the guilds (Thorne, p. 231). Guild arrangements to control labor were increasingly opposed and avoided as an increasing labor supply, expanding demand for particular goods, and the growth of new industries led to developments outside guild control (Coleman, 1977, p. 74). Coleman elaborates on the economic changes affecting the guilds in the era from 1500 to 1700:

If either the labour supply or the demand for particular goods were to increase substantially, pressure for entry would mount or production would expand outside the gilds. This seems to have been happening by the beginning of the sixteenth century, and it led in England to a gradual and piecemeal decline in the power and authority of the gilds over the period as a whole . . . The decay of the English gilds was probably hastened by the earlier move of the textile industry into rural areas, and by the failure of the urban-based gilds to establish their authority in such areas, although in some rural industries forms of gild control did continue to operate . . . (1975, pp. 20-21).
In addition, the guilds faced increased competition from independent traders and craftsmen, many of whom came along with inventors from continental Europe (Thorelli, p. 14). Such developments, alongside "the considerable extension of rural industry organized on the putting-out system ... tended to disrupt or simply bypass the guilds which, with a few exceptions, were unable to impose authority on rural manufacture or new industries" (Coleman, 1977, p. 74). Since the guilds were often "geared" to a localized and limited market (Whitney Jones, p. 168), expansion in demand decreased the degree of control they exercised.

The provisions of the Statute of Artificers did not successfully stem the decline of the guilds. As the sixteenth century neared its end, the difficulties in enforcing its provisions became evident. Several key features of the act were neglected by employers, as Nef observes:

Acts regulating methods of manufacturing, limiting the number of enterprises that might be established in an industry, and the number of apprentices a master might employ, were even less successfully administered than acts dealing with prices and wages. Early in the seventeenth

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20 London stands as a representative example of this development, as Kellett observes:

... by the end of the 16th century the gilds' control over entry to London's crafts and industries had been seriously weakened by the rapid extension of the built-up area around the square mile of the old City and by the growth of urban production ... On the one hand the Corporation and the Companies were failing to curb the retail sale of goods by foreigners; on the other hand they were failing to restrict the practice of handicrafts to those who had secured an apprenticeship and were free of a Company (pp. 381-382).
century, if not before, masters often took many more apprentices than the law allowed (pp. 49-50).

Apprenticeship rules were often skirted, for several reasons. There would often be a need to quickly meet an increasing demand for various products and services. Workers were apt to take on secondary occupations without qualification by apprenticeship not only when their primary craft was in a slump; if there was need for "a quickly enlarged supply of a commodity," in the absence of technological improvement "this required more workers" (Davies, p. 109). Apprenticeship requirements were particularly ignored by employers, because they hampered their ability to employ unskilled workers at low wages. This development inevitably led to the downfall of the guild system, for its power to supervise trade was bound up with its ability to enforce apprenticeship (Nef, p. 47).

Many guilds responded with measures which attempted to maintain the control of trade that they held within their own town.21 Ironically, their increasingly rigorous efforts to protect this control forced trade away and undermined their prosperity. As Jones notes, "The exorbitant entrance fees and other unwise regulations forced craftsmen out of the towns into the country and neighboring villages" (1926, p. 923).

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21 They were not aided by the fact that the Crown began to grant, "for sufficient compensation, immunity to tolls to the inhabitants of different towns, ecclesiastical orders and others," a policy which developed more widespread commercial intercourse throughout England (Jones, 1926, p. 923).
As new workers were recruited into industry to generate an increased output, many of these laborers were among those who could not afford to start their own business. Faced with the high fees for entrance into the guild which established craftsmen had implemented, "a growing proportion" of the labor force "was obliged to work on behalf of others" (Clay, 2, p. 10). The financial and territorial foundations of guilds thus came to be undermined.

The latter part of the sixteenth century, then, saw the implementation of more restrictive guild ordinances. Fisher observes that "many of the corporate towns reconstructed their gild systems and tightened up their bye-laws in an effort to ensure full employment for their citizens by suppressing the enterprise of those who did not share their freedom" (p. 7). Whereas they were once regulatory bodies which largely "concerned themselves with the quality of goods, fair dealing and high standards," the guilds increasingly became "combinations in restraint of trade" (Thorne, p. 231). In litigation over the validity of the guild ordinances passed in this context, the early seventeenth century common law increasingly distinguished between legitimate regulation and unlawful restrictions on trade.

II. COKE AND THE COMMON LAW COURTS ON RESTRAINT OF TRADE

The common law courts responded in two ways to the guild practices in the late sixteenth century. One direction jurists took was to apply the doctrine of the "public
calling." From the fifteenth century on, the common law had recognized the public calling as an occupation distinct in nature from the private calling. The latter involved occupations in which so many persons plied the trade that there was no hardship in one practitioner's refusal to serve a consumer, for there was competition within the trade. But a person engaged in a public calling was under a legal liability to serve, and moreover to perform the trade with proper skill. This obligation was founded on "the indispensability of the service performed and the existence of a monopoly in its provision" (Rubin, p. 33). The monopoly was based on the presence of a natural limitation of some sort, as well as some control of the market based on the character of the service (Wyman, p. 172).

A trade operating as a 'virtual or natural monopoly'

22 Thus a carpenter was under no legal obligation to serve every customer who requested that a house be built for them, but a blacksmith (and an innkeeper) faced a severe penalty if they did not serve all that made a request of them. Wyman argued that this distinction was based on the different economic conditions of the two trades:

So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There were builders enough to make the situation in that business virtual competition, so that there was no hardship; but the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for want of a shoe if the wayside smith should take it into his head to refuse to serve (p. 158).

Certainly a primitive infrastructure contributed to the existence of a 'natural' monopoly in the provision of certain types of services.
would be subject to the law of public employments or public callings. The courts argued that guild arrangements would be necessary for the proper regulation of these type of trades for the public good. As public callings, these trades were obliged "to provide competent service at a reasonable price" (Rubin, p. 33).

For purposes of understanding the development of the doctrine of conspiracy in restraint of trade, the other manner in which the common law responded is more significant. The common law jurists broadened the rule against private trade restraints which had been formulated in the fourteenth and fifteenth centuries. Increasingly the law spoke of 'the liberty of the subject to pursue lawful and established trades' as over against restrictions on trade promulgated by craft associations. By voiding guild ordinances which limited the freedom of trade of guild members and non-members, jurists were widening the lines of illegality, range of offenses, and prohibitions upon guild conduct all delineated by the common law. Their rulings were still grounded in the ancient writs. But these judges were establishing more fully the right to work as a fundamental tenet of the common law (Hamilton, 1940, pp. 26-27). Thus the principle (or common right) of freedom of trade developed alongside economic changes which allowed for greater competition.

Royal grants of privilege relating to trade also came under the scrutiny of this common law principle during this
era. These included "grants of exclusive rights relating to foreign trade," as well as "grants of such rights in particular domestic trades or manufactures conferred upon individuals or associations outside the guild system."

During the latter part of the sixteenth and early part of the seventeenth century, certain aspects of all these grants "came to be challenged on the ground that they interfered with lawful trade" (Thorelli, pp. 21-22). These challenges, especially those regarding the royal prerogative in regards to monopoly grants, increased in frequency and intensity during the later years of Elizabeth's reign and continued under James I and Charles I.

Appealing to past precedents, common law jurists found various private ordinances and royal grants of privilege to be unacceptable restraints of trade. Thus the common law courts curtailed the powers of guilds and municipal corporations, and the prerogative power of the crown in the sphere of economic activities. The regulatory apparatus of Tudor and Stuart England provided the backdrop for the controversy over the legitimacy of both private and royal trade privileges.

A. THE INSTITUTIONAL CONTEXT OF THE COMMON LAW RULINGS

Students of the English judiciary note that three common law courts had evolved in the period between the Norman invasion and the early seventeenth century: the Court of King's Bench, the Court of Common Pleas, and the Exche-
These civil courts "were initially under the crown's direct control." Ekelund and Tollison add that "During the thirteenth through the fifteenth centuries, however, the courts became increasingly independent of the crown . . . ."

Toward the end of the fourteenth century the Court of King's Bench became simply a common law court. This functional separation intensified the growing "cleavage of interests between the king's council, the Court of King's Bench, and the Parliament" (p. 48).

The common law courts believed that they had adequate precedent in the wisdom of the past, which they understood to stand against restraints of trade. Ekelund and Tollison summarize the history of the interaction between monarch and judiciary in this era (as seen by Heckscher): the king attempted "to avoid the common law courts by establishing a royal court system centered in the Privy Council (the court of the Star Chamber), which gave the crown an administrative elasticity to enforce grants of national monopoly" (p. 51).

Sir Edward Coke was at the center of the common law movement which evaluated the guild ordinances and royal patents in the early seventeenth century labor market. Coke and other common law jurists argued that common law was superior to statute law, especially in matters of economic legislation. Coke in particular attempted to subordinate the royal prerogative to common law. The common law jurists were the most powerful force in the resistance to economic abuses perpetrated by the monarchy and its agents in early seven-
teenth-century England. They aligned with Parliament in attacking the royal economic policy. Their alliance "first achieved prominence when Coke rose from Attorney General to Chief Justice." Coke presided originally in the Court of Common Pleas (1606) and later at the Court of King's Bench (1613), "the two principal courts of common law" (Heckscher, 1, p. 280).

Coke and other common law jurists drew upon a legacy of English legislation and rulings in the common law which were opposed to private intrusions on liberty in trade. The second part of Coke's Institutes contained a commentary on Magna Charta and some 38 other charters and statutes. Coke concluded from the Magna Charta that "all monopolies concerning trade and traffic are against the liberty and freedom, declared and granted by this great charter, and against diverse other acts of Parliament" (p. 62b). Other common law judges similarly appealed to what they saw as a longstanding perspective on economic freedom in English statutes and the common law which interpreted them. Heckscher argues that it was this understanding that was significant, whether or not it was in fact exactly accurate:

Magna Charta and 14th-century English legislation gave rise to the opinion held by later generations that economic liberty had therein an age-old basis. They thought that every compulsion in economic activity was illegal from of old. This idea had numerous consequences quite apart from the question whether those medieval decisions were correctly interpreted or not. The very fact that later generations interpreted them in this manner had important results (1, p. 274).
To what extent did Coke misunderstand or misuse common law precedents? Several observations can be made on this issue.

It should be noted that Coke's effort to substantiate legal rulings on the basis of precedent was characteristic of the common law courts, which espoused a fundamental belief in the antiquity of the common law (Pocock, p. 46). These courts were "the repository of the wisdom of the past." They operated under the premise that "they could not create law, only interpret it, and that the law 'grows' through such applications of old principles" (Ekelund and Tollison, p. 51). In regards to Coke, there is no doubt that he relied upon "very old sources" for his precedents; as Holdsworth adds, Coke thought "the older the source . . . the purer the law." Holdsworth further observes that

He naturally represented the law of his own day as the logical outcome of the law laid down in these older sources. The newer decisions had not changed the law - they had merely developed or explained the truth to be found concealed in the oldest authorities. This way of reasoning, which is found not only in Coke but also in the writings of many later generations of lawyers, has tended to mislead historians who are not lawyers (5, p. 473).

Thus it is helpful to consider the opinion of legal historians in regards to Coke's use of precedent.

Legal authorities have made a mixed evaluation of Coke's appeal to the older common law. Holdsworth contends that Coke tended to be "uncritical in the use of his authorities" and at times was led to "misrepresent their effect." Coke's belief in the antiquity of the common law was so strong that he attributed little or nothing of this law to
the Conqueror and his successors; this law rested "behind the meagre statements of the Anglo-Saxon codes and early Norman costumals" (5, p. 475). But his rulings have been accepted in the vast majority of cases by later jurists. Along these lines Bowen, Coke's biographer, follows Holdsworth in observing that neither of Coke's opponents, Bacon or Lord Ellesmere, could find any "serious errors in the Reports except in political or semipolitical cases" (p. 515).

B. COKE AND THE COMMON LAW ON FREE TRADE AND MONOPOLY

Coke's view of 'freedom of trade' followed the common law rule which opposed arbitrary occupational restrictions that prevented 'free ingress' into a trade. "Freedom of trade," Coke said, "is the reason that the Low countries so prosper. They are not troubled with Impositions to burden trade nor Monopolies to restrain it" (Commons Debates, 5, p. 94). The latter part of this statement is especially noteworthy. It leads us to consider Coke's understanding of 'monopoly.' He defined monopoly as follows:

A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful

23 For the purposes of this study, there are two relevant cases: Coke's view of the legality of the dispensation in the Case of Monopolies, and of the power of the common law to control Acts of Parliament in Bonham's Case.
trade (Institutes, 3, p. 181). 24

Coke did not always use the term 'monopoly' in a way that was entirely consistent with his own definition (White, p. 119, n.144). That is, in his rulings, monopoly could involve not only "exclusive trade privileges bestowed by the Crown," but also "private acts of hoarding" (Malament, p. 1340). 25 Coke opposed certain kinds of restrictive measures, whether public or private. 26 "He regarded monopolies

24 According to Boudin, when Coke uses the term 'freedom of trade,' consistent with his definition of monopoly, he means the privilege of trading:

. . . Coke did not say that there is such a thing as freedom or liberty of trade generally . . . What Coke said is that the king has no right to create a monopoly which would take away from persons or bodies politic or corporate any freedom or liberty of trade 'that they had before' (p. 17).

Believing that all freedom of trade was based on privilege, Boudin does not "recognize that trade might be lawful, and hence 'free,' even though it was not based on guild regulations, grants of privilege or other explicit expressions of public or semi-public sanction" (Thorelli, p. 21, n.49).

25 The economic writer Edward Misselden was a contemporary of Coke, and he defines a monopoly as follows:

Monopoly is a kind of commerce, in buying, selling, changing or bartering usurped by a few and sometimes but by one person, and forestalled from all others, to the gain of the monopolist and the detriment of other men. The parts then of a monopoly are two: the restraint of the liberty of commerce to some one or a few; and the setting of the price at the pleasure of the monopolist to his private benefit and the prejudice of the public. Upon which two hinges every monopoly turns (p. 57).

Misselden's objection to monopoly occurred when private persons created such a circumstance on their own without public sanction; he had no objections to monopoly created by the royalty or Parliament (pp. 61-72).

26 Heckscher errs in this connection when he argues that Coke and the common-law courts "decided according to the legal title which the monopoly could claim and not
established by royal grants as only particular instances of a more general economic grievance," that by which one was 'hindered in their lawful trade.' This could involve "statutory monopolies and the monopolistic privileges of corporate boroughs" (White, p. 117). He opposed measures based on all of these sources whenever he found them to be arbitrary restraints of trade.

Coke's understanding of freedom of trade and monopoly reflects the late medieval common law treatment of restraint of trade and Tudor social conceptions. Both of these features of his approach invoked "the ideal of the body politic with its emphasis on public good over private gain" (Malament, p. 1346). In this view, the ruthless pursuit of private gain should be prohibited in order to promote the public good. This ideal pervaded much of Tudor thought. It was applied to the grievance to the commonwealth involved in acts of hoarding or price fixing.

Coke utilized the concepts found in the ancient laws against forestalling, regrating, and engrossing in his approach to restraints of trade. He discusses these laws in the third part of his *Institutes*, where he observes that "every practice or device by act, conspiracy,27 words or according to its existence or to its economic character" (1, p. 284).

27 Coke does not elaborate on this aspect of these crimes. But he does discuss the concept of conspiracy in a non-economic context elsewhere. In part three of the *Institutes*, Coke defines conspiracy as a consultation and agreement between two or more,
news, to enhance the price of victuals or other merchandise, was punishable by law" (p. 196). Coke endorsed the common law penalties against these practices. Sixteenth century legislation dealing with both food and labor had emphasized the particular detriment caused by engrossing; as Heckscher observes, it was argued that "it should not be permissible for one person to retain what could suffice for many and so the expression 'engrossed into few men's hands,' was very common" (1, p. 272). In the same manner, Coke spoke out in the Parliament of 1621 against engrossing. He listed six categories of people who would come to grief; among them were "monopolists who engrosseth by themselves what should be free to all people" (Heckscher, 1, p. 272). As a jurist Coke ruled against the 'engrossing of labor' by exclusionary guild ordinances.

No precise precedent existed for actions in law against to appeal or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted and appealed; and afterward the party is lawfully acquitted by the verdict of twelve men (p. 142).

This narrow understanding of the offense was expanded in the famous Poulterers' case (1611) which Coke reported. There it was stated that the mere agreement falsely or maliciously to indict constituted the substantive offense of conspiracy; trial and acquittal was not a necessary condition. The essence of the offense was in the confederacy itself for the commission of a crime, and not in the actual commission. This led to a wider extension of the doctrine of conspiracy against combinations in the eighteenth century (Mason, pp. 25-26; Bryan, p. 59). Coke noted that malice was a key incident in conspiracy (Reports, 9, p. 55); this element was emphasized in the English trade union cases in the nineteenth century and is an integral element of the common law approach to combinations in restraint of trade.
royal grants of monopoly, "because it was not until 1601 that royal patents became actionable at common law" (Malament, p. 1340). In stating his opposition against this form of monopoly, Coke relied upon the common law hostility towards individual forms of trade restraint such as engrossing. Exclusive privileges conferred by the Crown could engross into a few hands a trade which should be open to all qualified craftsmen.

On the other hand, Coke did approve of certain kinds of guild privileges or royal patents to parties outside of the guild system. In opposing monopolies, Coke was opposing regulations of trade which were in fact restrictions of trade; but he did endorse the principle that trade must of necessity be regulated for the good of the commonwealth, for "true trade and traffic cannot be maintained or increased without order or government" (Reports, 8, p. 125a). Coke's understanding of freedom of trade was qualified; he did not equate freedom of trade with absolute economic liberty. "Free trade" was trade that was "not limited by unfair or unreasonable restraints" (White, p. 137).

28 Malament explains that "Cases involving the Crown prerogative had previously come before the Star Chamber and Privy Council; only the popular and parliamentary outcry induced Elizabeth to concede common law jurisdiction" (p. 1340).

29 Some economic writers of the early seventeenth century espoused a very similar conception of freedom of trade. It is true that many statesmen mouthed platitudes about the evils of monopoly and the virtues of free trade, and thus one must be careful in an examination of the meaning of these terms. Nonetheless, Raymond De Roover has
III. AN ANALYSIS OF COKE AS LABOR MARKET REGULATOR

In his involvement with labor market regulation as a jurist and legislator, Coke distinguished between legitimate regulation of trade and restraint of trade. He applied this distinction to guild by-laws, municipal corporate ordinances, ordinances of foreign trading corporations, and royal patents for operations outside the guild system. Considering the economic factors affecting the ebbing of the guild system, this sort of distinction was quite significant in the economic and legal thought of Tudor and Stuart England. As Malament observes:

It was the difference between setting just as opposed to extortionate prices; between enforcing standards of quality as opposed to adulterating goods. And most important, it was the difference between harmonious government in a trade and acri­monious dissension caused by the exclusion of many

pointed out that the term 'free trade' had a particular meaning to the economic writers who were contemporaries of Coke such as Gerard de Malynes, Edward Misselden, and Thomas Mun:

... in their parlance, 'freedom of trade' was not the opposite of protectionism - which was not yet an issue - and had nothing to do with the absence of trade barriers between countries. 'Freedom of trade' was the antithesis of 're­straint of trade' and of monopoly. The accent, instead of being on rivalry, as in 'competition,' was on the freedom of ingress into a profession or a trade and, more than that, on the absence of all hindrances to trade (1951, pp. 292-293).

De Roover overstates the case when he claims that these men opposed "all" hindrances to trade. As one example, consider Misselden's remarks on good order in trade: "want of government in trade opens a gap and lets in all sorts of unskillful and disorderly persons; and these not only sink themselves and others with them; but also mar the merchandise of the land, both in estimation and goodness" (p. 85). But their understanding of free trade certainly is in line with the common law view.
who sought membership and training in the craft of their choice (p. 1341, n.114).  

In order to understand the criteria by which admissible and inadmissible kinds of market regulations were distinguished, we must undertake an analysis of certain cases in Coke's Reports and his statements in Parliament.

We have seen that in the organic conception of society which was held in sixteenth-century England, the purpose of guilds was to promote quality workmanship and moral virtue. The Statute of Artificers reinforced this end of labor market regulation. It made the institution of apprenticeship compulsory on all engaged in industry. As a memorandum on the law put it, a seven year's apprenticeship was necessary in order that an apprentice "should grow into greater knowledge and perfection in the art or occupation that he was brought up in" (Tawney and Power, 1, p. 356). Moreover, this legislation sought by means of required apprenticeship

30 Little challenges the viability of this distinction, especially in regards to the last instance mentioned by Malament. He denies that the economic practices of the guilds can be usefully divided between restriction and regulation: "The widespread and thoroughly accepted practice of 'regulating' the number of guild members undoubtedly looked like 'restriction' from the point of view of those excluded from the guild, or those compelled to join" (p. 196). Little does not consider that the issue is really the standpoint of the common law jurist. He does concede that Coke claims "Ordinances for the good Order and Government of Trades and Mysteries are good, but not to restrain anyone in his lawful Mystery" (Reports, 11, p. 54a). He considers this statement of small consequence, and remarks that Coke does not give "any criterion by which to decide between 'order' and 'hindrance'" (p. 206). Little does not consider Coke's opposition to forestalling, regrating, and engrossing and his support for the regulation of goods in the public interest.
"to advance husbandry, to banish idleness, to reform the
unadvised rashness of licentious manners of youth" (Tawney
and Power, 1, p. 363). Because he held these same goals in
mind (Reports, 11, p. 53b), "most of Coke's criticism of
guilds was directed against ordinances which were either
more stringent" than the Statute of Artificers or which
conflicted with other of the Tudor national policies
(Malament, p. 1335, n.86).

The Statute of Artificers "provided a standard for the
regulation of trade which may have helped to check the more
extreme restrictive attempts of particular corporations"
(Davies, pp. 266-267). Such attempts included guild ordi-
nances that required a craftsman to apprentice with a
particular company. As will be seen in several of his court
rulings, it is evident that Coke shared the Tudor aim of
protecting the social fabric from the disruption caused by
corporate by-laws which suppressed the enterprise of
qualified craftsmen.

Coke's rulings followed the principles of the common
law that, as Holdsworth observes, held that the freedom of
trade "could only be curtailed by definite regulations known
to and recognized by the common law." The freedom referred
to here was "freedom from arbitrary restraints not recog-
nized by the law." The power of the chartered borough
represented a limitation upon the freedom of trade, which
"in the interests of public policy" was recognized by the
common law. The same was true of the "prerogatives of the
crown to act for the commercial interest of the nation" (its stated justification) by means of grants of monopoly for new inventions or for special trading privileges to corporations (Holdsworth, 4, p. 350). In the following two sections trade regulations by means of guild ordinances and the prerogative acts of the king will be discussed in turn.

A. GUILD ORDINANCES AND APPRENTICESHIP REGULATION

Litigation against guild restraints made a dramatic upturn in the late sixteenth century, when in their decline guilds resorted to practices which distorted their true purpose (Malament, p. 1341). Guild ordinances which had no clear warrant in law or custom were sharply challenged as the common law courts began to broaden the rule against restraints of trade.

The first significant case was Davenant v. Hurdis (1599).31 Here the common law court dealt with the validity of a particular guild ordinance in the cloth business. The by-law, declared in 1571, was entitled "An Ordinance for Nourishing and Relieving the Poor Members of the Merchant Taylors Company." It begins with a preamble invoking the proper ends of the guild: "... it is the duty of every Christian society to help and relieve every willing labouring brother in the Commonwealth, and especially such as are incorporated, grafted, and knit together in brotherly

31 The complete text is given in Fox, pp. 311-313.
society . . ." (Clode, 1, p. 393). To achieve this end, the guild called for every member of the Merchant Taylors to hire other guild members to fashion at least half of their cloth or pay a fine.

In this case Coke represented the plaintiff, Davenant, who had refused to submit to the by-law. Davenant brought an action in trespass after he was assessed a fine and had goods equal in value to the fine taken by Hurdis, the guild's representative.

Coke's made two claims about the by-law: it was unreasonable, and it was illegal. It was unreasonable because, as Letwin summarizes Coke's thought, "it absolutely required the merchants of the company to give their business to the clothworkers who belonged to the company, but it did not require the latter to provide quick service, good workmanship, or reasonable prices for this business" (1965, p. 25). It was illegal because it tended to create a monopoly, as Coke explained: "for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that, in Effect would be a monopoly . . ." (Reports, 11, p. 86b). Coke was particularly concerned to maintain employment opportunities and the right of skilled artisans to practice their craft. The exclusion of other cloth makers outside the company could potentially add to unemployment if this practice was allowed to persist, for
under the same reasoning the Taylor's Company might very well appropriate the whole of the trade for themselves.

Hurdis's attorney conceded that the ordinance would be void if it did in fact create a monopoly, and that was the judgment in the case; "it was against the common law because it was against the liberty of the subject" (p. 312). The defendant's counsel did not claim that the creation of a monopoly was consistent with the common law; his concession "suggests a consensus about the prior state of the law." Moreover, Coke saw no need to cite "the few early decisions against guild restrictions" (Malament, p. 1342). This was an example of a guild action "for which there was no clear warrant in law or custom" (Thorelli, p. 22). Instead, Coke "counterposed regulations made in the public interest with the ordinance of the Merchant Taylors" (Malament, p. 1342).

Coke cited a number of cases in which ordinances or patents had been upheld by the law because they were for the public good. These were privileges granted to boroughs and guilds in the law to make ordinances for the government of trade. The precedents Coke appealed to included

- a regulation that all ships must harbor in one port and no other, a grant by the King giving a skilled foreigner the sole right to make sailing canvas, and another giving a skilled projector exclusive right to drain lands, a by-law that all cloth sold in London must first be inspected and passed at Blackwell Hall, a by-law of St. Albans requiring each inhabitant to pay a contribution toward cleaning the town, and by-laws for the maintenance of bridges, walls, and similar public works (Letwin, 1965, p. 25).

All of these cases affirmed the right of municipal corpora-
tions to make laws which carried out local customs provided they were consonant with law and reason. The Taylor's ordinance was not a reasonable by-law, hence it established a monopoly. Coke concluded that "by-laws that establish monopolies are against common law and void" (p. 312). Regulations of trade were lawful and reasonable if they were made in the public interest.

Coke construed the public interest in Davenant v. Hurdis "to mean full employment of skilled craftsmen" (Malament, p. 1342). Public policy of this era required that all be usefully employed. On this basis, the judges ruled in Coke's favor: "a rule of such nature as to bring all trade or traffic into the hands of one company, or one person, and to exclude all others, is illegal" (p. 312). Thus the court held that certain privileged individuals could not be permitted to deprive others of their trade by means of an arbitrary private restraint.

32 Coke discussed occupational regulation based on immemorial custom in a case which he reported but did not preside over. This case supplied one of the by-laws which Coke cited. In the Chamberlain of London Case (1590) it was laid down that the city of London had the power to demand of all sellers of cloth that they bring it to be inspected at a common market in Blackwell Hall. The cloth had to be deemed of high enough quality before it was put upon the market. Coke said such an ordinance, a custom confirmed by act of Parliament, was "consonant to law and reason." But Coke reports that customs of London "which are contrary or repugnant to the laws or statutes of the realm are void and of no effect" (Reports, 5, pp. 62b-63a). Ordinances that were valid without a custom or royal charter were those made for the public good, such as reparation of a church or a common highway.
Two more cases illustrate Coke's concern that those properly qualified to practice a trade or craft not be hindered in their pursuit of that occupation. As Chief Justice of the King's Bench, Coke ruled on the case of *Taylors of Ipswich v. Shenning* (1614). The Merchant Taylors had an ordinance requiring that any apprenticed craftsman had to obtain their permission if he sought to practice his trade in the town. The defendant, a private tailor to a "freeman of Ipswich," refused to obtain a license from the company. Coke ruled against the Taylor's ordinance, but not against the right of the guild under its charter to make ordinances in general. Speaking of by-laws such as the one in this case, he declared that they are

... against the freedom and liberty of the subject, and are a means of extortion in drawing money from them, either by delay or some other subtle device, or of oppression of young tradesmen by the old and rich of the same trade, not permitting them to work in their trade freely . . . (Reports, 11, p. 54a).

Coke added that "the Common Law abhors all Monopolies, which prohibit any from working in any lawful Trade" and further that "at the Common Law no Man could be prohibited from working in any lawful Trade . . ." Coke opposed a situation in which one who was completely qualified by apprenticeship could be denied entry into a trade by some artificial pretext, for "the Law abhors Idleness" (Reports, 11, p. 53b).

Coke was not rejecting the apprenticeship provisions of the Statute of Artificers. Referring to this requirement, Coke supported his decision by stating that the Statute
"... was not enacted only to the Intent that Workmen should be skilfull, but also that Youth should not be brought up in idleness, but brought up and educated in lawful Sciences and Trades" (Reports, 11, p. 54a). This was a legitimate labor market regulation. Coke objected to the fact that a man fully qualified to practice his trade under the Statute could be kept from doing so by an arbitrary guild ordinance, i.e., a private restraint on trade (Malament, pp. 1336-1337). This is evident in Coke's additional statement that "Ordinances for the good Order and Government of men of Trades and Mysteries are good, but not to restrain any one in his lawful Mystery" (Reports, 11, p. 54a).

Similarly, in the case of Norris v. Straps (1616), the weavers of Newbury had made a by-law that no person should weave at Newbury unless he had been apprenticed with the town. The weavers sought to impose a penalty on one who had ignored the by-law. An action was brought to recover the penalty, and the judgment went against the weaver's by-law. On the bench for this case, Coke objected to this ordinance as an unnecessary restraint of trade. As in the previous case, this ordinance was "far more restrictive than the Statute of Artificers" (Malament, p. 1355, n.194).

These two cases show that Coke applied the apprenticeship provisions of the Statute of Artificers fairly closely. Another case provides additional evidence on how he con-
strued the law. In *Rex and Allen v. Tooley* (1615), a citizen of London was sued because he had practiced upholstering whereas he was apprenticed as a woolpacker. As we have noted, the relevant provision in the Statute of Artificers had stated that none was to exercise any craft, mystery, or occupation, except those who had apprenticed for at least seven years. Coke declared that the provision did not cover upholstering because it was neither a "trade nor a mystery and did not require any skill" (p. 382). The whole scope of the law concerned only such industries as demanded professional skill. The previously mentioned memorandum on the Statute of Artificers had declared that the purpose of the apprenticeship provisions was to prevent "ignorance and imperfection in diverse arts and occupations" and promote "good and perfect workmanship and knowledge in occupations" (Tawney and Power, p. 355). Thus the law sought to encourage a certain standard of skill among craftsmen. Coke was simply following this same interpretation of the law; he found that upholstering was an occupation requiring no training and hence was outside the scope of the Statute of Artificers.  

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33 This case is reported in Tawney and Power, 1, pp. 378-383.

34 Contrary to Heckscher (p. 292), Coke was not initiating an exclusion of crafts from the apprenticeship regulations. As Malament observes, "The occupation of buying and selling had been excluded twice in different decisions," and, like the Tooley decision, "it had been excluded on the ground that it required no special skill" (p. 1337; cf. Davies, p. 241). Explaining the nature of legislative and judicial relations on matters of this sort, Malament claims that in the Statute of Artificers, "Parliament's intention
It is difficult to gain much further insight into the basis of Coke's exclusion of this trade by utilizing the features of modern models of regulation. Why did it require no skill? The upholsterer "has all things made to his hand, and it is only [up to him] to dispose them in order after such time as they are brought to him . . . his art resting merely in the overseeing and disposition of such things which other men work . . ." (p. 382). Management did not require regulation to insure the proper level of quality. Coke argued that trades such as brickmakers, potters and millers were excluded from the apprenticeship clauses for lack of requirement of skill also. On the other hand, brewers and bakers were within the rules of the Statute of Artificers, because their work concerned the health of men's bodies, and required skill in the exercise of the profession (pp. 382-383). Coke expressed this same principle in another case, finding it "... necessary that brewers should have skill and knowledge in brewing good and wholesome beer, for that does much conduce to men's health" (Reports, 8, p. 131). Apparently Coke thought quality concerns become much more significant when dealing with public health issues.

While Coke did not use technical economic categories, it is apparent that he did have some criterion in mind that resembles modern market failure notions in distinguishing was stated in general terms and it was up to the courts to determine which trades fell within their scope" (p. 1338).
between cases where labor market regulation was and was not needed. The principle of distinguishing between legitimate regulation and unlawful restraint of trade was also utilized by Coke after he left the bench and became a member of the House of Commons.

B. ROYAL PATENTS AND EXCLUSIVE TRADING PRIVILEGES

In Parliament from 1621 through 1628, Coke addressed many crucial economic issues in England. Coke dealt with labor market regulation as found in royal patents and privileges granted to trading companies. As a parliamentarian Coke relied on the same distinction between arbitrary restraint and legitimate regulation. His remarks on the apprentices patent evidence his concern for legitimate occupational regulation. In the debate over this patent in Commons in 1621, Coke argued that the purposes of the Statute of Artificers were to be esteemed, for "it breeds a corruption of manufactures that men should exercise that [trade] wherein they have no skill" (Commons Debates, 4, p. 92). Appealing to the apprenticeship requirements in that legislation, Coke claimed that a patent granting four persons the right to give men licenses "before they be of their crafts masters [is] to the great hurt of trades" (Commons Debates, 2, p. 250).

Coke indicated the length he was willing to go in order to have legitimate regulation for the public health in a debate in 1624 over the Apothecaries' charter. As White
remarks, Coke contended that "Parliament should limit the access to occupations requiring skill, even if they were not trades within the Statute of Artificers" (p. 123). Originally the Apothecaries were members of the Grocers' Company. However, in 1617 "they had received a separate charter granting them the exclusive right to make and distribute medicines within seven miles of London" (White, p. 123; cf. Commons Debates, 7, pp. 77-85). White adds that Coke "was highly sympathetic to the Apothecaries' argument" that they should retain this monopoly when the Grocers' complaint against it was heard in Parliament (p. 123). Coke conceded that it took away "the greatest part of the Grocers' trade" and that merchants in general "had a great wrong by it."

Nonetheless, Coke reported that the Commons Committee on Grievances supported a charter granting exclusivity in trade to the Apothecaries, on the grounds that "such physical composure or potions as are to be taken by sick persons should be composed and made by men of skill and experience" (Journals, 1, p. 756).

Coke's ruling on an important case some sixteen years earlier illustrates that he did not always find the exercise of privileges based on patents to be legitimate regulation promoting the public health. In Bonham's Case (1608-10), Dr. Bonham had received a medical degree from the University of Cambridge. But he was not allowed to enter the Royal College of Physicians in London and practice medicine. The King had granted a patent to the College which had been
confirmed by Parliament (Hamilton, 1940, p. 28). One clause in the statute stated that "no one should practice medicine in the city of London and district if he be not admitted by the letters of the president and college" (Reports, 8, p. 109a). Coke argued that a proper construction of the statute indicated that the censors did not possess the power to fine and imprison unlicensed, as distinct from incompetent, physicians. Bonham was a competent physician. The charter of the College did not extend to the denial to a competent practitioner of his right to pursue his calling (Hamilton, 1940, p. 28). Furthermore, Coke stated that this would make the Censors of the College at once judges and parties, which was unjust, and so this clause in the Act was void (Reports, 8, p. 118a).

Thus Coke invalidated the patent. In doing so, Coke made a quite significant assertion. He stated that

it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void . . . (Reports, 8, p. 118a).

The common law jurist had the right to overrule a Parliamentary statute, i.e. the right of judicial review. As will be seen in chapter four, this principle was applied in a parallel way in American jurisprudence by Supreme Court judges who overruled legislation reflecting the state's police powers to govern the public health, safety, and
morals. In both instances, the jurists found some legislation governing occupations to be arbitrary restraint of trade and not legitimate regulation under the state's police powers.

Many of Coke's speeches in Parliament in the 1620's dealt with the requests of trading companies and individuals for monopoly grants, either to "order trade" or for the purpose of introducing a new invention. Coke's responses to them made a distinction "between restraints on free trade, which he believed to be illegal and inconvenient, and government of trade, which he regarded as both lawful and beneficial to the commonwealth" (White, p. 89). Each of these type of monopoly patents will be considered in turn.

Coke argued that the institution of a corporation of merchants or others for the increase and advancement of trade, but not for its hindrance and diminution, was legitimate (Reports, 8, p. 125a). The privileges given to such corporations "were generally of the commercial and not of the manufacturing order; and they were not regarded as grievances" (Holdsworth, 4, p. 351). Coke recognized the royal prerogative in granting trading companies the right to regulate a trade, for "trade and traffic cannot be maintained or increased without order and government" (Reports, 8, p. 125a). He also claimed that such a grant by the king would be subject to the regulation of the common law.

Coke was cautious in endorsing the claims that foreign trading companies such as the Merchant Adventurers, the
Staplers, the East India Company, and municipal corporations such as the borough of Shrewsbury, actually provided "good government in trade" in their own particular cases. Some trading companies no doubt promoted good government in trade, and Coke sought to uphold this principle; but others "ignored the public good by exporting wool or cloth of poor quality or . . . created demand for useless luxuries imported from abroad" (White, p. 114). Speaking of such claims to serve the public good, Coke observed that "new corporations trading to foreign parts, and at home, which under the pretence of order and government, in conclusion tend to the hindrance of trade and traffic and in the end produce monopolies" (Institutes, 2, p. 540). Coke was often sceptical about the claims of some regulations of trade to promote the public good and provide good order in trade; Coke "recognized that certain groups, like the Merchant Adventurers, fallaciously claimed to be providing good order for trade when they were actually restraining it, promoting their own private interest, and undermining the public good" (White, p. 115). Coke and other common law jurists were "quite prepared to see that these bodies used their power for the purposes for which they were given." Holdsworth further explains that "they refused to uphold their by-laws, though sanctioned as required by the Act of Henry VII, if they seemed to restrict unduly the common law right of every man to use his trade" (4, p. 352).

In regards to the other type of patent, Queen Elizabeth
had initiated a policy of granting exclusive rights of production in 1562 to "'industrious' denizens who either imported or invented new processes" (Malament, p. 1357). Holdsworth notes that, as originally instituted, the royal grant of patent "did not create a monopoly of selling, but of manufacturing the product" (4, p. 345). This type of grant differed from the medieval grant of special privileges to those who introduced a new industry. Such grants were made in the weaving, woollen, and other industries. The common law recognized the validity of these type of grants "if it could be shown that they were clearly for the welfare of the realm" (Holdsworth, 4, p. 344). Holdsworth adds that "the crown made the grant and kept the privileged industry under its sole control." Under these new grants, however, "the patentee applied for the grant, and, having got it, was left free to act under the powers conferred by it" (4, p. 346).

It was not until Elizabeth's reign that this type of grant became common. The Queen sold patents "irrespective of the fact that neither the commodity itself nor its manufacture represented an innovation in the realm."

Thorelli further observes that "by the end of the 16th century patents in no way related to invention covering the sale or manufacture of, among other things, such necessities as soap, salt, starch, saltpeter, glass, iron, steel and paper had been issued" (p. 25). The monopoly system began to be abused; there were hindrances to trade and manufacture,
high prices, and inferior goods. The grants by the crown simply got out of hand, becoming objects of personal profit. Patentees were delegated the right "to search the localities of competitors and even individual homes and the right to seize 'contraband' goods" (Thorelli, p. 25).

Protests against the patent abuses in Parliament led to a debate in the House of Commons over the power of the crown to make such grants. Those aggrieved by these patents thought that "the common law did not warrant these infringements of liberty to trade . . ." (Holdsworth, 4, p. 348). Elizabeth decided to leave the validity of the patents to the judgment of the common law. The latter was called upon to settle the question in the Case of Monopolies (1602).

In the Case of Monopolies (also known as Darcy v. Allen), Darcy brought suit against Allen for infringing his privilege (based on a royal grant) to make, import and sell playing cards. The King's Bench invalidated the patent. An exclusive privilege "founded on custom or by Parliament was held to be legitimate under the common law, while monopoly founded by royal grant was not" (Ekelund and Tollison, p. 54).

The rent-seeking interpretation of this case, as set forth by Ekelund and Tollison, argues that "the relevant issues concerned the legality of certain monopoly rights and who had the legal right to supply these rights, Parliament or the crown." Coke's report of the case "attacked the prerogative of the crown in the grant of monopoly or of special
trading privileges to corporations . . ." Ekelund and Tollison emphasize that Coke insisted instead "that rights over trade are reserved to Parliament." They claim that:

Coke's decision states that Elizabeth had no prerogative to regulate playing cards as "things of vanity," in part because this would constrain individuals from practicing a trade that had been protected and recognized by Parliament. In other words, only Parliament could act as regulator (p. 54).

Following the rent-seeking component's view of the independent judiciary, Ekelund and Tollison contend that patentees faced uncertainty concerning their monopoly rights. The role of the common law courts was to enforce the long-term contract between Parliament and rent seekers. Coke's role must be understood in this light; as they claim,

Obviously the legitimacy of rent seeking was not the central issue to Coke; rather, it was a question of which organ of government had the authority to collect rents. Other judgments of the common law courts also supported Parliament's power to supply regulation in output markets (p. 55).

Ekelund and Tollison reject the application of modern public interest style arguments to the action of the courts in this case. They do recognize that "Parliament and the courts may have regarded the public interest as identical to the removal of patent-granting power from the Crown" (p. 55, n.18), but they do not see this as the primary motivation for these actions: "In these ruder times, what other goal of regulation could there have been except unvarnished rent seeking? To apply conceptions of the 'public interest' to the historical context of mercantile England requires a
great stretch of the imagination" (p. 42).

However, one can argue that the actions of the common law courts can be better understood in light of these jurists' understanding of the public interest, rather than that of the twentieth-century. Coke's conception of "free trade" was more complex than opposition simply to royal patents; it was not merely based on a political argument. Coke opposed certain forms of monopoly irregardless of their source. Ekelund and Tollison's analysis suffers from a lack of any consideration at all of the other cases in which they claim the courts "rescinded monopoly rights in labor markets" (p. 52). Most of these other cases are ones which Coke decided. As we have seen, in them Coke refers to considerations of quality in workmanship and the promotion of industriousness; these are ends that serve "the good of the commonwealth." Monopoly rights are rescinded because they are hindrances to trade, and stand in the way of full employment.

Moreover, other aspects of Coke's report on The Case of Monopolies elaborate more fully that the decision in this case rested on an appeal to the "public policy of the common law" (Malament, p. 1343). The Court referred to Davenant v. Hurdis and general statements of principle to nullify monopolies. The King's Bench held that all trades provi-

\[35\] One of the sources for these principles was the Scriptures. Noting the Court's citation of Deuteronomy 24:6 (No man shall take the nether or the upper millstone to pledge: for he takes a man's life to pledge), Coke comments
ding employment to the Queen's subjects, "which prevent idleness . . . and exercise Men and Youth in Labour . . .
are profitable to the Commonwealth." An exclusive grant to exercise such a trade was "against the Benefit and Liberty of the Subject." The grant of manufacture was void because it was a "monopoly, and against the common law" (Reports, 11, p. 86a). Coke elaborated on this reason. Monopolies are against the common law, not only because they are damaging and prejudicial to the traders excluded, but they are also harmful to the public generally because of their 'three inseparable incidents': "the price of the same commodity will be raised," "the commodity is not so good and merchantable as it was before," and "it tends to the impoverishment of diverse artificers and others" (Reports, 11, p. 86b).

Higher prices and lower quality merchandise were produced by the abuses of royal patents. As seen in our study of the late medieval common law, these had long been seen as economic offenses. They were means by which certain individuals could gain at the expense of others in

in the Institutes that this passage showed that ". . . a man's trade is accounted his life, because it maintains his life; and therefore the monopolist that takes away a man's trade, takes away his life and therefore is so much the more odious . . ." (3, p. 181).

36 Malament observes that Coke might have cited "any number of cases on behalf of the common law's bias against attempts by individuals to manipulate prices." In her view, "That he did not do so suggests that Coke (and the court whose decision he was reporting) assumed the parallel between the offenses of engrossing and forestalling and monopolies would be obvious to his contemporaries" (p. 1345).
the commonwealth.

Coke reports that the jurists also made an explicit appeal to the obligation to prevent unemployment and idleness among craftsmen in the commonwealth, as well as a certain level of workmanship. As Malament observes, the Statute of Artificers "sought to enforce full employment." The liberty or right to work upheld in the common law was integrally related to this obligation. As we have seen, both the Statute of Laborers and the Statute of Artificers required that all be usefully employed, and thus, as Malament notes, "certain privileged individuals could not be permitted to deprive others of their trade." These laws created the obligation, and the courts upheld the right by voiding monopolies which created unemployment (p. 1344). For Coke, as for the legislators who passed the Statute of Artificers, skill in one's trade was important, as was the full employment of the labor force. The liberty or right to freedom of trade meant freedom from artificial restraints on trade which hindered the achievement of full employment. Coke observed that Darcy's patent was a "dangerous Innovation" (Reports, 11, p. 87a), because it extended monopoly privileges to an untrained and unskilled person, while excluding the trained artisans. The proper governance of trade required regulations to insure skilled persons would be employed in the various trades; these sort of regulations served the public good.

Monopoly grants issued by James I grew significantly in
the next two decades. The monarch sought to bring industry under royal control by means of patent grants for smelting ores, dyeing textiles, making gunpowder, and a host of other economic processes. The petitioners for new companies were "... given, or allowed to buy, a monopolistic right to supervise a trade, to conduct it, and to pocket (or to share with the crown) the fines, fees, and profits" so produced from the enterprise (Heaton, p. 378).

Coke construed the case for monopoly patents based on inventions fairly narrowly. Such patents were legitimate if "the grantee had introduced a new invention into the kingdom and had thereby created a new industry," thus furthering trade. Holdsworth elaborates on the distinction made by common law jurists such as Coke: "small improvements upon existing processes were not regarded as fit subjects of a grant" (4, pp. 350-351). Coke declared that "such a privilege must be substantially and essentially new invented; but if the substance was in esse before, and a new addition thereunto, though that addition make the former more profitable, yet it is not a new manufacture in law" (Institutes, 3, p. 184). As we have seen, various abuses began to appear in the patent system in the 1580's. Malament notes the deleterious effects of the granting of privileges to practice well-established trades: "Craftsmen who hitherto enjoyed the right to work found themselves unemployed or forced to pay a considerable sum to the patentee. Prices rose and often the quality of goods deteriorated." Coke saw
this as inextricably related to "the bestowal of monopolies on court favorites, sycophants and others who knew nothing of the trade which they controlled and who injured craftsmen who did." Coke and his allies in Parliament "sought to remedy the ills which had developed in the administration of the patent system, but not to destroy the system itself" (p. 1357). Coke valued inventions in so far as they contributed to the public good without artificially restraining trade.

In 1623 Parliament enacted the Statute of Monopolies (introduced by Coke in Parliament as "A Bill for Free Trade"). The law came as a response to "King James' flagrant disregard for the common law . . ." (Malament, p. 1351). The Statute was in the main declaratory of the common law; it stated 'the ancient and fundamental law' of the realm. As Thorelli puts it, the Statute "reflected the general aversion of the law to monopoly based on special privilege, an attitude which knew only certain clearly defined excep-

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37 Coke wanted to nullify patents granted for more than a seven year period. As White observes, "The rationale underlying this argument was that subjects who were apprenticed to the patentee for the usual term of seven years in the first year of the patent's execution would otherwise be barred later from what was or had become their trade." Coke also spoke out in Parliament against those monopoly patents which either excluded "subjects from their ancient trade," or "barred the practitioners of that trade from using a different method of making the same product as the patentee" (p. 140). Coke would no doubt object to the length of patent life today on the grounds that such a system gives many firms an entrenched monopoly position.

38 The text is given in Bland et al., pp. 465-468.
tions" (p. 26). The Statute began with a sweeping statement declaring the illegality of monopolies and then proceeded to make exceptions to the rule.39

In Section 1, the law declared that

. . . all monopolies and all commissions, grants, licenses, charters, letters patent heretofore made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of anything within this realm . . . are altogether contrary to the laws of this realm, and so are and shall be utterly void and none effect, and in no wise put in use or execution (p. 466).

This statement "seemed to void all institutions exercising exclusive control of any product or form of commerce" (Malament, p. 1351). In Section 2, the Statute went on to declare that all such "commissions, grants, licenses, charters, letters patents, restraints," were to be "examined, heard, tried, and determined by and according to the common law of this realm and not otherwise" (p. 466).

The comprehensiveness of Section 1 was constrained by certain exceptions. Section 5 allowed for "the sole making of new manufactures"; thus the law "recognized the legitimacy of a copyright patent" (Malament, p. 1352). The Statute rejected patents of monopoly that did not confine themselves to new industries. But Section 10 of the law did not void

39 Coke introduced the bill in the Commons in 1621. He did not include any provisos in this version, so that it must be used with care as a guide to his view of monopolies. Coke was probably willing to support the bill with the provisos "because he believed that they validated no monopolies but simply excepted them out of the bill" (White, p. 132). See Foster (1960) for a discussion of Coke's role in the formation of the Statute of Monopolies.
patent grants "relating to printing, the manufacture of saltpeter or gunpowder . . ." and certain other products (p. 468). Holdsworth argues that these exceptions were consistent with "the common law principle that certain forms of control must be exercised by the crown in the interests of the state" (4, p. 353).

Furthermore, Section 9 protected the "liberties" and "customs" of corporations and all "grants, charters, and letters patents" made for the ordering of trade in London. In fact, the prohibition against monopoly was not to apply to any other "town corporate," that is, to any privileges granted to them or to "any corporations, companies or fellowships of any art, trade, occupation or mistery, or to any companies or societies of merchants within this realm erected for the maintenance, enlargement or ordering of any trade or merchandise . . ." (p. 467). In these cases regulations could be made, but only those consistent with the principle of "good order and government" of trade. Along these same lines Coke had declared three years earlier that the "Common good is to be preferred before any particular town, and monopolies which restrain trades are to be taken away as well when they are for the benefit of the towns as when they concern but simple (single) persons" (Commons Debates, 4, p. 252).

40 It should also be pointed out that Section 9 "excepted companies which enjoyed the exclusive privilege of trading with specific countries or in specific commodities. Since most foreign trade was controlled by corpora-
The Statute of Monopolies served to underscore by legislative declaration the common law rule against restraints of trade and the elevation of the common law above the royal prerogative. Hamilton adds that there were some specific beneficiaries from its provisions. He acknowledges that "it had the support of those who wished to curb the grant of royal favors." However, "it had also support from persons who wished to arrest further grants of letters patent lest they encroach upon their own privileges" (1940, p. 28, n.24). These trades and individuals benefited from the list of exceptions. In this sense the Statute was a product of interest group pressure which locked in monopoly rights under the protection of Parliament.

C. AN EVALUATION OF COKE'S APPROACH

Having considered the development of the doctrine of restraint of trade in the rulings and statements of Coke, we can now consider how each of the models of labor market regulation fare in explaining his contribution to public policy. Again it is crucial to observe that Coke was a practicing jurist and legislator, not a theorist attempting to understand regulation. We are concerned with whether...
Coke's approach is best characterized as consistently being concerned with redistributing wealth between various groups desiring regulation, or as being driven by substantive good principles.

The rent-seeking component of the interest group model interprets Coke's role in the supply of regulation in Tudor and Stuart England as a practicing jurist and legislator. Coke was zealous to maintain the common law and Parliament's positions as provider of monopoly rights to individuals in the oversight of trade.

This component cannot adequately explain Coke's approach. Coke was not simply involved in a jurisdictional battle over the proper source of occupational regulation. He found objectionable guild and municipal ordinances which restrained trade, as well as royal prerogatives. Moreover, he could on occasion accept a royal patent as a legitimate means of "ordering a trade." Coke's approach goes beyond a political conflict; he had genuine concerns about labor market regulation of a substantive nature.

But the interest group model's depiction of the demand for regulation does highlight certain features of Coke's judicial reports and statements in Parliament. Coke draws conclusions about efforts to seek regulation which are quite similar to those falling out of this model. Coke recognized the existence of a demand for protective legislation on the part of well-organized groups. Corporations sought to convince regulators of the benefits to English society associa-
ted with granting them a monopoly. They attempted to cultivate a perception of 'disorder' in their own trade, and the recognition of the need for a desired type of regulation to successfully cope with this problem; or if they already had a monopoly, they tried to convince public authorities of the disastrous consequences of opening their trade to others.

Coke scrutinized carefully the appeals for regulation, and often found them merely attempts to obtain protection from competition. As White notes, in Parliament Coke had to consider several such appeals:

under the pretense of maintaining good order in trade, companies like the Merchant Adventurers were using their privileges and powers to harass their competitors; and . . . towns like Shrewsbury were also trying to justify their monopolies by arguing that they were not restraining trade but simply governing it (p. 138).

As a jurist Coke found that the Merchant Taylors guild sought to impose rules on competitors which were a burden on competing craftsmen, a "... means of extortion in drawing money from them, either by delay or some other subtle device, or of oppression of young tradesmen by the old and rich of the same trade, not permitting them to work in their trade freely . . ." (Reports, 11, p. 54a). Coke does not ratify the Taylors' ordinance, but rather finds it to be an arbitrary restraint of trade based on common law principles.

Residency requirements, high license fees and other means to exclude others from the practice of a trade were not unknown to the jurists of the common law. They had long been seen as attempts to impose exclusionary restraints on
competitors. Thus Coke was dubious of the claims of many regulatory measures; "he would not necessarily accept as a justification for a monopoly the fact that the economic activity placed under monopolistic control was said to be in a state of disorder" (White, p. 140). Moreover, Coke was sceptical about the claims of some guilds that certain exclusionary ordinances actually served the public interest. He recognized that some occupational groups made claims to the possession of a true 'mystery' when the level of skill involved in the craft was not significant.  

Nonetheless, Coke in many different instances affirmed the need for 'good government in trade.' Coke often referred to 'government of trade for the good of the commonwealth.' The proper governance of trade required regulations to insure skilled persons would be employed in the various trades. Guild ordinances upheld by the law were an important means to this end.

It is difficult to explicitly link Coke's approach to market failure arguments. Coke does not refer to the presence of natural monopoly in any of his writings or speeches. He does stress an obligation to serve with skill all who utilize the services of a trade, but not for 'natural monopoly' reasons. Coke desires to see that those

41 His cautiousness applied to individuals as well: "Coke argued against the legality of monopolies granted to men who lacked the skill necessary to execute them and monopolies over activities that could not possibly be executed by the patentees themselves" (White, p. 140).
dealing with the "health of men's bodies" perform their tasks well. They ought to have sufficient knowledge and skill. Coke does not allude to any informational advantage on the part of physicians or external effects in the performance of their services. In general Coke expresses a desire to maintain the level of skills in various crafts, as well as to maintain the quality of workmanship, and thought that guild ordinances could be legitimately made to serve that end.

But the presence of poor quality did not always require special privileges to certain producers. Coke did not claim that the presence of abuses in a trade was the sole ground for the grant of an exclusive license to practice. At one point, Coke argued that "If the existence of abuses in a trade were to constitute grounds for establishing a monopoly... then trades like those of butchers and bakers (and presumably others as well) might be 'put down' and 'sole selling' established in their places" (White, p. 122; cf. Commons Debates, 5, p. 59). Coke recognized that the grant of a monopoly in a trade led to higher prices for consumers, and higher incomes for those obtaining the privileges. Furthermore, Coke could appeal to the concept of consumer sovereignty and the discipline provided by the market mechanism. In the Taylors of Ipswich case, he argued against the guild ordinance, in part because "...if he who takes upon him work is unskillful, his ignorance is a sufficient punishment for him" (Reports, 11, pp. 53b-54a).
Such a craftsman would get no clients. Competition then could be a means to promote product quality.

Coke's approach, then, cannot be explained simply in terms of the market failure model. Rather, it is better understood in light of the liberty and virtue component of this model. This component makes the best sense out of the distinction between regulation and restriction which Coke consistently relied upon. It also describes most closely the normative features of Coke's approach.

Coke recognized at least three possible legal bases for the government of trade: custom, statute, and royal charter. While he recognized the legality of customary regulation of trade, he insisted that such regulations "were illegal if they were unreasonable" (White, p. 139). Moreover, Coke stood ready to declare void certain statutes that confirmed the power of corporations to enforce their economic privileges. In the Parliament of 1624, he reinforced the distinction between regulation and restriction by saying "If a Corporation, for the better Government of the Town, not contrary to the Law; but, if any sole Restraints, then gone" (Journals, 1, p. 770). Malament notes that for Coke, the danger of 'any sole Restraints' was "arbitrary power and unemployment." These considerations underlay Coke's antagonism to some royal patents of monopoly for individuals and trading companies, as well as to privileges for corporate towns, boroughs and guilds (pp. 1354-1355). Moreover, Coke "looked to corporate bodies to administer national policies"
such as those embodied in the Statute of Artificers), "but not to take the initiative, especially if it proved injurious" (p. 1358, n.217). At the same time, Coke firmly supported the right of guilds to make "Ordinances for the good Order and Government of men of Trades and Mysteries . . ." (Reports, 11, p. 54a).

These underlying considerations are best understood in light of the economic and social factors forming the background to Coke's approach. These factors shaped the precedents in the common law and the relevant statutes of England which Coke relied upon.

One of the most important pieces of labor legislation for Coke was the Statute of Artificers. Coke applied this law with a special emphasis on its aims of promoting full employment, industriousness, and eliminating vagrancy. Most significant for him were its apprenticeship provisions, which required the acquisition of the necessary level of skills and knowledge of a trade, mystery, or occupation.

Coke was concerned with maintaining full employment in the face of increasing social instability in early seventeenth-century England. Social stability and public order appealed to Coke's legal mind; measures to advance trade and employ the maximum number of people won his support (Travers, p. 30). This was consistent with the common law response to the unemployment in England of the late sixteenth and early seventeenth century. As Knafla observes, instead of "entrenching local privileges and interests," the
law responded by "maintaining the regulatory functions of local corporations and preventing restrictive practices." He adds that "a guild or corporation could regulate the practice of trade to prevent poverty, idleness, social dislocation, or local dissent; but it could not prescribe restrictive penalties against men who were qualified to practise their trade" (p. 150). Certain guild stipulations appeared to Coke to be merely trade restraints, not promoting quality production, but hindering qualified craftsmen from pursuing their trade. In Coke's view, men should be free to pursue their lawful trades.

Coke's arguments against restraints of trade by both private and royal means are not arbitrary, sporadic restrictions against market interference. 'Grievances in trade' were created by guild restrictions or corporate by-laws which artificially hindered qualified persons from pursuing their lawful trade or 'calling.' Such restrictions became increasingly evident as guilds came to be challenged by new methods of production. By creating unemployment, unnecessarily exclusionary guild ordinances vitiated a key purpose of the Statute of Artificers (Malament, p. 1355, n.194). Moreover, these by-laws violated the norm of fairness; Coke desired to afford individuals the opportunity to practice a trade based on the qualities relevant to the occupation itself.

Coke legitimately appealed to the antipathy in the common law towards attempts by guilds to artificially
Coke had adequate legal precedent for the limitations he placed upon the regulation of trade, whether it was by custom, Parliament or royal prerogative.

However, Coke still sought to remove economic grievances by use of legitimate regulation. This reflected his paternalistic outlook. In the Tudor perspective which Coke held to, challenging these regulations would amount to challenging "the entire underpinning of the social fabric" (Malament, p. 1332). Coke's normative goals were consistent with Tudor moral precepts which stressed the public good over private gain; this was ultimately the distinction between trade regulation and trade restraint. He followed the traditional hostility in the common law towards guild ordinances which "fixed prices at extortionate levels or lowered quality or excluded an unreasonable proportion of applicants . . . ." (Malament, p. 1340).

Coke's viewpoint towards the relation between economic freedom and regulation is reflected in his use of the concepts of 'free trade' and 'the good government of trade.' Coke regarded these notions "as complementary, and not antithetical, principles of economic policy." Coke thought that "absolute economic freedom could be and should be restrained in the name of government of trade . . . ." (White, p. 115). Coke could argue that "government of trade, like freedom of trade, promoted the public good" (p. 137). In addition, White notes that Coke "sometimes used
the phrase 'free trade' to refer to trade that was not limited by unfair or unreasonable restraints" (p. 137). Coke did not claim that "every subject's unbounded exercise of economic liberty necessarily promoted the public good" (p. 136). The 'liberty' of the common law was a much more limited obstacle to any type of government interference with private economic activity than the 'liberty' which is the end of the interest group model. The common law recognized the role of the state in making regulations which fostered the public health and morals, and which facilitated an industrious way of life. Thus when Coke referred to 'government of trade for the good of the commonwealth,' he was referring to regulations designed not only to prevent shoddy craftsmanship, idleness and unrest, but also to foster virtue by means of the fraternal life and discipline acquired through guild apprenticeships (Reports, 11, pp. 53b-54a).

Coke acknowledged that guilds could make ordinances for the good order and government of a trade, provided that these by-laws were in agreement with the laws of the realm, and subordinate to the common law (Reports, 10, pp. 30-31). Coke objected to restrictive guild practices which stood in the way of the Tudor policy of full employment. Faced with guilds in their period of decline, Coke's attitude towards them reflected his belief that they should not arbitrarily restrain the individual worker. But he thought their existence was necessary for the purpose of regulating
their own particular art or mystery.

Coke's approach to the regulation of guilds and other corporate bodies stressed the need for the promotion of industriousness and virtue. Guilds had long been seen as institutions which promoted character formation. By means of requiring prospective craftsmen to apprentice with a guild, labor market regulation would foster industriousness, civility and other virtues.

There is no doubt that there are elements of each of the models intertwined in Coke's rulings and speeches in Parliament. Nonetheless, the liberty and virtue component best explains the approach of the common law to labor market regulation. By distinguishing between legitimate regulations and arbitrary restrictions, Coke sought to strike a balance between the goals of full employment, quality in workmanship, character formation, and liberty.

Coke's opposition to restraints on trade had a different basis from that of the classical liberal thinkers of the eighteenth-century; "he accorded the State a positive and beneficent role" which they denied (Malament, p. 1347). Unlike Adam Smith, who was quite sceptical as to the need for labor market regulation and therefore urged the repeal of the Statute of Artificers and its apprenticeship laws, Coke validated this regulation. Such legislation as properly interpreted and applied by the common law would prevent the public from suffering from "disorder in trade" in the form of higher prices, lower quality products, and the exclusion
and impoverishment of qualified craftsmen by private restraints. Moreover, the public good would be promoted by means of guild practices and ordinances which fostered civic and spiritual virtues.

Coke's contribution to the doctrine of conspiracy in restraint of trade derives largely from his notion of freedom of trade. Coke was a moving force in the broadening of the common law right to pursue one's lawful trade. In his rulings and speeches, Coke emphasized the role of the common law in reviewing and overruling private and royal arbitrary restraints of trade while sustaining legitimate regulation. This principle of understanding liberty within a framework which accounted for the legitimate role of governmental powers in regulating the labor market was manifested in American jurisprudence in the nineteenth century. As will be demonstrated in chapter four, it is seen in the American legal notions of "substantive due process" in regards to economic freedom and the legitimate role of governmental "police powers" in promoting the public good. These concepts are a key part of the American development of the economic conspiracy doctrine as applied to labor unions.

Coke's approach to freedom of trade also significantly influenced the British development of the economic conspiracy doctrine. The common law hostility to arbitrary restraints of trade was extended in the eighteenth century to combinations in the labor market. In conjunction with the concept of freedom of association, the broadening of the
common law right to pursue one's trade contributed to the evolution of the doctrine of conspiracy in restraint of trade in the nineteenth century. These two concepts shaped the English common law of labor relations.
This chapter will examine the development of labor law in England from the late eighteenth century through the early twentieth century. The changing status of labor combinations will be considered in light of both statutory and common law. Our central focus will be on analyzing the changes in the law in terms of its treatment of labor unions as conspiracies in restraint of trade.

The eighteenth century saw the increase of common law rulings against labor combinations as illegal criminal conspiracies. The Combination Acts of 1799 and 1800 generalized the previous statutory prohibitions against labor combinations. These provisions were overturned in the Combination Acts of 1824 and 1825. In a series of cases which interpreted these statutes, the issue became not the legality of unions per se, but the legality of certain types of union activity to achieve their ends. The courts utilized the concept of conspiracy as a tort in ruling that certain agreements between workers and employers were unenforceable. Then during the 1870s unions were legitimized by statute, but subject to civil conspiracy charges in the courts. Finally, in the early part of the twentieth century, unions obtained complete immunity from all forms of conspiracy charges. Both the liberty and virtue component and the interest group theory contribute to an explanation of these changes. The former model especially applies to legislation.
in the 1870s and the common law rulings interpreting those statutes. The latter model is more applicable in understanding organized labor efforts to obtain special privileges before the law which culminated in the Trade Disputes Act of 1906.

It was Adam Smith who first extensively examined the economic aspects of attempts by interest groups to obtain exclusive privileges in the law. The discussion of the English approach to combination law thus begins with Smith's writings on guilds and corporations, and his evaluation of apprenticeship laws and labor combinations. Smith argues that both types of laws are ineffectual in their aims; he offers a coherent case against the granting of special privilege to organized craftsmen and organized laborers in general, as well as to organized employer groups. Smith's approach is best understood to be a combination of elements of both the liberty and virtue component and the interest group models. Both Smith's emphasis on interest group pursuit of labor market regulation and his understanding of how to achieve the ends of the 'public good' are compared and contrasted to the perspective of the common law, and particularly that of Coke, on these same issues. A consideration of the changed economic circumstances of eighteenth-century England helps to explain the dissimilarities in the two approaches. An appreciation of Smith's classical liberal approach to labor market regulation is crucial, because it made a significant contribution to the arguments
over the nineteenth century legislation regarding labor combinations.

I. SMITH AND THE CLASSICAL LIBERAL VIEW OF LABOR MARKETS

Economics in the classical liberal tradition is often said to have begun with the writings of Adam Smith in the eighteenth century. In the era preceding Smith, there were elements of the classical liberal stress on the role of markets. In seventeenth-century English economic thought, one finds a movement towards treating land, loans and labor as matters for market-type analysis.¹ At the same time, the perspective towards 'governance of trade' held by earlier traditions came to be increasingly questioned by those writing pamphlets on economic issues. Josiah Child was among the advocates of the removal of constraints on trade. He proclaimed that "to improve and advance trade" we must "begin the right way, casting off some of our old mistaken principles in trade, which we inherit from our ancestors who were . . . unskilled in the misteries of and methods to improve trade." Among the 'common errors' of his day, he included the notions that "none shall use any manual occupation except he has been apprentice to the same," and that "to suffer artificers to have as many apprentices as they

¹ Appleby (1978) has shown that this conception of these crucial economic elements came to be articulated as part of the explanation of and justification for a market economy.
will is to destroy trade" (cited in Lipson, 3, p. 293). 2

In The Wealth of Nations, 3 Smith took up this same theme and elaborated it further. He argued that under the system of natural liberty, there would be a close harmony between the interests of individuals and the public interest. Interference by government would often impair the attainment of the public interest, especially the consumer's interest. Thus in regards to occupational regulations, Smith claimed that both the Statute of Apprenticeship (another name for the Statute of Artificers) and the exclusive privileges of corporations obstructed the free circulation of labor from employment to employment and from place to place (I. x. c. 42), and thus limited competition. Open competition would lead to an enhanced national prosperity. Smith called for a policy which would "break down the exclusive privileges of corporations, and repeal the statute of apprenticeship" (IV. ii. 42).

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2 Letwin argues that Child's declaration that the monopolistic privileges of cities, guilds, and trading companies should be eliminated, as well as his call for the repeal of the apprenticeship laws, were "... advocated on the score of particular advantages they would procure to merchants and the nation rather than being deduced from any general and systematic doctrine" of laissez-faire (1963, pp. 46, 214).

3 All references to Smith's works are to the Glasgow Edition of the Works and Correspondence. Generally accepted abbreviations and citation codes are used.
A. APPRENTICESHIP REGULATION

Though there were many statutory regulations still in place in late seventeenth- and eighteenth-century England, a good number of them were only inconsistently enforced. Moreover, the Statute of Artificers' apprenticeship requirements had in general been confined rather than extended by the resolutions of the courts of the seventeenth century (Blackstone, 1, p. 428). Tawney observes that by the end of this century, it appears to have been established that the relevant clauses of the Statute of Artificers "applied only to trades (i) in existence in 1563, (ii) requiring some degree of specialised skill, (iii) carried on in boroughs" (1925, p. 12, n.4). The reasons for these tighter interpretations were stated in 1759 by the great common-law jurist Lord Mansfield:

"If none must employ, or be employed, in any branch of trade, but who have served a limited number of years to that branch, the particular trade will be lodged in few hands, to the danger of the public, and the liberty of setting up trades, and the foundations of the present flourishing condition of Manchester will be destroyed. In the infancy of trade, the Act of Queen Elizabeth might be well calculated for public weal, but now when it is grown to that perfection we see it, it might perhaps be of utility to have those laws repealed, as tending to cramp and tie down that knowledge it was first necessary to obtain by rule (cited in Holdsworth, 11, p. 420).

Parliament also did not desire to strictly enforce the Statute of Artificers. Holdsworth notes that in 1702 a group of wool combers and weavers petitioned Parliament, "complaining that intruders had come into their trade who had
only been apprenticed for a year or two . . . " The House of Commons responded that "trade ought to be free, and declined to take any action" (11, p. 421). In 1751 a committee of the House of Commons made a report opposing the apprenticeship requirements and particular corporate by-laws which amounted to restraints on trade. Citing its observations as recorded in the House of Commons Journals, Lipson notes that the committee referred to both public and private ordinances when it stated that "the most useful and beneficial manufactures are principally carried on, and trade most flourishing, in such towns and places as are under no such local disabilities." The committee also observed that while apprenticeship laws were

at first well intended for securing the goodness and consequently the value and estimation of our several manufactures in foreign parts, and to prevent the disparagement of them by unskilful workmen. But since the improvement of trade in general, it is found that all manufactures find their own value according to their goodness . . . (3, p. 290).

Smith articulated a carefully reasoned rationale for a virtually complete dismantling of these same regulations not being fully enforced in the England of his day.4

4 It has been argued that Smith was largely unaware of the actual state of English occupational regulation. Grampp has suggested that Smith deplored the regulation of trade in a way that has made many believe he was arguing against his age. If he was, he must have had the Elizabethan Statute of Apprentices in mind. When enacted it provided for extensive regulation, but after 1660 it was administered in a way that weakened both the principle and the practice of regulation; and by 1700 the courts refused to enforce it. It
What lay behind Smith's opposition to the Statute of Apprentices and the exclusive privileges of corporations? In general, it was but one aspect of Smith's distrust of the 'corporation spirit,' as James Becker has observed: "Smith regards all clubs, cliques, cabals, joint stock companies, and other social guilds as corporations having in common certain properties that render them positively harmful, or, at best, of dubious social utility" (p. 70). Though Smith himself was a "clubbable" man, he viewed combinations of guild artisans as especially suspect because of their pursuit of higher incomes by means of laws restricting competition from independent laborers.

More specifically, Smith was dubious of the efficacy of apprenticeship requirements in most industries. For example, he doubts the need for such regulation in the weaving industry:

it was imagined that the cause of so much bad cloth was that the weaver had not been properly educated, and that therefore they made a statute that he should serve a seven years apprenticeship before he pretended to make any. But this is by no means a sufficient security against bad cloth [LJ(B) 306].

Smith's empirical observations of the practices of corpora-

was not repealed until 1814. Its history illustrates the distinction between enactment, administration, and enforcement (1964, pp. 130-131). However, as Hollander has observed, in Smith's discussion of the apprenticeship requirements it is evident that he understood it to be interpreted in practice "to apply only in market towns and to those trades established prior to 1563" (p. 259). It was not extended to trades established subsequent to that time, such as those practiced in Manchester, Birmingham, and Wolverhampton (WN I. x. c. 9).
tions led him to argue that many presented an undue burden on prospective craftsmen:

Long apprenticeships are altogether unnecessary. The arts, which are much superior to common trades, such as those of making clocks and watches, contain no such mystery as to require a long course of instruction . . . How to apply the instruments and how to construct the machines, cannot well require more than the lessons of a few weeks, perhaps those of a few days might be sufficient. In the common mechanical trades, those of a few days might certainly be sufficient (WN I. x. c. 16).

Apprentices are likely to be idle because they receive no direct benefits from their labor. Smith thought that if a young person started out as a journeyman, being paid in proportion to his work, that he would practice with much more diligence and attention than if he were forced to serve as an apprentice for seven years. Not only would his education be more effectual, this approach would also increase the number of competitors by making the trade more "easily learnt," and thus: "The trades, the crafts, the mysteries, would all be losers. But the publick would be a gainer, the work of all artificers coming in this way much cheaper to market" (WN I. x. c. 16).^5

^5 Pike has observed that Smith's views toward the apprenticeship system were no doubt influenced by his contact with James Watt when Smith was a professor at Glasgow. Pike notes that Watt was "forbidden by the Corporation of Hammermen to practice his craft of mathematical instrument-maker in the town because he had not served as apprentice to one of their members." Smith stood up in Watt's defense, "with the result that Watt was provided by the university with a workshop in its precincts, where he carried out those experiments on steam-power that were of such vital importance in the development of the steam-engine" (p. 85).
In sum, Smith believed that the apprenticeship system interfered with a man's right to employ his "strength and dexterity in what manner he thinks proper without detriment to his neighbour," it gives no security against "insufficient workmanship," and it had no tendency to "form young people to industry" (WN I. x. c. 12-14). Smith was concerned with the total development of the worker as a person. The apprenticeship laws had a deleterious effect upon the worker's character.

Smith observed that the supply of labor for skilled occupations was restricted by limitations on the number of apprentices and by making the period of their training much longer than it need be:

The exclusive privilege of an incorporated trade necessarily restrains the competition, in the town where it is established, to those who are free of the trade. To have served an apprenticeship in the town, under a master properly qualified, is commonly the necessary requisite for obtaining this freedom. The bye-laws of the corporation regulate sometimes the number of apprentices which any master is allowed to have, and almost always the number of years which each apprentice is obliged to serve. The intention of both regulations is to restrain the competition to a much smaller number than might otherwise be disposed to enter into the trade. The limitation of the number of apprentices restrains it directly. A long term of apprenticeship restrains it more indirectly, but as effectually, by increasing the expense of education (WN I. x. c. 5).

As Hollander comments, "Smith was confident that the market process could be relied upon to generate appropriate supplies of skilled labour" (p. 260). Smith believed that "to the greater part of manufactures . . . there are other
collateral manufactures of so similar a nature, that a worker can easily transfer his industry from one of them to another" (WN IV. ii. 42). This process depended on freedom of entry into the different trades.

For Smith, freedom of entry was "the most reliable measure of the competitiveness of an industry or trade." As Anderson and Tollison go on to explain, Smith thought that barriers to entry produced monopoly:

Free competition did not imply a particular number of competitors; free competition was compatible with any number of suppliers so long as entry into the industry was free. The constraint on the process of free competition that interfered with the operation of the self-organizing system of the market and was of primary concern to Smith was monopoly produced by government regulation (1982, p. 1239).

In Smith's view, the majority of corporation laws in fact were established to restrain such competition and thus prevent a reduction in wages and profit. The clamour and sophistry of merchants and manufacturers persuaded others, such as the landlords, farmers, and laborers of the country, that "the private interest of a part, and of a subordinate part of the society, is the general interest of the whole" (WN I. x. c. 25). Smith found no merit in their argument that the corporation provided the proper ordering of a trade. The exclusive privileges of corporations led to several deleterious effects: "... the goods themselves are worse; as they know none can undersell them so they keep up the price, and as they know also that no other can sell so they care not what the quality be" [LJ(A) ii. 35].
Smith also referred to "enlarged" monopolies, which existed, as Mund has noted, where those practicing a particular trade excluded "certain sellers or certain suppliers of goods" and thus gave "the favored sellers a higher return than they otherwise would secure." Mund further explains that "they created an artificial scarcity similar to that created by a concerted action among sellers, though not in the same degree" (p. 80). As Smith put it:

The exclusive privileges of corporations, statutes of apprenticeship, and all those laws which restrain, in particular employments, the competition to a smaller number than might otherwise go into them, have the same tendency, though in less degree. They are a sort of enlarged monopolies, and may frequently, for ages together, and in whole classes of employments, keep up the market price of particular commodities above the natural price, and maintain both the wages of labour and the profits of the stock employed about them somewhat above their natural rate (WN I. vii. 28).

Companies and associations of people in the same trade encouraged and facilitated efforts to restrict competition.

Smith considered two kinds of situations, those where corporations had the power to enact by-laws and those where voluntary combinations of people in the same trade existed. The former arrangement gave rise to greater monopoly power: "the majority of a corporation can enact a bye-law with proper penalties, which will limit the competition more effectually and more durably than any voluntary combination whatever" (WN I. x. c. 30). But even where trades were not incorporated, Smith observed that "the corporation spirit" would surface in towns:
the jealousy of strangers, the aversion to take apprentices, or to communicate the secret of their trade, generally prevail in them, and often teach them, by voluntary associations and agreements, to prevent that free competition which they cannot prohibit by bye-laws.

By combining not to take apprentices, these trades would "engross" the employment to themselves (WN I. x. c. 22) and thus enjoy the benefits of some monopoly power.

Such combinations prevailed in urban areas. The putting-out system arose in part as a response to the higher costs of production associated with corporate towns. Though putting-out entailed time, travel, and transactions costs, relying on independent artisans was cheaper for the merchant than production controlled by guilds. Thus production expanded "in suburbs around the towns controlled by guilds" (Olson, 1982, p. 128). In observing this phenomenon, Smith made explicit his view that freedom of market activity, as over against guild regulation, provides the best assurance of quality workmanship in the consumer's interest:

The pretence that corporations are necessary for the better government of the trade, is without any foundation. The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers. It is the fear of losing their employment which restrains his frauds and corrects his negligence. An exclusive corporation necessarily weakens the force of this discipline. A particular set of workmen must then be employed, let them behave well or ill. It is upon this account, that in many large incorporated towns no tolerable workmen are to be found, even in some of the most necessary trades. If you would have your work tolerably executed, it must be done in the suburbs, where the workmen, having no exclusive privilege, have nothing but their character to depend upon, and you must then smuggle it into the town as well as
you can (WN I. x. c. 31).

The elimination of exclusive privileges would lead to greater consumer sovereignty; under the discipline of the market, craftsmen would be penalized for producing shoddy goods, and thus be led to a more industrious approach to their work.6

6 Smith's attitude towards exclusive privilege and the professions is best illustrated in his letter to William Cullen as given in Rae's Life of Adam Smith. The College of Physicians of Edinburgh sought to prohibit the universities from granting any medical degrees to any person "without first undergoing a personal examination into his proficiency, and bringing a certificate of having attended for two years at a university where physic [medicine] was regularly taught" (p. 273). Smith opposed any suppression of competition, and he defended with "great vigour and vivacity the most absolute and unlimited freedom of medical education . . ." (p. 271). He wrote that "The monopoly of medical education which this regulation would establish in favour of universities would, I apprehend, be hurtful to the lasting prosperity of bodies corporate. Monopolies very seldom make good work . . ." (p. 274). In Smith's view, consumers were more knowledgeable than the physicians perceived, and non-degreed practitioners were not as bad as they thought either.

Smith makes a comparison between medical degrees and the practice of guild apprenticeships, noting some significant similarities:

A degree which can be conferred only upon students of a certain standing is a statute of apprenticeship which is likely to contribute to the advancement of science, just as other statutes of apprenticeship have contributed to that of arts and manufactures. Those statutes of apprenticeship, assisted by other corporation laws, have banished arts and manufactures from the greater part of towns corporate. Such degrees, assisted by some other regulations of a similar tendency, have banished almost all useful and solid education from the greater part of universities. Bad work and high price have been the effect of the monopoly introduced by the former; quackery, imposture, and exorbitant fees have been the consequences of that established by the latter. The industry of manufacturing villages has remedied in part the inconveniences which the
Smith did not in every instance appeal to the principle of consumer sovereignty. In a few cases, he favored quality control by government-appointed inspectors. He argued that this method was much more efficacious to secure the quality of goods than relying upon corporate regulations: "the sterling mark upon plate, and the stamps upon linen and woollen cloth, give the purchaser much greater security than any statute of apprenticeship" (WN I. x. c. 13). Protection from fraud was not served by self-regulation.

Nonetheless, Smith was often dubious of governmental efforts to regulate trade, due to the speciousness of many claims of the need for "order in trade." He observed that when the state regulates an activity, it usually does so not in the public interest but rather in the interest of particular business groups seeking some benefit or trying to thwart competitors or potential competitors. Smith described guild efforts in this regard:

The government of towns corporate was altogether in the hands of traders and artificers; and it was the manifest interest of every particular class of them, to prevent the market from being overstocked, as they commonly express it, with their own particular species of industry; which is in reality to keep it always understocked (WN I. x. c. 18).

Monopolies established by towns corporate had occasioned. The private interest of some poor Professors of Physic in some poor universities inconveniently situated for the resort of students has in part remedied the inconveniences which would certainly have resulted from that sort of monopoly which the great and rich universities had attempted to establish (pp. 277-278).
The best policy would be to give complete freedom to internal trade without such group regulations. But Smith feared that private interests would prevent the complete restoration of free trade in Great Britain.

It should be observed that Smith did not oppose all governmental intervention. Alan Stone has noted that Smith was not an ideologue "seeking to show that state action is always harmful; rather he focused on the public benefits that would result if competition prevailed and was undirected by state regulation." He adds that "The principal focus of Smith's enmity was monopoly, especially those monopolies and cartels that were created and protected by state action" (p. 44). Smith's critique of the apprenticeship laws was not based on "an undiluted program of laissez-faire," but was grounded in his conviction that such laws "prevented the dominant force of self-interest from working itself out in socially desirable ways" (McNulty, p. 60).

B. COMBINATIONS IN THE LABOR MARKET

During Smith's time the relations between participants in the labor markets were changing. The 'friendly societies' of artisans and craftsmen in the same trade, which were composed of self-employed journeymen or masters, often had to revert to being employed as wage-earners as the early forms of manufacturing began to appear. Mathias notes that "Effective trade societies were first confined to male skilled handicraft workers," sometimes referred to as the
"aristocracy of labor" (p. 334). As the eighteenth century progressed, journeymen among many diverse trades, such as the ironworkers, papermakers, and millwrights, began to form unions, known then as labor combinations, which could bring their members out on strike against their employers in order to obtain higher wages (Mantoux, pp. 444-445).

In considering the determination of the general level of wages, Smith emphasized the workings of competitive forces. He did not contend that employers benefited from an asymmetry of power in the payment of wages to their workers. But when he examined "the mechanism for setting individual wage transactions," Smith described competition in the labor market "in terms of unequal bargaining power" (Dickman, p. 42). In the course of explaining that in the short run wages are determined by bargaining, Smith claimed that employers held the advantage over their employees:

What are the common wages of labour depends every where upon the contract usually made between those two parties, whose interests are by no means the same. The workmen desire to get as much, the masters to give as little as possible. The former are disposed to combine in order to raise, the latter in order to lower the wages of labour. It is not, however, difficult to foresee which of the two parties must, upon all ordinary circumstances, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorises, or at least does not prohibit their combinations, while it prohibits those of the workmen. We have no acts of parliament against combining to lower the price of work; but many against combining to raise it (WN. I. viii. 11-12).

The employers' smaller numbers facilitated combination (even
cartelization). This was largely unopposed by the law, while the same did not hold true for labor combinations. In addition, the employee's disadvantage stemmed from his lesser wealth as compared to the employer:

In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate (WN. I. viii. 12).

Smith went on to say that employers combine so as to facilitate their intentions to pay workers a subsistence wage:

We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate. To violate this combination is everywhere a most unpopular action, and a sort of reproach to a master among his neighbors and equals. We seldom, indeed hear of this combination, because it is the usual, and one may say, the natural state of things which nobody ever hears of (WN I. viii. 13).

Smith found that it was the obvious interest or desire of employers to combine together to lower wages:

Masters too sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy, till the moment of execution, and when the workmen yield, as they sometimes do, without resistance, though severely felt by them, they are never heard of by other people (WN. I. viii. 13).
What did Smith mean by his reference to such tacit employer combinations? Was Smith implicitly making a case for monopsonistic exploitation by employers, which could imply the need for a legislative grant of 'countervailing power' to labor combinations to insure a decent wage for workers?

Smith most likely did not have such an argument in mind, but rather was referring to the drive on the part of masters to employ workers at the current market wage and not a higher rate. W.H. Hutt argues that Smith's dictum essentially is that "... masters will not pay more than they believe to be necessary to get the labour they desire ..." (1975b, p. 24). Along the same lines Grampp suggests that Smith was referring to the notion that "employers keep an eye on each other so that none need pay more than the competitive or 'actual' wage ... that they sometimes combine to pay even less; but that they succeed only in the short run ..." (1979, pp. 508-509). Nonetheless Smith's reference was taken as an equivocation on the benefits of free competition and utilized by those in the nineteenth century who sought after protective legislation for labor unions.

Smith noted that workers also organize; their combinations are sometimes "defensive." Laborers organize to offset employer combinations. They may also "... without any provocation of this kind, combine of their own accord to raise the price of their labour." The reasons the workers give include "the high price of provisions; sometimes the great profit which their masters make by their work" (WN.
The non-defensive combination of those in the same trade could lead to significant monopoly power. As we have noted previously, Smith observed that where they could not prohibit free competition by means of by-laws, people of the same trade might voluntarily agree to limit competition. Smith wrote that

The trades which employ but a small number of hands, run most easily into such combinations. Half a dozen wool-combers, perhaps, are necessary to keep a thousand spinners and weavers at work. By combining not to take apprentices they can not only engross the employment, but reduce the whole manufacture into a sort of slavery to themselves, and raise the price of their labour much above what is due to the nature of their work (WN. I. x. c. 22).

There were numerous other examples of such combinations in the late eighteenth century. Mantoux notes that the Kent papermakers refused to work with men outside their combination, and "would leave the workshop in a body if the others were not dismissed. The millwrights adopted the same tactics . . ." (p. 445).

Despite his recognition of the monopoly power possessed by these type of labor combinations, Smith did not directly endorse the various eighteenth-century statutes prohibiting combinations by laborers. While Smith did say combinations of employers were more effective than combinations of laborers, he did not recommend that Parliament should be concerned only with combinations of employers. He was apparently not in favor of laws forbidding combinations of
either type. This is suggested by a famous passage in which he wrote:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary (WN. I. x. c. 27).

Combinations of employers and of laborers arise naturally. Smith thought it was impossible to prevent such combinations by any law possible of enforcement or consistent with liberty and justice. The latter consideration is characteristic of Smith's normative perspective on regulation, as will be shown in the next section.

Thus Smith believed that legislation should treat individuals and groups impartially, regardless of their position in the labor market. And it seems clear that Smith opposed the facilitation of employer or employee combinations, such as by granting them special legal privileges.

C. THE NORMATIVE FEATURES OF LABOR MARKET REGULATION

What values informed Smith's evaluation of labor market regulation? Smith pronounced that competition for the satisfaction of consumer demands should prevail over the regulations of guilds, corporations, and other groups. But what are the normative ends that this system of natural liberty is to serve? Smith placed a significant emphasis on
an expanding output as a criterion by which to evaluate the regulation of trades. This notion is captured in his emphasis on "widening the market." Smith writes that

The interest of the dealers . . . in any particular branch of trade and manufactures, is always in some respect different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it (WN I. xi. p. 10).

Elzinga explains that Smith was warning that "dealers could be expected to try and restrict the activities of their competitors, that is, to 'narrow the competition.'" But these same dealers also "could be expected to pursue actions, both singly and jointly, that would expand the number of customers in their market, thereby making producers and consumers better off . . ." (1980, p. 109). For Smith, competition was "never established as an end; output and consumption were the ends" (1980, p. 110). Competition was the means that most efficaciously secured a greater output for consumers. Thus efforts to restrict competition should be prevented, without barring efforts to expand the market.

But focusing on greater economic output alone is misleading. For Smith, the end of producing the greatest output in the most efficient manner is complemented by another goal, as Buchanan explains:

Smith's great work, The Wealth of Nations, has been widely interpreted as being informed normatively by efficiency criteria. This emphasis is
broadly correct, provided that the efficiency norm is not given exclusive place. Smith's purpose was to demonstrate how the removal of restrictions on free market forces and the operation of his 'system of natural liberty' would greatly increase the total product of the economy and, more importantly, how this would generate rapid economic growth, thereby improving the lot of the laboring classes. What is often missing from this standard interpretation is Smith's corollary argument, sometimes implicit, to the effect that this system of natural liberty would also promote his ideal of justice (1976, p. 68).

A key manifestation of justice for Smith is in the recognition of one of the most sacred rights of mankind, the "property every man has in his own labour." Smith declares that corporate by-laws that restrict the worker's freedom to labor are a manifestation of injustice:

... to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him (WN I. x. c. 12).

Instead of such by-laws, the employer should have discretion as to whether or not the worker is fit to be employed. Statutory apprenticeship rules established by political authorities 'for the public good' were both impertinent and oppressive. In general, "Smith's arguments for economic liberty ... were linked with an insistence on justice"; this connection was made "for reasons any reader familiar with natural law jurisprudence might readily have understood" (Teichgraeber, p. 156).

Smith looked to competition and the market principle to promote justice, as Billet explains, by undermining "politi-
cally determined sources of economic advantage." Competition would also "prevent the entrenchment of established industry which, he thought, always has a tendency to seek official 'protection,' i.e., legal means of preservation from the possibility of competitive displacement" (p. 89). Billet stresses Smith's concern with "effective and not merely 'formal' economic justice and liberty." According to Billet, Smith exposes and aims to reform all those public policies, institutions, laws and rules of taxation which, 1) help to create, encourage or sustain enterprises or incorporations of capital or labor which can escape the competitive pressures of the market place and impose an unjust and 'absurd tax on their countrymen' through higher prices and profit, or 2) which effectively restrict access to certain types of employment and investments or new uses of capital and other factors of production, thereby preventing or inhibiting alternative goods, methods or processes from arising and competing with established ones (p. 97).

In Smith's view, the system of political economy which is most just is the one "which allows the greatest scope for persons to labor in accordance with their capacities and aims, and which, as much as possible, enables them to gain the reward or 'produce' of their labor" (Billet, p. 91). Smith's preference for the 'system of natural liberty' meshed with the importance of the competitive regime, which minimized "those forms of economic oppression that arise from monopoly privilege or conspiracy" (Winch, p. 97).  

Smith believed that liberty was integral to the progress of the economy. There is a vital "complementarity between individual freedom and the economic progress of society," as Hutchison explains:

Smith uses his system of natural liberty as a historically 'dynamic' model in that it is
D. AN EVALUATION OF SMITH'S APPROACH

Is Smith's approach to labor market regulation best explained by the market failure model? Smith appears at times to be critical of the unhampered operation of the market. For example, Smith disapproves of the dehumanizing tendency of "a system of natural liberty." 8 Smith also recognizes the potential presence of unequal bargaining power in the labor market.

Even though Smith recognized these defects, he nowhere brings together in a systematic way a case for regulation which would ameliorate undesirable features of the labor market. Indeed, he argued that the law should not facilitate

concerned not only with the progress of the economy - an essential part of Smith's central theme. What Smith's Inquiry is primarily about is how the simple system starting from individual initiative allocates, accumulates, and reallocates resources via free markets so as to release and stimulate more effectively than any other 'system' the economic forces which make for progress (p. 517).

8 Smith's purpose in his advocacy of the removal of market restrictions is not only increased productivity and economic growth, but also a more subtle end: the market was "the crucial instrument for securing civil society through the way in which it forced men to recognize natural right" (Lewis, p. 22). But Smith also observed, as Lewis notes, that the market "has the potential for vitiating its most important consequence by destroying men's capacities for the use of natural right" (p. 42). The consequence upon a man who spends his whole life performing a very few simple operations include the loss of understanding and invention by way of lack of exertion. He is unable to conceive "any generous, noble, or tender sentiment" (WN V. i. f. 50). To remedy this situation, Smith recommends not political interference with the market, but instead "a combination of educational subsidies and legal requirements to oblige parents to see that their children receive at least a rudimentary education" (Lewis, p. 42).
laborers organizing into combinations. Smith was not willing to grant guilds or other forms of organized labor special privileges. Public policy ought to neither prohibit nor encourage the efforts of employees in this regard.

The market failure model does not do full justice to Smith's approach to labor market regulation. Though Smith acknowledges various instances of non-harmony between private interests and the public interest, he lays much greater stress on government failure as opposed to market failure. Indeed, Smith's statements in this regard lead one to turn to the interest group model as a viable explanation of his writings in this area.

Throughout his writings Smith made numerous observations of the force of self-interest. He applied this principle to the pursuit by laborers in the same trade of legal protection from competition. Self-interest led some groups to demand regulation as a means of transferring income in their own direction. These groups would appeal to the deleterious consequences for the 'public interest' of relaxing controls on entry to their occupation or trade.

Stigler (1982) has examined the Wealth for Smith's use of the principle of self-interest as an explanation for the economic behavior of merchants, manufacturers, legislators, and other groups. Stigler notes that in Smith "the merchants and manufacturers are singled out for the unusual combination of cupidity and competence which marks their legislative efforts" (p. 137). Stigler's analysis leads him to
question, though, why Smith did not make a strong proposition along these lines: "All legislation with important economic effects is the calculated achievement of interested economic classes." Stigler contends that Smith "implicitly rejected the use of self-interest as a general explanation of legislation" (p. 139); Smith did not fully develop a self-interest theory of the emergence and maintenance of governmental restrictions on markets.

In fact, Stigler points to instances in which Smith pictures self-interest as failing to guide people's behavior, and not just in the political arena (p. 144). For example, there is the case where "The individual knows the 'facts' but fails to anticipate the consequences of his actions"; thus Stigler notes that Smith argues "The apprenticeship system does not give appropriate incentives to the apprentice to be diligent in his work" (p. 144). The guilds have failed to reason correctly; their requirements do not achieve their desired ends.9

But the key issue for the purposes of our study revolves around the fact that Smith recognized the power of

9 Coats argues that Smith in fact observes a difference between the role of self-interest in economic as opposed to political affairs; Smith thought that "in political affairs, men often do genuinely believe themselves to be acting for the public good" and thus Smith warns that the individual seeking his own interest "frequently promotes that of the society more effectually than when he really intends to promote it" (2, p. 136). Coats argues that Smith did not conceive of self-interest in "perfectly cold-blooded and rational" terms. Hence, it is not surprising that Smith observes several types of failure of self-interest.
governmental coercion to implement regulation which was in the interests of guilds and corporations and "against those of potential new entrants and the customers of industry" (West, 1979, p. 143). But, as Stigler points out, Smith did not inquire into the domination of self-interest in political undertakings (1982, p. 136). West describes one example of the paradox Stigler finds in Smith's work: Smith was aware that the owners of corporations were the main beneficiaries of legislation such as the Statute of Artificers, but when Smith prescribed policy he apparently forgot this lobby and "addressed himself to some ideal government. He failed to remember that party governments need votes and the spoils of office" (1979, p. 144).10

10 West responds to this criticism by pointing out that Smith was operating predominantly at the constitutional level of what West calls "the economics of politics." Smith's economics of politics is concerned with constitution making, and not the post-constitutional dimension which involves "legislative tactics within given majority rules, given property rights, and given electorates" (1979, p. 132). West defends Smith against the charge of neglect of self-interest: "there was something in Smith that could best lead to the public interest, and that was a wise constitution and a firm rule of law" (p. 145). He adds that in Smith's time

Only 2 percent of the population yet had the vote. Smith's concern was to stop Stigler's nightmare world from developing. To do this required that errors in the emerging constitution should be anticipated and checked by those in a position to do so. This is a normative position no doubt, but an unavoidable one nevertheless (p. 144).

As West adds, that Smith was interested in the constitutional dimension is evident by the fact that he discusses the law as "general rules of just conduct." Smith thought he had a method of disarming the various special interest groups. He favored a repeal of this law; he addressed himself "to a change in the rules, that is, in the constitution" (p. 145).
Smith recognized that various producer groups had succeeded in obtaining regulations that served their own interest. But this does not mean he believed that government would always be 'captured' by these groups, so that it could not pass legislation for the interest of the public. Smith proposed to eliminate the special privileges of existing monopolies.\textsuperscript{11,12}

The interest group model provides new insights and explanatory power towards Smith's approach to labor market regulation. It should not be overlooked that "Smith was extraordinarily sensitive to the varying capacities of different groups to organize to obtain the advantages of monopoly, whether through concerted action in the market or by exerting pressure on governments" (Olson, 1976, p. 107, \textsuperscript{11}).

Smith expressed his advice in this regard with some caution. He remarked that any expectations of entirely restoring freedom of trade in labor and product markets were "dangerous" as well as utopian. Free trade was hampered in Britain because "not only the prejudices of the public, but what is much more unconquerable, the private interests of many individuals, irresistibly oppose it" (WN IV. ii. 43). The "master manufacturers" had a powerful influence in the Parliament against measures promoting more competition. Thus Smith sought "a reasonable way of eliminating the worst regulations" (Teichgraeber, p. 167).

\textsuperscript{12} Smith's practice as a commissioner of customs in some ways belies his proposals in his writings. Anderson et al. (1985) note that in this position "Smith may have had ample opportunity to observe interest group behavior at first hand as a determinant of economic policy" (p. 755) and to resist measures which favored particular producer groups. However, having examined the "records of Scottish customs for the period of Smith's tenure," they observe that Smith's commission, among other things, prosecuted smugglers and imposed duties on imported goods. They find "no convincing evidence of Smith as a deregulator" (p. 757).
Among the factors influencing the acquirement of privilege, Smith referred to location and the degree of dispersal (WN I. x. c. 22-23); the size of the group (WN I. x. c. 61); and previous governmental regulation (WN I. x. c. 27-28). However, Smith's insights "on what makes it possible for a group to organize to serve its interests monopolistically or politically" are scattered (Olson, 1976, p. 107). It does not make for a fully integrated model of rent-seeking.

While Smith commented on various efforts to alter the distribution of income, he was concerned primarily with questions of allocative efficiency. Greater output to provide consumers a wider variety of choice was his goal, in conjunction with the freedom of individuals to pursue their own desired occupations. As Viner has observed, to Smith occupational restrictions such as corporate privileges were objectionable either because they kept labor (and other resources) "from following the channels in which they would

Smith's analysis of the impact of self-interested efforts to restrict competition was fairly sophisticated. West (1978) observes that while Smith's perception of the costs of monopoly was not framed in terms of the deadweight triangle, it recognized such effects. Moreover, Smith's analysis was not merely static, but extended also to the dynamic aspects of attempts to restrict competition (p. 841). Smith emphasized the fact that "people will use resources to profit themselves by actions outside the rules or directed to changing the rules" (p. 842). West further explains that "Smith was as much interested in monopolizing as in monopoly. And he was impressed by the fact that in the process of monopolizing (in the sense of attaining the narrow, neoclassical monopoly) the law and the constitution itself were dependent variables" (p. 841).
otherwise go, or because they attract to a particular species of industry a greater share of the factors [resources] than would ordinarily be employed in it" (1928, p. 134). Smith criticized producer promoted regulations because they did not serve the interest of the public. Smith did not stress the principle of market failure; the 'interest' of the public was greater output and greater liberty. Smith's approach then is best understood to be a combination of the normative elements of the liberty and virtue component and the positive and normative elements of the interest group model.

II. COMBINATION LAW IN THE EIGHTEENTH CENTURY

The labor market regulation of the nineteenth century cannot be understood apart from an appreciation of developments in the law regarding combinations in the prior century. In the eighteenth century Parliament began to pass statutes which penalized combinations in particular trades. While there were common law rulings against combinations of employers and laborers in the eighteenth century, statute law was directed solely against combinations of workers until 1799. In that year and the next Parliament passed the first general acts against combinations both of employers and laborers.

Three facets of these developments are emphasized in this section: the interaction between the classical liberal and common law norms governing regulation, the economic
forces leading to abandonment of apprenticeship regulations and the rise of combinations, and the beginnings of the application of the concept of conspiracy to combinations.

A. SMITH'S APPROACH AND THE COMMON LAW

Smith's treatment of apprenticeship regulations and the combination laws had an important influence on the nineteenth century labor law. An examination of the similarities and dissimilarities between Smith's approach and that of the common law in the early seventeenth-century (as represented by Coke) further highlights the role of public good and interest group arguments regarding regulation.

Coke recognized that guilds and other corporate groups would attempt to impose exclusionary restraints on others in their own self-interest. He accordingly was judiciously sceptical about guild claims that certain regulations served the public interest. Smith applied the principle of self-interest in a more extensive manner. Corporate by-laws are an evidence of the spirit of monopoly at work: "... it is in the interest of the freemen of a corporation to hinder the rest of the inhabitants from employing any workmen but themselves ..." (WN IV. iii. c.10; cf. WN I. x. c. 18). Coke found that the good government of trade could be a legitimate reason for regulations, arguing that 'manufactures' would be corrupt if men exercised trades in which they had no skill. Smith found no credibility in the reasons expounded by merchants for 'or-
dering' trade: "I have never known much good done by those who affected to trade for the public good" (WN IV. ii. 9).

As discussed in chapter two, Coke thought of the public good in terms of character formation. Coke employed a paternalistic approach to virtue. He stressed the nature of the character formed by certain occupations. In essence, Coke was affirming what later came to be known as the police powers function of the state in promoting virtuous character. Smith likewise emphasized the development of moral virtue and the formation of character, but did not think that the guilds achieved such ends. In Smith's view, the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations (p. 162). Blackstone followed Coke in emphasizing character formation as the proper end of regulation.

14 Blackstone, a contemporary of Smith, affirmed the need for laws dealing with offenses against public trade such as forestalling, regrating, and engrossing, while Smith's digression on the corn laws appears to be a careful refutation of the reasoning supporting such laws. Furthermore, in the same section (part 4, chapter 12), Blackstone noted that the exercise of a trade without serving a seven year apprenticeship was considered to be "detrimental to public trade, upon the supposed want of sufficient skill in the trader," (p. 160) where Smith saw the requirement itself as injurious to the public interest. Interestingly, Blackstone went on immediately in the next chapter to consider sumptuary laws and other regulations dealing with offenses against the public health. While his paternalism had definite bounds, these type of laws Blackstone considered part of the "public police and oeconomy," which he explained was
guilds were secretive, inclined to think in terms of 'mysteries' (the trade secrets of technology). Smith was aware of pride and avarice as fundamental features of human nature, and also how these features worked themselves out in institutions, as for example, in the guilds' desire for regulation. Smith instead appealed to the market, the fundamental institution which provides a device for channeling pride, vanity, and the desire for self-approval into socially useful purposes. The workmen in the suburbs could not depend on corporate exclusionary privileges. Open competition in the marketplace disciplined them to produce quality work, and not be negligent or fraudulent in character.  

What do the differences in these two approaches imply about the development of labor market regulation in the

the members of the corporation or within society at large are somehow subverted" (Becker, p. 71). "The usual corporation spirit, wherever the law does not restrain it, prevails in all regulated companies," Smith wrote (WN. V. l. e. 7). This passage is a good example of a habit to which Smith adhered uniformly, which was "regarding monopoly, i.e., monopoly practice, as an off-shoot of the corporation spirit itself" (Becker, p. 72).

16 In Cropsey's view, Smith places such a high value on free competition in a market society because "competition is the element in commercialism that directly replaces virtue"; in the area of the provision of quality in the production of goods and services, "competition rather than the artificial regulations of gild and state is to guarantee probity in manufacture and sale." For the traditional virtues are substituted "the controlled passions of self-preservation through gain, the unhampered motion of which is commerce" (p. 72). Yet this interpretation is inadequate because it ignores the fact that Smith is disagreeing with the means to achieve high character, not the end itself.
eighteenth and nineteenth centuries? This question is best answered by considering certain aspects of their positive and normative differences: the contrast in key aspects of the economic setting in which Coke and Smith each lived; and the role of liberty with regard to the goals of regulation.

There were significant changes in economic conditions between the late sixteenth century and mid-eighteenth century. Coke lived during a period in the English economy when the monopolistic control of guilds over trades was only beginning to be challenged by the putting-out system and rural industry. The great concern in his time was with the social instability, poverty, and unemployment accompanying the first stages of significant commercialization. By the latter half of the eighteenth century, the advances in technology and the availability of capital turned attention away from underemployment, poverty and starvation as great societal concerns. In addition, advances in road and river transport combined with improved communications to reduce the monopolistic power of trade corporations; by 1750 the volume of inland trade had increased significantly (Holderness, p. 145). As Smith observed,

Good roads, canals, and navigable rivers, by diminishing the expence of carriage, put the remotest parts of the country more nearly upon a level with those in the neighbourhood of a town. They are upon that account the greatest of all improvements. They encourage the cultivation of the remote, which must always be the most extensive circle of the country. They are advantageous to the town, by breaking down the monopoly of the country in its neighbourhood (WN I. xi. b. 5).
Smith then was sceptical of regulations sponsored by various groups in the economy to promote the public interest. Unlike Coke, his concern was not with full employment *per se* but with breaking down barriers to entry so as to promote greater output and individual liberty.

Changes in the methods of manufacture and the costs of production interacted with the application of the tenets of the classical liberal policy which flowed out of Smith's analysis. Wesley C. Mitchell has observed that in the eighteenth century, there were numerous Englishmen "who were pursuing profitable trades without having served a regular apprenticeship." They disregarded the guild regulations and statute law which prohibited a man who had not been "duly initiated in a certain mystery from exercising the trade." Many businessmen found better and cheaper ways of producing things than the craft guilds' methods. Mitchell argues that "It was this pursuit of private profit, whether it ran counter to law or not, that was responsible for a change in practice that occurred a considerable time before the change in theory and policy" (1, p. 118). Mitchell further claims that "the promulgation of Adam Smith's kind of thought led men to believe that the laws were wrong and ought to be changed, and what they had been doing was not only right and profitable for themselves, but advantageous to the country as a whole." Smith spoke for the interests of the new businessmen at the proper time: "[he] came forward as the philosophic champion of a doctrine that justified a system
under which everybody would be free to follow his own interests" (1, p. 119).

Mitchell's argument correctly emphasizes the role of changing technology in changing attitudes toward guild regulations. But his portrayal of Smith is misleading, in that it ignores Smith's own discussion of changes in the need for types of labor market regulation. Smith made several observations on the older arguments for the necessity of the exclusive privileges of corporations. Speaking of trades in the Middle Ages, he wrote that:

It is found that society must be pretty far advanced before the different trades can all find subsistence, that is, before those trades which do not immediately procure food of some sort, such as bread, flesh, etc., or even most of these, can be depended on for a subsistence. A carpenter or a weaver could not trust entirely to his work in that way; he would only take in this trade as a subsidiary one . . . [IV(A) ii. 40].

The division of labor was limited in societies with primitive technology. The need for a regularized trade which assured a steady income to the craftsman spurred on the formation of guilds with their various restrictions on competition. But advances in capital formation made such regulations unnecessary:

To bring about therefore the separation of trades sooner than the progress of society would naturally effect, and prevent the uncertainty of all those who had taken themselves to one trade, it was found necessary to give them a certainty of a comfortable subsistence. And for this purpose the legislature determined that they should have the privilege of exercising their separate trades without the fear of being cut out of their livelihood by the increase of their rivals. That this was necessary therefore in the first stages
of the arts to bring them to their proper perfection, appears very reasonable and is confirmed by this, that it has been the general practice of all the nations in Europe. But as this end is now fully answered, it were much to [be] wished that these as well as many other remains of the old jurisprudence should be removed [LJ(A) ii. 40-41].

The privileges of corporations, though once conducive to the interest of the country, were now prejudicial to it. In the same way, "all fairs, however necessary they then were, are now real nuisances. It is absurd to preserve in people a regard for their old customs when the causes of them are removed" [LJ(B) 305]. He adds that "All monopolies and exclusive privileges of corporations, for whatever good ends they were at first instituted, have the same bad effect" [LJ(B) 306].

In Smith's view, the old regulations no longer served their avowed normative ends either. Smith argued that virtue would be promoted by the liberty and responsibility of independent men. But liberty was just as crucial an end in itself as virtue. Each man had a natural right to dispose of his labor as he wished (WN. I. x. c. 12). Moreover, as we

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17 Smith found some exclusive privileges relatively harmless. A patent given to an inventor of a new machine was a "reward for his ingenuity." Likewise the exclusive privilege for an author to publish and sell his book "may do some good" by serving "as an encouragement to the labours of learned men" [LJ (A) ii. 30-33]. However, Smith thought that the exclusive privileges of corporations could be severely detrimental to the wealth of the nation. By increasing "the difficulty with which the several necessaries of life are procured," monopolies tended "to promote the poverty" of the country in which they were located. The exclusive trading privileges of corporations in towns had made "all sorts of necessaries so much more uncomearable" [LJ(A) ii. 34-35].
saw in his comments on the inefficacy of any anti-
combination laws 'consistent with justice,' Smith upheld
the principle of voluntary exchange for groups as well. In
essence Smith advocated that, as long they do not make use
of force or fraud, individuals or groups should not be
restrained from making agreements to purchase or sell
property or services on whatever terms are mutually agree-
able. The law would promote justice by expanding the
individual's area of freedom. This was the classical liberal
philosophy in regards to economic freedom.

By way of contrast, the common law did not extol
liberty as the highest good. It did not uphold absolute
freedom as a normative criterion. It set forth a concept of
freedom of trade as freedom from arbitrary restraints on
trade not sanctioned by the law. It opposed the unreasonable
exercise of monopoly power secured by government privilege.

As seen in chapter two, from the late medieval period
on, the English common law tradition was suspicious of
attempts by private combinations such as guilds to arbitra-
rily restrain trade to their own advantage. It invalidated
measures which violated the public good by means of raising
prices or lowering the quality of products or services. The
economic freedom which the common law affirmed was "freedom
from arbitrary restraints not sanctioned by the law"
(Holdsworth, 1934, p. 372). Common law principles developed
over the seventeenth and eighteenth centuries to "favor a
great deal of contractual freedom." However, "such rules
were always subject to the legislature's overriding . . .
'police power'' to impose proper regulation of trade
(Dickman, p. 52). Freedom to associate was fundamental
to the common law; but it "has always exercised the right to
regulate the constitution and activities of certain kinds of
association" (Keeton, p. 220).

What Smith was suggesting, that public policy ought to
neither encourage nor prohibit labor efforts to combine, was
not the approach of the eighteenth-century common law. This
principle did manifest itself in the statutory law of the
nineteenth century.

B. STATUTORY LAW AND THE RISE OF COMBINATIONS

State regulations on entry into occupations and on
wages were implemented by statute or by charter grants to
craft guilds from the fourteenth century to the beginning of
the nineteenth century. Besides the Bill of Conspiracies in
1548, sixteenth-century and seventeenth-century statutory
legislation was largely silent on the freedom of combina-
tions. It was only in the eighteenth century that statutes
against combinations among laborers were passed with any
frequency. As Hutt has observed, the development of this
legislation stemmed in part from the difficulty of enforcing
the general law against conspiracy. This led employers
during the eighteenth century to petition Parliament for
special legislation to outlaw combinations "in their
specific trades" (1975a, pp. 97-98).
The first of these statutes,\(^{18}\) passed in 1720, was directed against combinations among journeyman tailors. It stated that

all contracts, covenants and agreements . . . made or entered into . . . by or between any persons brought up in, or professing, using or exercising the art or mystery of a taylor, or journeyman taylor . . . shall be and are hereby declared to be illegal, null and void to all intents and purposes (p. 17).

It also fixed the hours of work and wage rates.

The statutes against combinations were part of an increasingly futile attempt by the state to regulate industry in the face of a growing capitalist enterprise. In fact, the provisions against combinations in particular trades often were passed as an extrinsic part of broader legislation regulating rates of pay to laborers. The clauses dealing with combinations were incidental to this main purpose (Holdsworth, 1934, pp. 370, 379). As Grampp observes, combinations interfered with the main purpose of the laws, which was the fixing of wages, because combinations of workers or employers sought to secure different wages than those set by public authorities. There were also some instances in which laws were passed to prevent "a particular combination from having a damaging effect" (1979, p. 503).

The latter type of statutes sought to regulate abuses which had appeared in the conduct of some particular

\(^{18}\) Citations from statutes and cases in this chapter are found in Sayre, unless otherwise noted.
trade. One statute passed in 1725 was entitled "An act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of their wages." It provided that contracts, agreements, and ordinances made and entered into by such laborers for regulating the prices of their goods, or increasing their wages, or shortening their hours of labor, should be "illegal, null and void to all intents and purposes." Subsequent acts made like provision against combinations of workmen in the manufacture of textiles (1749), the weaving of silk (1773), the manufacture of hats (1777), and in the paper trade (1799) (Bryan, pp. 118-119; Holdsworth, 1934, p. 383). No doubt Smith had some of these statutes in mind in his discussion of laws against people of the same trade making agreements. Smith was certainly correct as to their ineffectiveness.

As the eighteenth century progressed, combinations "became more frequent and more permanent." This phenomenon may be attributed to the growth of capitalism and the factory system, as well as the lack of enforcement by Parliament of the older regulations regarding labor market relations between employers and workers (Holdsworth, 1934, p. 384). The growing number of new manufacturers and industries were increasingly difficult to bring under the old and weakening system of guild controls. At the same time, by the middle of the eighteenth century, unions (then small local societies of workers) were seeking to negotiate their wages
and working conditions with their employers. Supply and demand increasingly governed labor markets without interference of legal sanction (Holdsworth, 1934, p. 379).

Holdsworth further argues that workers organized in order to obtain a wage in line with the regulations of the older guild system, and employers responded with their own combinations. He contends that the labor combinations sought to compel employers to

\[\ldots\] concede that fair wage which the older legislation had endeavoured to compel them to give. Nor is it surprising that combinations of employers should also be formed to regulate prices, and to resist the demands of their workmen. It was these new conditions which produced the rise of the modern trade unions and combinations of masters on the one hand, and, on the other hand, the enactment of more general and more stringent laws against these combinations of masters and men, which were attempting to regulate wages and hours of work (1934, pp. 379-380).

As industries were increasingly organized on a capitalistic basis, there were also demands by employers to be freed up from obsolete apprenticeship regulations. Brentano, who was a late nineteenth-century student of guilds, argued that trade unions largely originated with the non-observance of the regulations of the Statute of Apprenticeship (prior to its repeal in 1814). He declared

It is evident that, as long as the regulations of the Statute of Apprentices were maintained, the position of the workmen was secure. The long term of service assured them the regularity of employment, which they desired above everything \ldots\ the restrictions as to apprentices prevented a too great competition from lowering the skilled workmen to the level of common labourers (pp. 103-104).
Using the woollen industry as his primary example, Brentano describes how the introduction of machinery brought a change into this regularity of employment. In the mills it became usual to employ workers who had served no apprenticeship, their labor being "much cheaper than that of skilled workmen." The employment of great numbers of children and journeymen who had served no apprenticeship, along with the greater irregularity of employment and reductions in wages, led to the formation of trade societies (pp. 107-109).

After 1760, the independent journeymen in various trades faced a rapidly growing labor force along with the increasing invention and application of machinery in production. This weakened the ability of combinations to obtain their demands from employers (Henry Phelps Brown, p. 30). Both combinations of laborers and employers increasingly came to call on the state for regulation. Lincoln notes that "As late as 1796 labourers petitioned Parliament for the regulation of wages and working conditions" (p. 17). The employers' interests frequently won out, as legislation often was specifically directed against combinations of workmen.

The combinations also found themselves in conflict with the common law. This created quite an ironic situation. Brown explains that many independent artisans formed combinations as a means to secure their livelihood and save their independence. Thus, as he points out, "one way in which the trade union arose was as an endeavour to maintain men's common law right to do what they would with their own
labor. But the union once set up would be viewed by the common law as a conspiracy" (p. 30). A consideration of the principles of the common law as applied to the new circumstances of the eighteenth-century labor market will expand upon this irony.

C. COMBINATIONS AS CONSPIRACIES IN RESTRAINT OF TRADE

Up until 1721, there were few instances in which "combinations among workmen to raise their wages or otherwise to alter the conditions of labor" were actually regarded as criminal conspiracies at common law (Bryan, pp. 125-126). Bryan adds that "As long as conspiracy retained its original technical meaning and narrow scope," combinations of labor remained outside of the scope of court consideration. The frequency of the statutes dealing with labor combinations in the eighteenth century seems "to indicate a belief that the combinations prohibited were being made unlawful for the first time" (p. 126).

On the other hand, during the sixteenth and seventeenth centuries the crime of conspiracy was being "enlarged and generalized." As Holdsworth further explains, "It was extended to apply not only to all combinations to do acts which amounted to a crime or a tort, but also to acts which were regarded as illegal because they were contrary to public policy." As seen in chapter two, in the early seventeenth-century common law courts, the jurists ruled that involuntary restrictions on freedom of trade "were
contrary to public policy." They were "illegal unless they could be justified by a valid local custom, or by some recognized principle of the common law" (1934, p. 373).

Similarly, voluntary restrictions on the freedom of trade (contracts in restraint of trade) were illegal because they were contrary to public policy, "unless it could be proved that they were reasonable as between the parties to them and not detrimental to the public" (Holdsworth, 1934, p. 373). Holdsworth adds that

In these circumstances it was inevitable that the courts should hold that combinations of masters which were entered into in order to force down wages or force up prices, or combinations of men which were entered into in order to force up wages or diminish the length of the working day, were indictable conspiracies. These combinations attempted to effect their objects by the pressure of numbers, and so infringed the liberty of masters and men to make what contracts they pleased (1934, pp. 373-374).

A further expansion in the conception of conspiracy took place in the eighteenth century. One significant change was that, as Dickman observes, "The agreement or combination itself to perform a criminal act became the offense; it was no longer necessary to actually commit the crime." Even more significant was the evolution of the 'conversion' principle: "Under the law of conspiracy, some acts that, if done by an individual alone, would be merely tortious - civil wrongs for which the tortfeasor could be sued - might be criminal, that is indictable, if done by a combination." Consistent with this principle, "... there were certain activities an individual could lawfully do alone (such as fix a price on
his own goods), which, if done (or even contemplated) by a group of individuals, would not be lawful" (p. 55). Two cases illustrate the outworking of these principles in the eighteenth century common law.

The case of the King v. The Journeymen Taylors of Cambridge arose in 1721 just after the passage of the law dealing with combinations among tailors. These men had combined to refuse to work for less than a certain sum per day. In this case the court convicted them of conspiring to raise wages. The court declared that a combination to raise wages was a conspiracy at common law, and a conspiracy of any kind was illegal. An attempt to raise wages on the part of any one individual was not unlawful, but a conspiracy on the part of more than one worker was an "offense at common law" (p. 34).

As a result, the language of subsequent acts dealing with labor combinations underwent a change. As Bryan notes, "the language of the statutes passed after 1721 unmistakably indicates that the combinations attacked were looked upon as contrary to common law, and that the purpose of the acts was to declare the law and to make 'more effectual provision . . . against such unlawful combinations'" (p. 129).

Later in the same century, in the case of Rex v. Eccles (1783), Lord Mansfield ruled that certain workers conspired to prevent a man from practicing his trade, and hence were guilty of a criminal offense (p. 35). He argued that

The illegal combination is the gist of the
offense, persons in possession of any articles of trade may sell them at such prices as they individually please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offense (p. 36).

This is probably the strongest common law authority against labor combinations as conspiracies in restraint of trade (Abrahams, p. 19).

These cases should not be taken to suggest that the common law was opposed simply to labor combinations. Indeed, there were several common law rulings against combinations of employers as well. Moreover, it should be noted that during the eighteenth century hostility to labor combinations should be traced, "not primarily to the courts, but to the legislature" (Keeton, p. 218). Statute law was directed solely against combinations of workers until 1799. In that year and the next Parliament passed the first general acts against combinations both of employers and laborers.

It seems that the eighteenth-century common law was holding labor combinations to be conspiracies due to the way in which it was applying the principle of freedom of trade. The way that this principle worked out in this context was that labor combinations were seen to restrain the trade of individual workers attempting to compete with them for jobs available from employers. Holdsworth argued that the specific eighteenth-century statutes presuppose "the general principle of the common law that trade ought to be free from restraints unless those restraints had been imposed by
they enforce that principle, first in the case of particular trades, and later in the case of all trades, because it appeared that its enforcement was necessary by reason of the prevalence of combinations to raise or lower wages or to alter hours of labour, which infringed it (1934, p. 379).

The principle was enforced in all trades in the 1799 and 1800 Combination Acts. But the principle of freedom of trade in the common law was to take another direction later in the century. This was due to the influence of classical liberalism in conjunction with another common law principle, the concept of freedom of association. These forces gradually led the common law towards a more lenient view of union activity. The existence of labor unions came to be consistent with freedom of trade, though many of the labor agreements were neither enforceable nor illegal.

III. ENGLISH LABOR LAW FROM 1799 UNTIL THE 1850S

A. THE COMBINATIONS ACTS OF 1799 AND 1800

The statutory approach toward particular combinations was written into a general law in the Combination Acts of 1799 and 1800. The motivation for these statutes has been attributed to several sources. One was the English fear that trade combinations were inspired by the revolutionary associations of late eighteenth-century France; another was "the subordination of the interests of the state to the interests of employers." But these laws are best understood as products of the land-owning aristocracy, for it was the
The Combination Act of 1799 originated with a petition by a group of master millwrights to the House of Commons. It complained about a combination among mill workers which existing legislation did not adequately suppress. Spurred by a legislative move by Wilberforce, Parliament turned out a more comprehensive bill dealing with all combinations (Holdsworth, 1934, p. 385; Mantoux, pp. 446-447). Unlike the earlier eighteenth century statutes, this law was not directed against combinations as interfering with the general attempts to implement public regulation of industry.

Two provisions of the 1799 Act are most significant. Section 3 made it a criminal offense for members of a combination of workers seeking an advance of wages to endeavour to induce others "to quit work" or prevent an employer from hiring whatever workers they "think proper" (p. 627). Section 4 expressly stated that these prohibitions were "for the more effectual suppression of all combinations among journeymen" which had as their object to obtain an advance of wages or otherwise fix the terms of employment (Bryan, p. 120).

In 1800 petitions protesting against the Act came in

19 The text of this statute is found in Bland et al., pp. 626-627.
from all parts of England. The Act was reconsidered, and in 1800 a second Combination Act was passed which repealed the previous statute (Holdsworth, 1934, p. 386). In Section 1, this law did reaffirm the previous statute's provision which declared all contracts or agreements between workers for obtaining "an advance of wages," for "lessening" the hours or quantity of work, "preventing or hindering" an employer from hiring anyone, or in "anyway" to control an employer's conduct of his business "to be illegal, null, and void . . ." (p. 19). But the 1800 statute expressed Parliament's opposition to every kind of trade combination, for Section 17 imposed a penalty upon combinations among masters "for the reduction of wages or for an increase in the hours or quantity of work" (Dicey, 1904, p. 516). The net result of the two statutes "was to render illegal and criminal any and every combination among masters or workmen to fix the wages or alter the conditions of labor" (Bryan, p. 121).

The law of conspiracy stood behind the 1800 Combination Act (Dicey, 1904, p. 516). At common law all combinations for illegal purposes, and all combinations which interfered with the freedom of trade, were indictable conspiracies. Thus "a combination for any purpose made or declared criminal by the Combination Act, 1800, e.g. a combination to collect money for the support of men on strike, was in 1800 an undoubted conspiracy" (Dicey, 1905, p. 98).

The courts inconsistently applied these statutes, for in fact unions were quite active for the next two decades.
Dorothy George (1927) has given numerous examples of successful union strikes for higher wages which were not prosecuted in this era. Moreover, the period from 1800 until the repeal of the Acts in 1824 was marked by numerous representations to Parliament made by organized workers for "the control of wages, hours, and conditions of employment of their members" (Lincoln, p. 18). However, the trade combinations sensed that their appeals to the courts and to Parliament were useless; they turned to a demand, not for the enforcement of the older apprenticeship laws, but for radical reforms of the anti-combination legislation. At the same time, there were increasing demands laid on Parliament by employers and others to repeal the older apprenticeship regulation. The influence of Smith's classical liberalism was evident in the legislation passed dealing both with labor combinations and the apprenticeship laws.

Smith's influence was seen in the way nineteenth-century political economists argued about the proper labor market policy. He provided them "with a text that became the foundation for a mode of economic discourse that was more dogmatic and deductive, yet also more urgent and rigorous, than the Wealth of Nations had been" (Teichgraeber, p. 174). Classical economists applied their analytical rigor to labor

20 However, Thompson has observed that the success of combinations of workers in obtaining higher real wages during this period "was not as smooth nor as continuous as is sometimes implied. It was closely related to the success or failure of trade unionism in each industry . . ." (p. 242).
market regulation, extending Smith's insights into both

21 One important economist who followed Smith in the classical liberal approach to this area was Jean-Baptiste Say. In his work on political economy (1827) there is a special emphasis on the need for occupational freedom. The public interest is best served by allowing workers the freedom to pursue the trades they desire; regulation of trades should be limited to merely insuring that the laborer demonstrates his skills in the marketplace. This approach was a feature of the French classical liberal tradition. It is most explicitly manifested in the doctrine of the "right to work." Ironically, this concept had its roots in the European guild system, in which, as Machlup has noted, "licences, charters, and organized trade bodies formed the basis of a detailed government regulation of economic life . . ." Machlup has observed that the origins of this notion are to be found in grants of privilege by the state:

One of the oldest and most widespread methods of government regulation is to prohibit specified activities without the express permission of the government. In the 16th century King Henry II of France carried this type of regulation to its extreme limit, at least in theory, when he declared that the right to work was itself a 'droit royal' - a privilege bestowed by the king (pp. 287-288).

Beginning in the eighteenth century, "right to work" developed broader connotations. Spengler (1968) has illustrated that the right to work involved two distinct features: one was the droit au travail, which argued that unemployment was due to factors such as "the deficiency of the demand for labor and market imperfections," and the other was the droit de travailler, which was based on the notion that unemployment was "traceable mainly to monopolistic restraints upon entry into various crafts and occupations" (p. 172). The latter 'right' was "directed most specifically against the guild system" (p. 177).

Smith's condemnation of the guild system was couched in a natural-law philosophy shared by French political economists (Spengler, p. 177). Smith wrote that "all systems of preference or of restraint" suppress "the obvious and simple system of natural liberty." As we have already seen, Smith believed that "by not leaving things at perfect liberty," exclusive privileges produce distortions in the movement of workers among employments and violate "the property which every man has in his labour" (WN I. x. c. 12). Quesnay, Turgot, and Smith, as well as Say and other English and French economists in the classical tradition, thought that removal of artificial obstructions to the pursuit of any employment would lead to the emergence and persistence of full employment (Spengler, p. 180).
the inefficacy and the detrimental features of labor laws.

The classical liberal economist J.R. McCulloch described several harmful aspects of the apprenticeship requirements in Europe. Laborers were forced to serve as apprentices for a longer period than was commonly required to obtain a knowledge of the trades they meant to exercise. McCulloch contended that this practice resulted in a double injury to the public; first, since the wages of labor are proportioned in part to the expenses involved in learning a trade, the employers are injured by artificially higher wages; second, "it injures the workmen from its tendency to generate idle and dissipated habits, by making them pass so large a portion of their youth without any sufficient motive to be industrious" (pp. 387-388).

The early nineteenth-century parliamentary debate over the repeal of the Statute of Artificers served as a forum for the classical liberal opposition to most forms of labor market regulation to clash with older conceptions of the need for such regulation. Commenting on the debate, McCulloch remarked that the law had been passed to comply with the solicitations of various guilds. Even though the injurious operation of this law was long obvious, "so slow is the progress of sound legislation, and so powerful the opposition to every change affecting private interests, that its repeal did not take place until 1814" (pp. 388-389).

The "private interests" utilized long-standing
rationales to oppose the abrogation of the statute. One of the arguments revolved around the moral value of apprenticeships. William Playfair cited the example of towns "where apprenticeships have no particular privileges, and where the trades can be most easily learnt," yet the respectable inhabitants nevertheless preferred to apprentice their sons. Why? "They bind them apprentices to keep them from becoming vagabonds and blackguards" (p. 81).

Somewhat ironically, the promoters of repeal utilized the threat of workmen's combinations as a rallying force against the Statute of Artificers. Instead of observing that the nonenforcement of apprenticeship regulations led to the formation of labor combinations, the Bermondsey fellmongers declared that "the general apprehension of the masters is, that if men were compelled to be bound for seven years, and those who have been so bound were to combine together, that let their demand be ever so exorbitant we must comply with that demand, or have our goods perish." A master manufacturer added that any restraining law on the free movement of workers furnishes a "never-ceasing motive to all denominations of journeymen to congregate in dangerous bodies and engender injurious measures to the peace and prosperity of the country" (p. 86). The manufacturer's arguments won out, as the statute was repealed in 1814.

But these liberal notions regarding apprenticeship

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22 The citations from the debate are taken from Derry, pp. 81-86.
regulations meant that to be consistent, one would have to allow for the freedom of workers to combine. The notion of the "right of association" developed alongside freedom from the older labor market regulations. The interaction of these ideas shaped the drive for the Combination Act of 1824.

Dicey observed that the right of association had not been well known under this label in England, but it was labeled as such in France and continental Europe. It is the right of two or more citizens "to combine together by agreement among themselves for the attainment of a common purpose" (1904, p. 512). In its classical liberal form it was known as the principle of 'free labor.' Dicey saw the changes in the combination laws from the 1799 and 1800 Acts to the 1824 and 1825 Acts as a series of attempts to resolve the problem of the conflict between the rights of two or more individuals "to combine freely together for any purpose not definitely illegal," and the right, on the other hand, of every individual not to be deprived by the concerted action of others of the right "to manage his own affairs in his own way . . ." (1904, pp. 514-515). This latter right is essentially an expression of the common law principle of freedom of trade; it is freedom from restraint of trade which would harm individuals in the labor market. The alterations in the statutes dealing with combinations are thus seen as "attempts to fix the limits of the right of association in regard to trade disputes" (Dicey, 1904, p. 515).
B. THE COMBINATION ACTS OF 1824 AND 1825

Legislation in the early nineteenth century was successful in impeding the growth and activities of combinations, but did not put an end to them (Holdsworth, 1934, p. 381). During the same period, classical liberals who favored freedom of trade tried to achieve their other aim of equality before the law by giving workers as well as masters freedom to associate. Some, such as Letwin, have argued that the advocates of the 1824 Act erred in their approach. By allowing freedom of combination, the labor market would necessarily be characterized by the exercise of monopoly power. Letwin contends that "By rejecting the alternative that would have achieved both their objectives, by not denying the right of combination to workers and masters alike, they wasted an opportunity to secure economic freedom against attack by monopolies of either" (1965, pp. 47-48).

Instead, the Combination Acts of 1799 and 1800 were in effect repealed by the Combination Act of 1824.23 This law resulted largely from agitation by reformers who were followers of Jeremy Bentham and his radical individualism.

The chief organizers of the repeal campaign were the working-class radical Francis Place and middle-class radical Joseph Hume. As Langer observes, they managed to bring together the Ricardians and several trade union leaders (p. 167). Arguing before Parliament, they sought the repeal

23 Citations from the Combination Acts of 1824 and 1825 are taken from Cole and Filson (1965).
of the Combination Acts on two grounds. They claimed that these laws were "unjust and oppressive," and that "they were unnecessary and inexpedient." Langer further explains that "They argued that they were unjust because masters could combine their capitals and employ them jointly in whatever manner they chose but that the laws prohibited the workers from doing the same" (pp. 169-170). Place and Hume believed that not allowing 'free labor' in the law would be oppressive to workers, as Langer notes:

They argued that laborers ought to be as free jointly to negotiate the terms of their employment as employers are to combine their capitals and thus jointly offer employment. They also used the principles of political economy to show that in the absence of such freedom wages would be prevented from attaining their 'natural levels.' This, they argued, was not only 'oppressive' to the laborer but also prejudicial to the progress of the nation's wealth (pp. 167-168).

In general, their arguments were consistent with classical liberal political economy in two important respects, liberty and equality: "the belief that trade in labour ought to be free as any other kind of trade . . . [and the] conviction that there ought to be one and the same law for men as for masters" (Dicey, 1905, p. 195).

Furthermore, Place and others argued that "the disorderly, violent strikes occurring in the late 18th and early 19th centuries were the result of the unfair and unequal laws which prohibited employees from combining to resist employer combinations" (Dickman, pp. 61-62). They thought that if workers were allowed to combine in friendly
associations that they would desist from all violent and monopolistic activities.\textsuperscript{24}

Place acquired the support of McCulloch in the repeal campaign. McCulloch was the leader among the classical economists in approving of and encouraging peaceful trade unions (O'Brien, p. 366). McCulloch believed that the repeal of the combination laws was consistent with the principles of political economy. Along with other classical political economists, he thought that combinations of workers were basically ineffectual in remedying their members' working conditions or increasing their wages, yet insisted that "workers had the right to freely associate" (Dickman, pp. 60-61). David Ricardo seconded that opinion, stating that the combination laws which prevented such actions were "unjust and oppressive to the working classes, and of little real use to their masters" (8, p. 316).

Grampp has described the contributions of workers and employees to the discussion in Parliament of the repeal. The workers were the most outspoken group, insisting that the combination laws "held down wages and that repeal would raise them."\textsuperscript{25} Some 150 petitions were presented to the

\textsuperscript{24} Place himself thought the repeal of this law would lead to the end of organized labor. By giving labor unions legal freedom to combine, he believed that they would realize the futility of all combinations bigger than friendly societies (Cole, p. 60).

\textsuperscript{25} Grampp observes that some of the labor groups wanted to secure the right to organize "as a means to an end," that is, "... they believed that the workers by combining could do for themselves what the state was supposed to do
House of Commons in 1824, and almost all of them were from laborers. Grampp notes that only two petitions "were in favor of retaining the laws, and they came from employer groups." Otherwise employers were not heard from in the debate (1979, p. 517).

In a relatively short and quiet repeal campaign (Langer, p. 167), Place and his supporters successfully urged Parliament to pass the Act that gave combinations of laborers immunity from all statutory and common law prohibitions against such combinations. Combinations of laborers to "obtain and advance or to fix the rate of wages, or to lessen or alter the hours" of work, or otherwise interfere with the management of a business were no longer liable to prosecution for conspiracy. The statute also ruled out combinations of employers who sought to lower wages or raise the hours of work from prosecution as a criminal conspiracy under the common or the statute law. Section 5 made illegal violence, threats, or intimidation by a person or by a group to "maliciously force another to depart" his work or "regulate the mode of carrying on any" employer's management of his business (pp. 184-185).

Unions were rendered immune from prosecution for peaceful acts under the common or statute law of criminal conspiracy. But the statute left it up to the judiciary to decide "what exactly constituted 'threats' or 'intimida-

for them but had not. That was to take the determination of wages away from the market" (1979, p. 517).
Consequent upon being given a greater freedom of combination, unions engaged in an unprecedented flurry of organizing workers. However, contrary to the desires of the designers of the legislation, there was also an epidemic of violent strikes.

Responding to petitions by employers, Parliament repealed this legislation in 1825 and replaced it with another statute which restricted the right of combination. Employers and workmen retained a right to combine as in the 1824 law. But the 1825 statute made this right subject to the common law in regard to conspiracies in restraint of trade. Members of combinations were not criminally liable so long as their actions came within the permission given by the statute. Section 3 made strikes and lockouts subject to prohibitions against "violence, . . . threats or intimidation." Section 4 in essence stated that a union's activity was to be confined to questions of wages and hours (Lincoln, p. 23). Laborers did have the right to agree among themselves "for the purpose of fixing the rate of wages" or the hours of work (pp. 186-188). They were limited by the statute in their attempts to get other workers to concur with their demands (Dickman, p. 64).

Both of the Combination Acts reversed the statutes of 1799 and 1800. The 1824 and 1825 enactments in part reflect competing interest group pressures; laborers were more effective in the former statute, while employers succeeded in having their demands met in the latter statute. But the
laws also embodied classical liberal principles that affirmed the norm of liberty in the labor market. Even in repealing the previous legislation, the 1825 Act conceded the right of employers and employees to "discuss and agree together as to the terms on which they will sell or purchase labour." It affirmed the idea that "the sale or purchase of labour should be as entirely a matter of free contract as the sale or purchase of boots and shoes." Moreover, neither individuals nor combinations were to "interfere with the right of each person freely to enter into any labour contract which may suit the contracting parties" (Dicey, 1905, pp. 191-192). However, in practice the government failed to provide much protection for independent workers (interlopers) who did not wish to join the union (Hutt, 1936, p. 189, n.1).

The statutes saw the implementation into law of the principles of freedom of trade and the right of association. Nonetheless, these principles were circumscribed by the constraint of the common law. Combinations which did not fall within the limitations of the Act of 1825 were subject to the law of conspiracy in restraint of trade. Thus at this point in English history, a trade union was "at best a nonlawful society, i.e., a society which, though membership in it was not a crime, could not claim the protection of the law" (Dicey, 1905, p. 194). This distinction was further formulated in several court cases which ruled on the statute. English unions continued to be prosecuted under the
conspiracy laws over the next 50 years.

IV. ENGLISH LABOR LAW FROM THE 1850S THROUGH 1906

A. THE COURTS AND LABOR LAW FROM 1850 THROUGH THE 1870S

In a series of cases in the 1850s which interpreted the Combination Act of 1825, British jurists still used the common law doctrine of conspiracy against labor combinations, not regarding conspiracy as a crime, but rather as a tort. The underlying agreement between workers and employers thus was held by the courts to be nonenforceable. Cole notes that the courts held that "although no one could be indicted under the common law merely for forming or joining a Trade Union," so that a union was ''no longer 'criminal' in itself," the taint of illegality still rested on the unions as being in 'restraint of trade' (Cole, p. 202).

In Reg v. Duffield (1851), Judge Erle maintained that under the Combination Act, the act of combining itself by workmen for their own protection and to obtain such wages as they choose to agree to demand was not a crime. But any combination was a conspiracy that interfered with "the free course of trade," as when workers conspired together for the purpose of inducing others to leave their jobs in violation of their employment contracts (p. 549). During this era even peaceful strikes could be regarded as an illegal means to obtain the purposes of the combination (Bryan, p. 145).

26 The text for this case is found in Cole and Filson, p. 549.
Organized workers who relied on these means were guilty of conspiracy where it was believed that their actions would "injure nonstriking workers, employers, or the public" (Dickman, p. 64).\footnote{In \textit{Reg. v. Druitt} (1867), Judge Bramwell declared that "the liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body." Those men that agree to "coerce that liberty of mind and thought by compulsion and restraint" are guilty of conspiracy against that same liberty (p. 183).}

Another significant case was \textit{Hilton v. Eckersley} (1855), which dealt with the legality of a cartel of employers "set up to defend themselves against labor unions." Eighteen mill owners agreed among themselves to settle wages and hours by majority rule. Their combination in essence stated that they would implement a general lockout in the case of a strike by a union against any one employer in the group. Dickman adds that "Each employer posted a bond to insure that he would abide by the decision of the majority" (p. 66). The purpose of the arrangement was mutual protection against labor union actions.

Under Judge Crompton, the Court refused to enforce the agreement, and gave as its reason that the parties were not left free to trade on their own terms. The Court declared that if Parliament had not passed the Combination Act of 1825, it would have found the employer's combination "illegal and indictable at common law." Dickman adds that the statute exempted the combination itself from indictment.
as a conspiracy in restraint of trade. The combination was lawful in the sense that "it was not punishable"; but action against the breach of the contract between the employers could not be legally enforced. As Dickman observes, Judge Crompton meant for this principle to make agreements between workers unenforceable as well. The principle invoked was the longstanding common law principle of freedom of trade; its application in this case had widespread impact:

... after Hilton v. Eckersley the general understanding in England and America came to be that, even if they were not otherwise illegal, agreements between employers, or between laborers, or between employers and unions, to fix prices or wages were not enforceable, as being contrary to the public policy favoring competition (p. 67).

As a consequence of the court rulings prior to the 1870s, labor unions found that much of their organizing activity was constrained. Brown summarizes the way in which union actions were seen by the courts. Workers were "free to agree together not to work for less than certain wages, and to withhold their own labour in concert" if they did not obtain those wages. But if they "tried to secure the withdrawal of other men" working for lower wages, they were seen as "passing over from the legitimate pursuit of their own interests to an indictable conspiracy to inflict injury."

The courts might treat such union actions as "recruiting or picketing ... as interference and obstruction." Workers threatening a strike might be charged with "coercion and molestation" (p. 28). This approach was not satisfactory to the growing trade union movement; they wanted the conspiracy
doctrine as a criminal offense to be eliminated and the
right to organize other workers more clearly spelled out.

In 1868, a Royal Commission heard spokesmen for the
Trades Union Congress skillfully present "evidence establi­
shing the beneficial industrial functions of the unions . . ." (Lincoln, pp. 24-25). The Commission's majority
report recommended that the law more explicitly recognize
unions as lawful associations and acknowledge their right to
combine (pp. 566-567); the minority report recommended that
Parliament should rescind the criminal sections of the 1825
Combination Act which made unions subject to the common law
doctrine of conspiracy (p. 569).

This report spurred the passage of legislation three
years later which largely followed the minority report. The
new statute was generated no doubt in part due to the
demands of organized labor upon legislators for regulation
giving unions protection from the demands of the common
law. The General election of 1868 was the first in which
large numbers of workmen were able to vote. A considerable
number of candidates pledged to support trade union initia­
tives, and after the election organized labor ceaselessly
lobbied the members in the House of Commons. The period
between 1867 and 1875 was also a time of "widespread indus­
trial unrest," as well as a time of significant growth for
existing unions and the formation of many new unions (Cole,
p. 215).

But there were other forces at work in the new legisla-
tion as well. To many legislators, certain changes in the characteristics of labor markets meant that the application of common law principles regarding restraint of trade was no longer appropriate. The 1871 Parliament faced the question of whether or not to fully legitimize the increasing number of trade unions in a different economic setting from that of the previous century. Trade unions in the 1860s and 1870s were "probably less able to obstruct the economy by the exertion of monopoly power" than some of the trade societies and labor combinations (particularly among skilled workers) "had been in the narrower [trade] channels" of the eighteenth century (Brown, p. 20). The dramatic increase in the introduction of mechanization during the nineteenth century (as compared to the previous century) also limited the ability of unions to extract higher wage rates.

At the same time, the range of accepted activities of labor combinations had been limited by the statutory and common law of the previous 50 years. This seemed to leave workers in a weak position relative to their employers, especially as the scale of industry grew. The common law constraints on the activities of unions diminished the ability of workers to maintain their power in negotiating wages relative to that of their employers. Brown explains how economic forces seemed to put the laborer in a squeeze relative to his or her employer due to the way actions by each party were perceived by the common law:

... as firms grew larger, and fluctuations of
trade brought on changes in pay from year to year, many workers found their rates of pay being set unilaterally, take it or leave it, by the employer. Whatever their possibilities of moving in the longer term, in the foreseeable future their livelihood depended on their keeping their present jobs. Inherent in their employer's position was a form of economic power. They joined in a union to attain countervailing power. The sole buyer of labor then had to come to terms with a sole seller: monopsony was met by monopoly. But it is in the nature of the common law, as it "operates between individuals" that the worker's monopoly being achieved by combination is overt as the employer's is not, and the attention of the law is drawn to it (pp. 30-31).

What is suggested, then, is that the positive response of legislators to union demands in 1871 was based to some extent on an appreciation of a labor market failure requiring corrective regulation.

In fact, the Trade Union Act (1871) reflected a compromise balanced in the favor of trade combinations. It did contain severe penal clauses against obstruction and intimidation by labor unions. But its main thrust was aimed in the direction that organized labor desired. In Section 2, the statute declared that the "purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise" (p. 22). Likewise a strike was no longer to be considered a criminal conspiracy if its purpose was a restraint of trade. Thus with this statute Parliament attempted to eliminate the application of the criminal conspiracy doctrine by the courts to the use of peaceful
means in a trade dispute.

Nonetheless, the courts in the early 1870's still found that some types of organized labor actions constituted a conspiracy in restraint of trade. Trade union activities in several instances were held to constitute civil conspiracies. In the most famous example, the London Gas Stoker's case (1872), the Court found that seven union leaders were guilty of criminal conspiracy for intimidating others to break their employment contracts (p. 575). Unions reacted very strongly to this ruling and petitioned Parliament for redress.

As a result Parliament passed the Conspiracy and Protection of Property Act in 1875. This Act eliminated the criminal conspiracy aspect of the common law restraint of trade doctrine from labor disputes (with certain exceptions). The threat by an individual or a union to break an employment contract was now legal, as was the threat "to induce another to break his or her employment contract" (Dickman, pp. 68-69). Furthermore, Section 3 contained a key provision, which stated that

An agreement or combination by two or more persons to do or procure to be done by any act in furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime (p. 23).

Thus the statute restricted the application of the 'con-
version principle' in conspiracy law. Only a limited number of definite acts remained punishable under the rubric of intimidation.

The statute gave explicit legal sanction to strikes and picketing. It facilitated "combined bargaining on the part both of men and of masters" (Dicey, 1905, p. 269). The 1871 and 1875 laws had the effect of legalizing all combinations of workers and employers alike, provided those combinations were formed to settle labor disputes and to negotiate hours and conditions of labor. This meant the reversal of the common law ruling in Hilton v. Eckersley; the Act authorized majority rule agreements among employers or laborers.

Labor unions received the two statutes enthusiastically and "were satisfied that their demands had been met" (Lincoln, p. 26). One labor historian argues that at this point organized labor appeared to have "adequate legal status and immunity in the conduct of industrial disputes" (Cole, pp. 214-215). But the 1875 Act was a compromise; there was still a question as to the effect of the compromise as it spoke to the protection of individuals, whether employers or workers, "whose legal liberty of action might be infringed by trade combinations" (Dicey, 1904, p. 528).

B. THE "TRILOGY CASES" AND THE TRADE DISPUTE ACT

The common law responded to this issue in a fashion that evoked great hostility from organized labor. For in the remainder of the nineteenth century the courts reproscribed
"virtually all of their decriminalized activities under the laws of tort and civil conspiracy" (Dickman, p. 69). In one way or another their activities brought them into the courts on such common law offenses as conspiracy, breach of contract, restraint of trade and intimidation (Lincoln, p. 27). In the area of labor relations, "the tort of inducing a breach of contract was applied to employment contracts at will as well as employment contracts by the term" (Dickman, p. 69). A 'by term' employment contract meant that employees "could not quit, nor could they be fired, without notice"; violation meant that the employee or the employer was "liable to suit for damages" (Dickman, p. 202).

The implications of the famous "Trilogy cases" (Mogul Steamship Co. v. McGregor, Allen v. Flood, and Quinn v. Leathem) generated a great outcry from organized labor. These cases developed the doctrine that certain actions (such as secondary or tertiary boycotts) "causing damage would be actionable if done for a purely malicious purpose, whereas the same acts would not give rise to liability if a legal justification could be shown" (Bryan, p. 153). They were widely seen as invoking a double standard, because the courts found a union's 'restraint of trade' activities to be malicious, while they did not hold a business liable for the same type of activities. Union leaders felt the courts "unfairly limited their collective freedom of action in labor disputes" (Dickman, p. 200).

The first of these cases was Mogul Steamship Co. v.
McGregor (1889). In this instance, a combination of shipowners "offered rebates to all shippers who used their lines exclusively." However, they "refused to ship the goods of anyone who used their competitors" (Dickman, p. 201). This was a type of secondary boycott, hence the combined shipowners were sued by a rival.

The majority of the Court ruled that the shipowners were innocent of conspiracy in restraint of trade. It was determined that "a combination of shippers could act to exclude rivals by predatory pricing even though their intention was to inflict economic harm in order to secure their own self-advancement" (Epstein, p. 1367). The conspiracy concept was held not applicable as there had been no combination to do an unlawful act, nor to do a lawful act by unlawful means. Judge Bowen held that the doctrine of restraint of trade did not apply, for the doctrine "does not prohibit the making of such contracts; it merely declines, after they have been made, to recognise their validity" (p. 258). The agreement was held to be unenforceable at common law.

This decision was relied on heavily by the majority in Allen v. Flood (1898). In this case one group of workers announced through their union agent "their refusal to continue to work ... for an employer unless he discharged all members of a rival union" working under contracts at will (Dickman, p. 201). The case wound up in the House of Lords. They ruled that this threat of a secondary boycott
did not constitute "a civil wrong," even if it stemmed from a malicious motive (p. 279). As Epstein observes, the majority view "treated both malice and combination as wholly immaterial to the question of liability." What constituted illegal means under the Allen doctrine then was "force, fraud, and inducement of breach of contract." Epstein argues that the Court was saying that "As long as workers, either alone or in combination, do no more than withhold or threaten to withhold labor that they are not bound by contract to supply, they have not trenched upon the rights of rival workers, even if rival workers suffer as a consequence" (pp. 1367, 1369).

In Quinn v. Leatham (1901), the House of Lords appeared to reverse direction. In this instance, a group of workers tried to unionize "the labor supply of an employer's shop, although they didn't have any members in the shop to begin with. They did so by threatening to strike one of his customers." This was a tertiary boycott threat (Dickman, p. 201). Leatham, a Belfast butcher, then offered to require his men to join the union and "to meet any demands made on them by it. His offer was refused and Leatham brought an action for conspiracy" (Lincoln, p. 29). Both the contracts "between the employer and his present employees" and "between the employer and his customer" were "at will" (Dickman, p. 201).

The Court ruled that the union threat was an illegal conspiracy in restraint of trade (p. 296). The House of
Lords upheld the judgment of the court. They established that if two or more persons combine together, without legal justification, to injure another, and by so doing cause him damage, they are liable in an action for conspiracy (pp. 295-296).

In response to these rulings, the intellectual supporters of organized labor argued that there seemed to be "one law for business competition and a more restrictive law for labor disputes" (Dickman, p. 201). Sidney and Beatrice Webb observed in 1897 that at the present moment "the elastic and indeterminable law of criminal conspiracy" had more than usual uncertain limits to it. The Webbs contended that this law was often capriciously applied by biased jurists:

The case in doubt is that in which a combination for lawful purposes, contemplating and using only lawful means, violates some actionable private right. Such a combination, besides giving ground for a civil action, might, in the opinion of some authorities, be indictable as a criminal conspiracy, if the private right is one in which the public has a sufficient interest. So long as this view is not definitely negatived, there will always be danger, especially in periods of reaction, of the law of criminal conspiracy being invoked and enforced against any association which is unpopular, or against which the judges or the governing classes are prejudiced (pp. 857-858).

The Webbs believed that jurists of their time had a bent towards narrowing the scope of Section 3 of the 1875 Act in such a way as "to bring many ordinary incidents of a strike once more within danger of the criminal law" (p. 858).

According to the Webbs, in the Allen case the judges "formed a new weapon for the employer's use": holding unions
liable for third party damages even when the union official was persuading workers to take actions within their legal rights. Furthermore, in the Mogul case it was decided that a combination of traders who sought "for their own profit, to exclude a particular rival from trade . . . was not actionable." It was not liable for the damage it incidentally did to a third party (p. 860). The Webbs observed a double standard at work in these three cases:

. . . because the combination was a Trade Union, not aiming at commercial profit, the judges refused to recognise that its members had any adequate lawful motive for jointly exercising their admitted rights, by their duly appointed agent, to the incidental detriment of other persons (p. 860).

The judges failed to acknowledge that the unions' intentions "of increasing their own wages" and of seeing that their own unemployed members be employed in the place of other workers "constituted as real, immediate, and direct a pecuniary interest as the trader's hope of profit" (pp. 860-861).

There are true incongruities in the reasoning in these cases. Some have argued that the difference in the Allen and Quinn cases was that the latter was characterized by the element of conspiracy which was lacking in the former case (Bryan, pp. 154-155). However, this does not truly resolve the discrepancy. As Epstein has observed, there are real conflicts between the decision in Quinn and the other cases:

[Allen] itself could be transformed easily into a conspiracy case given that the defendant Allen represented a union, all of whose members were prepared to strike over the work issue. In addition, Quinn seems difficult to reconcile with
Mogul given that the union's actions were well calculated to serve the self-interest of its members, both by placing current members in high paying jobs and by choking off the powerful economic competition from non-union shops (p. 1368).

The labor statutes of the 1870s had removed provisions which "made actions by trade unions crimes in themselves." But the right of association in the common law still involved tensions when it came to union activities, as Lincoln observes:

The right to associate freely for every conceivable legal reason or purpose is basic to the Common Law, and the removal of criminal law hostility to industrial associations was in this sense a victory for the Common Law. But, paradoxically, the collective purposes and methods of the unions conflicted with the Common Law and involved, and continue to involve, both the law and the unions in unresolved differences, contradictions and perplexities (p. 27).

Beyond these tensions, it remains clear that at this point the statutory and common law did not treat trade unions as exclusive bargaining representatives. There was no legislation compelling unions and employers to bargain collectively. Dickman notes correctly that unions in England "remained fully voluntary associations representing only their members, and employers were under no obligation to bargain with them" (p. 200). It was in 1906 that the law began to intervene in labor disputes.

This change came about with the passage of the Trade Disputes Act. It was a reaction to the developments in the law courts after the 1875 Act. The late nineteenth century was a time in which organized labor exerted increasingly
powerful influence in Parliament. Labor unions sought a reversal of court rulings which used the doctrines of tort and civil conspiracy for the same ends as previously accomplished by the law of criminal conspiracy (Dickman, p. 201). They campaigned vigorously for a "return of their rights" (Lincoln, p. 30). Their objections were finally acted on after a House of Lords' ruling on a significant case in 1901.

The Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants case involved a suit for damages against a union in South Wales "whose members had participated in a disorderly, violent strike." The employees of the railway were hired 'by term.' Dickman adds that "... the company sued the union in its common name for the acts committed by agents on the union's behalf ..." The House of Lords allowed the suit to stand, and the union was assessed 23,000 pounds sterling in damages (p. 202). Thus it was decided that a trade union could be sued for tortious acts (pp. 527-533). Brown comments that "The torts of civil conspiracy and procuring breach of contract were now powerfully sanctioned by the possibility of proceeding not against the individual members or officials who took the wrongful action but against their union ..." (p. 32).28

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28 Brown observes that few firms did in fact proceed against unions so as to recover damages from them that would be crippling; "there was no employer's offensive, no concerted action, nor any spontaneous move to take advantage of the new law" (p. 32).
This case, along with the decision in Quinn which sharply qualified a union's ability "to induce others via secondary boycotts to make union rules stick," provoked a great outcry from organized labor. As Dickman adds, "the English Trade Unions Congress launched a crusade to rewrite, once and for all, the conspiracy law" (p. 202). Pressure was brought to bear on members of Parliament, aided by the fact that in 1902 many trade unions started political funds of their own (Pelling, pp. 122-123; Cole, p. 298). They sought to influence the elections and legislation through the newly formed Labor Representation Committee.

Parliament appointed a commission to investigate the question in 1903. The Royal Commission on Trade Disputes heard from employers, workers, and legal experts alike. Brown notes that employers contended that since the Taff Vale judgment, trade disputes had been easier to settle and strikes were less frequent. The labor groups, which were much more numerous than the employers, opposed the court decision because it would limit a union's ability to strike. Some of the lawyers "objected on principle to the conferment of legal privileges on any section of the community" (pp. 35-36).

The Commission issued a report that "contained a mixed bag of recommendations" (Dickman, p. 202). It did make the point that there had been "no assurance of immunity" in the law ever held out to unions by public commission, legislature, or jurist (Lincoln, p. 31). The Commission recommended
"abolishing the 'conversion principle' of civil conspiracy in labor disputes as the 1875 Act had earlier abolished it from the law of criminal conspiracy." It endorsed limiting the right of action for conspiracy when the act being questioned was done in furtherance of a 'trade dispute.' It also "suggested pruning back the tort of interfering with contractual relations so as to permit strikes and picketing" on a wider basis (Dickman, p. 202).

When the Liberal government proposed legislation "following fairly closely the lines of the Commission's Report," many unionists reacted strongly against it (Cole, p. 302). The Labor Representation Committee had scored important victories in the general election of 1906 and thus the union resistance had a major impact, as Cole explains:

The Labour Party, with almost unanimous Trade Union support, pressed strongly for its own alternative Bill, in which it was laid down simply that 'an action shall not be brought against a Trade Union . . . for the recovery of damage sustained by any person or persons by reason of the action of a member or members of such Trade Unions.' As soon as the Government produced its Bill, it appeared that the Trade Unions had done at the General Election a good deal of effective work besides promoting the return of their own candidates. A very large number of Liberal Members, it was found, had pledged themselves to the complete reversal of the effects of the Taff Vale decision. Not a few Conservatives, hard driven by Trade Union pressure in their constituencies, had done the same. The Government was unwilling to incur the unpopularity of resisting the Trade Union claims. It hastily dropped overboard both the Royal Commission's Report and its own scheme, and capitulated almost entirely to the Trade Unions (pp. 302-303).

There was "no effective opposition" to the union efforts to
obtain the law they desired (Cole, p. 303).

There were several arguments used by supporters of the organized labor cause in Parliament in favor of the new act. It was said that "to reverse the Taff Vale judgment was not to take a leap in the dark or confer a novel privilege, but simply to return the trade unions to the position that they had held under the law" for the 35 years since the Trade Union Act (Brown, p. 35). It was also stated that due to their unequal bargaining power, trade unions should not have their hands tied by the law in an unequal struggle with employers. They felt the right to strike was empty without immunity from action for damages caused by the strike. As in America, the spokesmen for labor unions relied on a market failure type of argument to justify legal privileges.

The Trade Disputes Act of 1906 (TDA) largely followed the directions suggested by organized labor. It abolished the civil law aspect of the common law conspiracy in restraint of trade doctrine from labor disputes. It eliminated entirely the 'conversion' principle. According to Section 1, "an act done in pursuance of an agreement or combination . . . shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable" (p. 24). The law would no longer recognize a difference between individual acts and group acts (Dickman, p. 203). Thus the "tort of conspiracy in the furtherance of a trade dispute" was treated "exactly as the
1875 Act" treated the crime; there was "no privileged group" created at this point (Lincoln, pp. 33-34).

Section 3 eliminated any basis for civil action "on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills" (p. 24). The tort of "procuring a breach of an employment contract, whether the behavior was engaged in by an individual or by a union . . ." was done away with. This applied "not only for prospective contracts, and not only for employment contracts terminable at will - but in all cases" (Dickman, p. 203). Strike action was thus set outside the scope of civil conspiracy, as the Act of 1875 had set strike action outside the scope of criminal conspiracy.

Furthermore, the TDA provided that trade unions were immune from any liability for torts. Section 4 stated that

An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court (p. 24).

As Dickman notes, "The range of privilege created by this last provision was very large" (p. 203). The union's immunity applied to 'any tortious act . . . committed by or on behalf of the trade union . . .'. Lincoln emphasizes that the union's immunity was not limited to "acts done in
furtherance of a trade dispute." This provision reversed the Taff Vale judgment (p. 35).

C. AN EVALUATION OF ENGLISH LABOR LAW

How are the court rulings following the 1870s statutes and the TDA to be understood in light of the models of economic regulation? The market failure theory would understand this legislation to be grounded in the unequal market power of workers compared to their employers. Labor unions need complete civil and criminal immunities from conspiracy in the law in order to pursue tactics that will enable them to obtain their wage objectives. The Webbs advocated such changes in the law in the late 1890s (thus anticipating the provisions of the TDA). They contended that laborers should be free to peacefully combine (and organize to refuse to work) in order to enhance their bargaining position with employers without facing liability for damages caused to employers or to third parties. Deleterious consequences should be handled by stricter labor market regulation:

It may well be that combinations of workmen, or combinations of capitalists, lawfully and peacefully pursuing what they conceive to be their own corporate or class interest, will insist on terms in their bargains which are detrimental, not only to other parties, but also to the common weal. In that case the remedy is not to shackle one of the contracting parties by civil liabilities to individuals who may feel aggrieved by the exercise of the right, but to protect the community from such consequences of legal freedom of contract by definitely prescribing, by Factory Act or otherwise, any conditions of employment or trade that
are deemed necessary in the public interest (p. 862).

A similar way of understanding the common law rulings in the "Trilogy cases" and the TDA is given by those who see the latter as the response of Parliament to jurists who were systematically prejudiced against the working class. Cole offers a spirited defense of the immunities given to unions in the 1906 Act. Utilizing the 'capture' approach, he affirms that

... the judges have, again and again, been actuated by a strong anti-Trade Union bias. Any compromise would therefore have been likely to be interpreted in the courts in such a way as to concede as little as possible to the Trade Unions. The only effective way of tying the judges' hands was to get a simple and inclusive declaration from which legal subtleties would offer no way of escape (pp. 304-305).

Cole's case is appealing only insofar as one recognizes the persuasion of Parliament in the early 1900s to this view of the jurists' biases. It can be granted that there are certain inconsistencies in their rulings, though in light of Allen it is hard to argue a systematic prejudice against labor on their part. But what is more significant is the interest-group explanation which highlights the power of organized labor to influence legislators along the lines that Cole suggests.

The interest group model would understand the TDA as a product of the pursuit of trade unions for protective legislation in order to enhance their position in the labor market. Brown notes that "... the severity of the
depressions in each decade from the 1870s onwards" (pp. 42-43) played a key role in this regard. Complete immunity in the law was more intensely sought as the vagaries of the business cycle came to increasingly affect working people. Brown notes that during the late nineteenth century

The British economy was losing its industrial ascendancy; its staple manufacturers which had dominated the markets of the world were losing ground to foreign competitors, and it was failing to develop the new industries as they did. The depressions went deeper in the United Kingdom than in those other industrial countries, and lasted longer. They brought severe unemployment. In absolute numbers this increased in successive depressions, and it became increasingly resented; it intensified what contemporaries noted as 'the spirit of unrest' (p. 43).

Thus, consistent with Peltzman's observation that organized interest groups are more successful in securing protective legislation during recessions/depressions, unions intensely competed for and gained favorable regulation in 1906.

Union interests outcompeted employer interests in the early 1900s due in part to superior organization. The unions utilized the rationale of unequal bargaining power in a most persuasive fashion; convinced of the weaker condition of the worker compared with the employer in bargaining for wages and conditions of employment, Parliament "readjusted the power relationship between capital and labor" (Rimlinger, p. 216). As a consequence the Labor Party saw its affiliated membership rise to over a million in 1907 (Cole, p. 305). In the years from 1910 until 1914, trade union membership grew at an unprecedented rate (to over 4 million workers in
At the same time, while "between 1900 and 1909 there were relatively few industrial disputes," industrial turmoil reached an unprecedented level between 1910 and 1914 (Rubinstein, p. 63).

The interest group theory no doubt sheds some light on labor market regulation in this era, but it does not do full justice to the features of the law in this period. Other facets of the changes in labor law are better explained by the liberty and virtue component. Consider the notion of character formation as an end of labor market regulation.

Brown notes that in Victorian England trade unions commended themselves to legislators in several ways. They provided "various forms of social insurance" for their own members. In a line of thinking no doubt influenced by John Stuart Mill, many policymakers also saw labor unions as a vehicle for "attracting the most skilled and responsible workmen, and exerting a steadying and uplifting influence on their members generally." The implication for the employer was that the labor which "received the full trade union rate" was "highly productive." Brown argues that "This was all the more so, because the unions actually strengthened the character and improved the performance of their members."

The Victorians laid great stress on this consideration (p. 23). Alfred Marshall wrote that

... the power of Unions to sustain high wages depends chiefly on the influence they exert on the character of the workers themselves ... Unions all can, and most of them in fact do, exercise an elevating influence by punishing any member who
conducts himself badly, or who is frequently out of employment from excessive drinking (pp. 401, 402-403).

Hence in the 1870s it made sense to give unions a freer hand by lifting the doctrine of criminal conspiracy off their backs. This meant that with the Trade Union Act and the Conspiracy and Protection of Property Act labor unions would have no special taint of criminality resting on them, but no special immunities in the law either.

The 1871 and 1875 statutes were interpreted by the courts in light of the common law principles of conspiracy and breach of contract. The construction put upon the 1875 Act marked "a reaction not against the provisions of that Act," but against the tendency to construe them as conferring "upon trade unions a position of privilege" (Dicey, 1904, p. 531). Labor unions remained liable as any other group of citizens "for any criminal acts they might commit" (Lincoln, p. 27). As any other association they were liable "to pay damages for wrongs done by themselves or by their agents . . ." (Dicey, 1904, p. 531).

Since the 1870s unions came to engage in much more impetitive practices than had been previously seen. Yet in 1906, as Brown observes, it seems that Parliament relied on a parochial view of unions which did not recognize that they had become much more insistent on upholding restrictive practices, especially when those were regarded as protective of employment. This was clearly evident in the union reaction to "the heavy unemployment in the cyclical depres-
sions from the 1870s onwards . . ." (p. 46). Union leaders were less deferential to employers, and union members became more militant (p. 42). Brown adds that "The type of union that had gained approval" in the 1870s "accepted the existing order in industry and society, whereas many unionists of 1906 rejected it as unfair and denied the legitimacy of profit" (pp. 46-47). Furthermore, the miner's strike in 1893 had shown that unions could impose widespread disruption in the community (p. 44). Parliament underestimated both the "actual power" of unions and "the will of their members to use it" (p. 47).

Apart from the TDA, the English trade union law was based on the assumption that it applied to "free contracting parties." This ruled out the imposition of "compulsory unionism under the immunity of voluntary association . . . ." Unions allowed to engage in intimidatory practices as a means to secure membership would no longer be "workers' mutual aid associations" (Lincoln, p. 67). But if the TDA is thought of as remedying a temporary imbalance of power in the labor market, so that unions might continue to perform their socially beneficial functions, perhaps it is not incongruous with the traditional common law understanding of legitimate regulation. Lincoln interprets the TDA along these lines. He contends that Parliament desired to compensate for organized labor's weakness by "weighting the position of the unions with legal immunities thereby securing them a measure of equality with the employers when
it came to bargaining over contract terms" (p. 36). Lincoln further argues that the legal immunity given to the unions was not "a grant of right," but "a grant of necessity due to the inferior state of their power and as such subject to adjustment as that power grew" (p. 54). In a similar fashion Brown has observed that the 'unequal bargaining power' argument loses its force "as unions grow in power and in their ability to enforce their demands not only by withdrawing labour from the employer but by imposing losses on third parties and disrupting the life of the community" (p. 48).

Recognizing that there are elements of each model of regulation at work in this period, it would be helpful to evaluate the labor law of this period by means of a comparison and contrast between the explanations offered by each approach. Advocates of both models would argue that the termination of the application of the concept of criminal conspiracy in restraint of trade to labor unions in the late nineteenth century was appropriate; both would favor retaining the tort concepts of economic liability as applicable to unions as well as to any other property holders. The two approaches differ as to whether or not the concept of 'restraint of trade' should be eliminated altogether with regards to labor unions.

As seen in chapter one, those who utilize the interest group model most often emphasize freedom as the normative criterion by which to evaluate regulation. The libertarian understanding of labor law exemplifies this approach.
Epstein (1983) offers a libertarian 'normative account of labor relations' grounded in entitlement theory. He argues that "common law rules in their ideal form make legal entitlements among strangers without reference to personal status" (p. 1364). Epstein contends that the English common law has taken the position that "Every person owns his own person and can possess, use and dispose of his labor on whatever terms he sees fit" (p. 1364). Thus when individuals create voluntary arrangements, it is "never the occasion for increased state regulation of private transactions apart from the faithful enforcement of their agreement, be it in employment relations or anything else" (p. 1366). Thus Epstein claims that there is no reason to justify the existence of labor unions other than on the grounds of voluntary arrangements that apply to any other parties in the marketplace:

As the identities of the contracting parties and the terms on which they contract are of no special concern to the state, a contract between an employer and an employee is indistinguishable from one between two prospective employees. The protection of labor unions from doctrines of criminal conspiracy, therefore, should not depend upon any elaborate affirmative social justification for their use. If A could enter into a contract with a prospective employer, then there is no reason he cannot enter into a contract with his potential rival, B, to present a united front against the employer. Similarly, the voluntary formation of labor unions need involve neither the use of force and fraud nor the inducement of breach of contract. There is therefore no need to appeal to special justification to account for the legality of labor unions, as it is already accounted for by a general theory of entitlements (p. 1366).
If the common law thus does not offer a basis for special privileges for any one party in the marketplace, then how do we understand the conflicts presented by the "Trilogy cases"? Epstein contends that the more significant question is not the harsher rules for labor than for business, but the doctrine of conspiracy in restraint of trade itself. He argues that "Labor unions should not be considered criminal conspiracies not because they operate in restraint of trade - many do - but because restraint of trade itself should not be illegal." In Epstein's view, "... legislation that secures the rules of Allen is appropriate, even if more massive labor legislation is not" (p. 1369).

The liberty and virtue component's understanding of the common law principle of freedom of trade does not hold liberty as its overarching normative criterion. Hence it would not dismiss outright the possibility of applying the concept of conspiracy in restraint of trade to labor (or business) groups when economic circumstances warrant. Thus this model would evaluate the implications of the "Trilogy cases" and the TDA in a different (though not completely dissimilar) fashion.

In regards to the latter, there were several alternative routes Parliament could have taken that would have been consistent with the common law tradition. Brown suggests that Parliament could have created a "catalogue of practices" (or economic torts) which would be specifically
immune from tort liability. The case for "providing the complete immunity . . . is a case for simplicity and certainty": unions were spared from "the unforeseeable developments of case law." Still, there is no question that in providing complete immunity, Parliament was deciding that, uniquely among British institutions, "trade unions and industrial relations should be exempt from regulation by law" (p. 51). Brown explains that

. . . Parliament had denied itself the possibility of distinguishing between different actions by the trade union, according to the balance between the union's need of those actions in order to fulfill its functions, and the damages they inflicted on others. It had denied itself also the possibility of adapting regulations to new practices and problems as they emerged (pp. 51-52).

Brown goes on to suggest that with regards to such practices as the secondary boycott, the sympathetic strike, and the withdrawal of labor by reason of a dispute between groups of workers, Parliament could have "drawn the boundary by statute" (pp. 52-53). He argues that

Within it the unions would have enjoyed all the shelter of the actual settlement of 1906. In any action they took outside it they would have been exposed to the civil law relating to combinations of whatever form. The intensity of trade union opposition to later proposals for such regulation does not show that if it had been adopted in 1906 they would have found their bargaining power much reduced by it (p. 53).

Brown does acknowledge that a distinction between fair and unfair labor practices would likely not have been enacted in 1906, because organized labor "commanded too many votes" and thus obtained complete immunity (p. 54). Nonetheless, the
distinction follows nicely in the common law tradition of
distinguishing between legitimate regulation and
unreasonable restraints of trade as seen in chapter two.

What is the problem raised by giving unions special
privileges in the law? By excluding "industrial contracts,
trade union and employers' agreements from the scope and
protection of the law . . . the whole concept" of contract
law is weakened (p. 70). Thus Lincoln argues for amending
Section 4 of the TDA "to cover only the privileged occasions
as in Sections 1 and 3"; he contends that "The unions' total
immunity, constituting them a privileged group, should be
repealed" (p. 68). Instead, the union member would still
have secured by law "his contract rights and his freedom of
association." The union itself would benefit from "legally
established negotiation rights and status" (p. 70). Much
like Epstein, Lincoln believes that "the Common Law hinders
the trade unions not in their restraint of trade activities
but in their pursuit of the 'closed shop'" (p. 71).

The liberty and virtue component considers freedom as
an important, but not penultimate, normative criterion.
Freedom of trade is understood as freedom from arbitrary
restraints on trade not sanctioned by the law. It opposes
the unreasonable exercise of monopoly power secured by
government privilege. Yet there is a role for regulation in
promoting substantive ends such as character formation.
Likewise, the right of association is highly valued as an
end of public policy. Thus, the liberty and virtue component
shares the notion with the interest group model that public policy ought to neither encourage nor prohibit labor efforts to combine by the grant of special legal privileges or immunities. This rule can always be overridden, however, by the legislature's police power to regulate the labor market when public good considerations warrant such regulation.

There are some interesting parallels to the British experience in the development of American labor law over the nineteenth and twentieth centuries. Chapter four will examine the various arguments about the proper position of the law regarding immunities and privileges granted to organized labor in America from the early 1800s until the 1940s. The role of the concept of substantive due process in labor disputes, and its relation to governmental police powers in applying regulation, offers an enlightening comparison and contrast to the British development of the doctrine of conspiracy in restraint of trade.
This chapter will examine the development of the doctrine of conspiracy in restraint of trade in nineteenth-century and early twentieth-century American law. It applies the models of regulation to the treatment of organized labor in U.S. statutory and common law. Of particular importance will be the concept of substantive due process in regards to labor. The tension between the legitimate use of police powers in labor markets and the protection of economic rights from the use of those powers as artificial interference in the marketplace will be a central theme. Restraint of trade as violation of substantive due process in regards to labor unions is a key element of the American conspiracy doctrine.¹

A central issue to be explained by the application of the models of regulation will be the changed status of labor unions in the law and in economic policy. The social and economic policy toward labor combinations in America went from the taint of illegality associated with criminal conspiracy in the early nineteenth century, to the recognition of the right to organize laborers in 1842 and a limited application of the conspiracy concept until the 1930s, to

¹ Substantive due process may also restrain laws fixing prices, minimum wages, hours of work, etc. I shall deal with cases pertaining to these issues only insofar as they shed additional light on the nature of police powers vis à vis substantive due process in relation to labor unions and labor market entry.
the mandatory requirement that employers bargain with elected union representatives and elimination of the concept of the labor union as conspiracy as expressed in the New Deal labor legislation. It was a change which spanned a quite significant era in American legal and economic history. At the beginning of this period there was no special set of rules for labor cases. They were governed by common law principles which applied also to contract and tort issues. Towards the end of this era, with the advent of the New Deal, these common law principles largely gave way to "a complex body of statutory and administrative law" that treated labor law "as a separate and self-contained subject" (Epstein, p. 1357).

Both the liberty and virtue component contribute to the explanation of this phenomenon prior to the 1930s. The latter theory most clearly explains the passage of the labor legislation of the 1930s. Neither model completely explains the development of labor law over the entire period.

The argument of this chapter may be summarized as follows. American courts sought to adapt to labor disputes English common law rules in regards to freedom of association and the freedom to pursue one's trade. In the first half of the nineteenth century, American common law recognized the right of unions to organize workers. This was not a grant of special privilege or immunity to unions in the law. During the nineteenth century American common-law jurists still examined the purposes of unions and the
legitimacy of the means they utilized to attain their objectives.

Later in the nineteenth century federal statute law established its opposition to combinations or conspiracies in restraint of trade. Under the interpretation followed by the Supreme Court of the application of the Sherman anti-trust law to organized labor, union activity was treated in much the same manner as any other combination. The issue of the legality of the means of unions to obtain their objectives was ruled on. In several key cases the Court held that the use of the secondary boycott or strikes, due to their effect on interstate commerce, could constitute a union as a conspiracy in restraint of trade.

During the late nineteenth and early twentieth century, organized labor opposed the use of yellow-dog contracts, in which workers agreed they would not join a union, and the use of the injunction to enforce such agreements. The Supreme Court overthrew state legislation banning such agreements and upheld the principle of equality of bargaining power in the fashioning of contracts between employer and employee. As Dickman observes, this principle as applied to freedom of contract "did not assume that men had to be equal in position or wealth in order for the bargains between them to be fair. It assumed only that they were equally free" (p. 18).

The economic due process principle predominated in these high Court decisions. Indeed, this period of
Supreme Court rulings has been called the era of substantive due process (1885-1937). In several key rulings, the Court overturned statutory enactments which under the guise of the legitimate use of police powers by the state instead actually served private interests. As nullifications of legislative enactments, these rulings are not easily explained on the basis of the interest group model. The independent judiciary failed to ratify legislative agreements between politicians and labor groups. Yet the Court affirmed the usage of legitimate regulation for the public good under the police powers of the state. These judicial rulings are better explained utilizing the liberty and virtue component.

Faith in competition diminished during the latter part of the nineteenth century, and "the idea grew that unions were not merely tolerable, or desirable, but were indispensable if workers were to obtain fair wages and working conditions" (Dickman, pp. 7-8). Moreover, the market failure argument in regards to the labor market was increasingly accepted, i.e., that the employer held an advantage in bargaining with his employee, and that immunities in the law needed to be granted to labor unions to redress this imbalance.

Organized labor began to utilize such arguments against both court injunctions and the application of antitrust law to unions. In the Norris-LaGuardia Act of 1932, American unions first secured legal immunity from the application of
the common law conspiracy doctrine in regards to labor disputes. Organized labor generated a particularly effective demand for regulation in securing this legislation.

With the onset of the Great Depression, union proponents heightened their insistence "that the 'right to organize' under the common law was not enough." They demanded that the state also restrict "employer's freedom not to associate with unions or their members." The National Labor Relations Act (NLRA) established this "positive right" by establishing "compulsory collective bargaining" (Dickman, p. 8).

While in 1935 the Supreme Court overturned the National Industrial Recovery Act with its favorable provisions for organized labor, in 1937 it upheld the NLRA. Political pressure from President Roosevelt ultimately swayed the majority of the Supreme Court to interpret the New Deal labor legislation consistent with the desires of organized labor. The New Deal labor legislation is best explained by means of the interest group model.

I. AMERICAN LABOR LAW FROM 1800 THROUGH THE 1920S

A. THE CONSPIRACY DOCTRINE IN THE NINETEENTH CENTURY

We have discussed the development of the concept of conspiracy in the English common law as applied to labor combinations. We have emphasized the significance of the common law principle of conversion: a legal action by one individual can become illegal it is performed by a group of
individuals. As in Great Britain, this characteristic of the conspiracy doctrine had particular import in the American labor conspiracy cases. Workers could set a price on their own labor services individually, but such an action would be illegal if performed by a group of individuals. As Dickman observes, the primary significance of the conversion principle for workers was "its impact on their right to organize into unions," and on "the use of their organized power through primary or secondary boycotts" (Dickman, p. 56). In the late eighteenth-century English common law, a group of laborers organized into a combination to raise wages was declared a conspiracy. The British Combination Acts of 1799 and 1800 set forth generalized provisions against labor combinations which acted in a conspiratorial manner against the public interest by striking to obtain higher wages.

While labor combinations were increasingly being formed in England (despite legal opposition) in the latter part of the eighteenth century, the labor movement was also springing up in America. Labor combinations were first formed among the craft workers, which had skills that "were not easily learned," and thus "employers could not readily replace them" (Taylor and Witney, p. 16). Almost every time there was a combination of workers, it sought "to obtain, or retain, a monopoly of the labor supply through a closed shop . . . " (Dickman, p. 74). Some of the laborer's tactics were relatively simple; efforts by employers to hire inferior workmen were met by a "social boycott," i.e. craft
association members "refused to live in the same boarding-house or to eat at the same table with nonassociators" (Rayback, p. 55). In other instances there was more direct pressure put on employers to recognize and hire only members of the labor association.

Employers objected to these tactics and brought suit against the labor groups, charging them with being illegal combinations. The American common law of conspiracy was first established in these early nineteenth century trials of labor combinations. The individual laborer's right to bargain for his own labor services had been "firmly entrenched" in American law based on English law and custom. But it was an uncertain matter as to "how far American law (either common or constitutional) protected the rights of combinations"; thus "the applicability of the English common law of conspiracy to labor combinations" was tested in a series of state cases involving "journeyman trade unions in various crafts" (Dickman, pp. 73-74).

There are two competing interpretations of the thrust of the rulings in these cases in regards to the status of labor combinations in American common law. An older view which was widely held argued that in the early 1800s American common law viewed labor unions which sought to increase their wages or otherwise alter their working conditions as illegal conspiracies. It was thought that only in 1842 did the Hunt case overthrow "these archaic doctrines" and move the legal focus from the legitimacy of a labor
combination itself to the question of the lawful means which unions might utilize to better their conditions (Witte, 1926, p. 825).

This view laid a great emphasis on the fact that labor combinations were prohibited by the early eighteenth-century British statutes. Prosecutors in several of the early American labor cases "urged that English law established a precedent for American courts" (Taylor and Witney, p. 17).

A second interpretation emphasizes the fact that it was only in a few scattered instances in these early labor union cases that combinations of workers were declared illegal as such. It was never the established American common law that labor unions "are illegal per se." The cases of the early nineteenth century "did not turn upon the legality of the unions per se, but on the methods which they employed to gain their ends." The legal theory that it was unlawful for workers to combine to raise their wages was abandoned early.

More broadly speaking, Thorelli has observed that prior to the late nineteenth century "British attitudes towards restrictions of trade influenced American policies in the field in a number of ways." He explains that some of these influences were direct and tangible, others rather indirect and intangible; all were interrelated. To the group of indirect influences belong such maxims as the desirability of greatest possible individual liberty compatible with social order and the consequent aversion to excessive concentration of power in few hands. The greatest direct and tangible influence of the old mother country no doubt was on the development of American common law on the subject. This was natural because until the 1880s there were comparatively few statutory enactments of significance, state or federal, relating to private restrictions (p. 36).
in American common law and "never attained the status of
generally accepted law" (Witte, 1926, pp. 825-826).

The evidence seems to suggest that there was develop­
ment in the law, which initially declared labor combinations
to be illegal but never established this doctrine as the
rule of the land. Two of the most significant of the early
cases did declare labor combinations to be outright illegal
conspiracies. An examination of these cases will help to
answer the question of how unions were originally thought to
prejudice the rights of others or of society under the
common law of conspiracy.

In 1806 the Philadelphia shoemaker employers charged
that unions were conspiracies, and as such, were unlawful
combinations. The shoemaker union (cordwainers) tried "to
force their employers to fire all journeymen who did not
belong to the union" and also "attempted to prevent non­
members from entering the trade" (Baird, p. 30). In the
trial of this case (Commonwealth v. Pullis),^ the prosecu­
tion affirmed the individual laborer had the right to
bargain for his own wages; they did not intend "to introduce
the doctrine that a man is not at liberty to fix any price
whatsoever upon his own labor" (3, p. 68). The charge was
that the attempt to combine all shoemakers to obtain an
increase in wages constituted the cordwainers as a

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[^3]: Citations of the first two labor conspiracy cases in
this section are from Volumes 3 and 4 of Commons and Gilmore
(1958).
conspiracy: "Our position is that no man is at liberty to combine, conspire, confederate, and unlawfully agree to regulate the whole body of workmen in the city" (3, p. 68).

While the defense pointed to "the positive contributions that labor unions could make to the economic and social life of the community" (Taylor and Witney, p. 19), the jury focused on the attempts to "restrict the lawful acts of non-union workers" (Baird, p. 30) and found the union guilty of being a criminal conspiracy.

In the Pittsburgh Cordwainer's (Commonwealth v. Morrow) case of 1815, which revolved around similar concerns, the judge contended that "a conspiracy to prevent a man from freely exercising his trade, or particular profession, in a particular place, is endictable. Also, it is an endictable offense, to conspire to compel men to become members of a particular association, or to contribute towards it" (4, p. 82). The jury upheld the charge that "the master shoemakers, the journeymen, and the public were endangered by the association of journeymen and returned a verdict of guilty of conspiracy . . . ." (Walton and Robertson, p. 274).

There were a total of seventeen labor conspiracy trials in the period from 1806 until 1842 (Taylor and Witney, p. 18). Generally, the decisions in these cases did not follow the stringent construction seen in the previous two cases, as Dickman observes:

Except insofar as state law prohibited them, virtually all the courts granted workmen the common law right to organize for mutual protection
and betterment. But virtually none of them granted the unions the right to seek or maintain the closed shop through strikes or strike threats (p. 74).  

In addition, Witte explains that "In several of these early conspiracy cases the prosecution or the court, or both, stated that it was the methods which the defendants had used which rendered their combination illegal." But it was not until 1842 that the distinction "between the legality of the combination per se and the methods which it employed was clearly expressed" (1926, p. 828).

The Commonwealth v. Hunt case of that year was highly significant for the economic conspiracy doctrine as applied to labor unions. A lower court found a group of organized shoemakers guilty of conspiracy because they would not work for an employer "who hired a shoemaker not a member of their union"; they were indicted because their actions "interfered with the right of the nonunion shoemaker to practice his trade" (Taylor and Witney, pp. 20-21).

Chief Justice Shaw ruled that the union was not to be seen as a conspiracy based on a 'conversion principle' rationale. He stated that "every free man, whether skilled

4 It was during this era that national labor organizations appeared and the first federation of labor unions was founded. This organization, the National Trades' Union, "sought to unite in one organization every local union, city central, and national labor union in the nation." It disappeared during the depression of 1837 (Taylor and Witney, p. 20).

5 Citations from this and other cases and statutes in the remainder of this section are found in Sayre (1923), unless otherwise noted.
laborer, mechanic, farmer, or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his option, except so far as he is bound by contract" (p. 108); he added that, "In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests" (p. 106).

Justice Shaw emphatically affirmed that labor unions may exist for either pernicious or laudable and public spirited purposes. A union may advance the general welfare of the community by raising the standard of life of the members of the union. In fact, what the union was after, "to induce all those engaged in the same occupation to become members of it," was not unlawful since the power this state of affairs would give the organization "might be exerted for useful and honorable purposes." Shaw declared that labor organizations "might be used to afford each other assistance in times of poverty, sickness, or distress; or to raise their intellectual, moral, and social conditions; or to make improvements in their art; or for other proper purposes" (pp. 105-106). There is a striking parallel here with the attributes of the medieval guild; Shaw was affirming a 'public good' perspective towards labor combinations.

Shaw ruled that for the union to be convicted under the conspiracy doctrine, it had to be shown that either the "intent" of the union, or the "means" it used to accomplish its intent, was "unlawful" (pp. 105-106). Dickman comments
that "by unlawful, Shaw clearly meant conduct or behavior that might only be actionable by a private suit, such as for fraud, breach of contract, or tort" (p. 75). Shaw ruled that the prosecution did not demonstrate such "unlawful means" or an illegal purpose on the part of the union in this case.

It is probably correct to say that Shaw "did not eliminate, nor did he intend to eliminate, the law of conspiracy in restraint of trade as it applied to unions (or to any other group in the economy)" (Dickman, p. 76). The doctrine could still be utilized by jurists who applied the traditional common law principles of freedom of trade and the right of association. Shaw observed that a labor "association might be designed for purposes of oppression and injustice . . . injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be" (p. 106). Shaw was following in the common law tradition in recognizing a distinction between labor combinations which served their proper ends and those which arbitrarily restrained trade. A combination in which a group of workers combined to break their employment contract would be unlawful and indictable.

This case applied the principle of freedom of association "about as far as any 19th century American judge was willing to apply it to labor unions" (Dickman, pp. 75-76). The ruling in this case recognized the right of a union to organize workers. As Dickman further explains, this ruling
did not recognize the right of unions to force non-union workers to join the organization, nor was there a duty imposed on employers to bargain with the union or even hire union workers. The right of the union recognized by Judge Shaw was "primarily a legal claim that 'ran' against the government." It did not imply any obligation on the part of the state to aid labor in seeking its ends, as Dickman explains:

[It was] a claim that the government refrain from doing something to an individual (or a group of individuals), not a claim that the government do something for an individual (or group) at someone else's expense (i.e., at the expense of someone else's freedom of action or of his material resources). As such, the right to organize implied no positive (affirmative) obligations on employers or non-union workers (outside the criminal law) (p. 7).

As in the nineteenth century British common law cases, American justices in this era expressed a commitment to the principle of freedom of association, for both employees and employers.

The Hunt case narrowed the applicability of the conspiracy doctrine to labor unions. As Taylor and Witney note, "Labor organizations taken by themselves were declared lawful organizations . . . In general, most other courts, though not bound by the Massachusetts decision, followed the doctrine established by Shaw" (p. 21). The Hunt case expressed the conspiracy doctrine in a form which was usual for the next 90 years, "namely, that the legality of a combination depends upon the purposes sought to be accomplished
and the means used to affect these ends" (Witte, 1926, p. 828).

Thus the conspiracy doctrine was still employed to constrain certain union actions. For example, there were eighteen labor conspiracy trials during the period from 1863 to 1880 (Witte, 1926, p. 829). If a jurist in a particular case thought that a union was pursuing an illegal objective (such as a closed shop), judicial action was undertaken to oppose the union (Taylor and Witney, pp. 21-22). While Justice Shaw defended the closed shop, not all of the other state courts were willing to legitimate such an arrangement, for, as Dickman notes, "strikes or strike threats to obtain or maintain a closed shop were held in some states (as in England during this period) to be an unlawful attempt to injure other employees, employers, or the public interest in competition" (p. 76).

The persistence of judicial inquiry into the activities of labor combinations led labor organizations to demand the enactment of legislation to abrogate the economic conspiracy doctrine, as Witte has observed. Laws along this line were passed in Pennsylvania, New York, New Jersey and Maryland. In Pennsylvania, an act was passed which declared that laborers "might singly or collectively refuse to work for any employer, but also that this should not be construed as legalizing attempts to hinder others from working." However, all the statutes "failed to end prosecutions for conspiracy premised upon participation in strikes" (1926,
In the latter part of the nineteenth century, while there were still some rulings unfavorable to union activities, there was gradual recognition of the legality of peaceful strikes. Moreover, labor disputes after the 1880s were the source of "comparatively few criminal prosecutions for conspiracy" (Witte, 1926, p. 832). By the end of the century, as will be discussed shortly, the key issues in labor law revolved around the use of the injunction by employers and the application of federal antitrust statutes to labor union activities.

In sum, to this point we have seen that the American development of the conspiracy law as applied to labor unions has been somewhat different from what took place in Great Britain. English labor unions were declared to be illegal conspiracies in the late eighteenth century. However, this situation changed in the latter half of the nineteenth century. Several key pieces of legislation, including the Trade Union Act of 1871, the Conspiracy and Protection of Property Act of 1875, and the Trade Disputes Act of 1906, were the prompt for the rise of several national labor organizations, one of which was the Federation of Organized Trades and Labor Unions of the United States and Canada, formed in 1881. It declared that "it would encourage the formation of trade and labor unions on a local and national scale, and seek 'to secure legislation favorable to the interests of the industrial classes.'" At the head of the list in its legislative program was the "legal incorporation of trade unions - in order to remove labor organizations from the operation of state conspiracy laws" (Rayback, p. 157).
rendered unions as legal combinations and eliminated the criminal and civil aspects of the common law doctrine of conspiracy in restraint of trade as applied to labor unions. In addition, with the TDA, labor unions were exempted from all liability for tortious acts committed in their behalf.

In America, it was never "generally accepted as law that labor unions are unlawful," although there were a few attempts to apply the late eighteenth-century British animus toward "all combinations to raise wages." But the American courts generally accorded laborers "the right to organize for their mutual economic betterment, and scrutinized only the measures they adopted to gain their ends" (Witte, 1926, pp. 836-837). In America, the doctrine of organized labor as criminal conspiracy was a "phantom tort" (Petro, p. 546).

Nonetheless, English law supplied a wider range of freedom regarding union activities than that which labor combinations had recieved prior to the New Deal labor legislation. Speaking of the period from the founding of America up until 1926, Witte wrote that "As regards substantive rights, the law of labor combinations in the United States has remained unchanged, except as to details, throughout its entire history." He added that "The fundamentally important changes which have occurred, relate to remedies, not to substantive rights." After the first American labor union case and up until the 1880s, "practically the only remedy was a criminal prosecution for conspiracy." Then in the 1880s the injunction was employed,
and after 1910 the damage suit came into usage (1926, p. 837). Thus in England there was a much wider swing in the views of the courts towards organized labor and its activities, from illegality to significant government privileges, than what took place in America.

Taking a broader perspective on developments in nineteenth-century American law, Thorelli notes that "The principal use of the common law conspiracy concept in regard to trade restrictions for quite some time before the passage of the Sherman Act in 1890 was in the field of torts rather than in criminal law." The term 'conspiracy' signified "concerted action for a purpose not sanctioned by the law" (that is, concerted efforts to restrict competition); and conspiracy "was freely used much in the same sense as 'combination,' or at times with a somewhat more odious taint than that concept." Thorelli adds that by 1890 it was recognized that "courts had for long been speaking of 'conspiracy to monopolize' and 'conspiracy in restraint of trade' as well as 'combination in restraint of trade'" interchangeably, all referring to concerted actions to monopolize (p. 39). The concepts of 'conspiracy in restraint of trade' and 'attempt to monopolize' "were often used interchangeably in one and the same case." Referring to both notions, Thorelli observes that "The rule applied in a majority of cases was that such combinations were 'against public policy' and the underlying agreements therefore void and unenforceable" (pp. 39-40). The generalization of the
doctrine of restraint of trade has been greatly significant in the development of American policies against monopoly, especially in contrast to the British experience: "Whereas the extension of the restraint of trade concept in England marked the beginning of a continuous relaxation of public policy, American courts moulded the broadened doctrine into a useful, if imperfect, general antimonopoly instrument" (Thorelli, pp. 52-53).

Before 1890, how did the courts treat arrangements involving restraints on business competition, as compared to labor combinations? Many of the former were invalidated (Thorelli, p. 40); in the latter case the situation was somewhat ambiguous.7 Thorelli adds that

some judges, especially around the middle of the 19th century, were prone to regard labor combinations as instruments of restriction as objectionable as business combines. Nevertheless, it is probably true that by the time the Sherman Act was passed the right of labor to organize, to strike for higher wages or improved working conditions and to engage in most types of not overly coercive activities typical of labor market relations was generally not questioned at common law (p. 41).

However, for over thirty years after the passage of America's first national antitrust law, jurists following basic common law principles found the concept of restraint of trade fully applicable to certain types of labor activities. We must consider the relevant statutes and Supreme

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7 Boudin makes the unqualified and incorrect remark that combinations to raise wages as well as "any other means of interference by employees with their employers as part of a labor dispute" were entirely beyond the scope of the restraint of trade concept (pp. 50ff.).
Court cases in this era to determine whether this approach stemmed from the application of market failure or 'public good' principles by the judiciary, or from highly organized rent-seeking activity by organized labor groups.

B. LABOR UNIONS AND ANTITRUST POLICY

After 1880, the courts infrequently made use of the conspiracy doctrine in labor disputes. But antitrust laws entered the picture and played a significant role in the legal status and rights ascribed to labor unions.

The Sherman Act of 1890 did not specifically mention labor unions. Sections 1 and 2 of the statute declared:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal . . . every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . (p. 112).

However, it must be noted that these two key parts of the law did not specifically exclude unions from consideration as combinations or conspiracies in restraint of trade. There was much debate over whether "combination" or "persons" referred to labor unions as well as to business firms (Taylor and Witney, pp. 43-44). Berman (1930) argued that Congress intended to exclude unions from the law; Mason (1925) thought the legislators wanted to include unions in the scope of the law. It is no doubt true that "the Sherman Act was not intended to abolish labor unions, or declare
them per se combinations in restraint of trade." But it is not the case that "nothing unions could do in the context of a labor dispute could be held to be an illegal restraint of trade . . . Even the passage of the Clayton Antitrust Act . . . failed to accomplish that end" (Dickman, pp. 230-231).

In the early part of the twentieth century, a more interesting argument was raised on behalf of labor unions. The defenders of organized labor contended not only that "unions weren't meant to be subject to the Sherman Act, but that they shouldn't be: unions deserved special privileges and immunities because of larger public policy considerations." After the enactment of the TDA in 1906, "progressive intellectuals" relied on this argument "and unionists agreed" (Dickman, p. 231). The most common reason given was the market failure notion of unequal bargaining power in the labor market. Combinations of workers should not be subject to laws against restraint of trade because public policy should aim to strengthen worker's bargaining power vis-à-vis employers. Arguing along these lines, Witte (1932) argued that organized labor should be exempt from the Sherman law. He contended that "The antitrust laws may serve a useful purpose in the business field but have no proper place in labor controversies." Restraint of trade should not apply to organized labor actions, for "labor unions are not trusts and should not be treated as such. Their activities should be judged by their social effects, not on the basis of incidental restraint of trade which they may involve"
Union leaders such as Samuel Gompers denounced the application of Sherman Act antitrust principles "because they violated freedom of contract, particularly their right to seek and maintain a closed shop." Organized laborers had "the right to refuse to work" with non-union laborers as "an exercise of their own right of contract." Moreover, "the right to contract implied the right not to contract," thus it was "insisted that the right to boycott be absolute." However, the demands by Gompers, Louis Brandeis and others "for an absolute right by unions to boycott employers were not matched by an equal respect for employers' right to boycott unions" (Dickman, pp. 232-233).

The Supreme Court in the 1890s and for many years thereafter applied the Sherman Act to labor unions. It will be instructive to consider the nature of the union activities which were restrained and the philosophy of the Court in respect to restraint of trade in labor markets. The Court's rulings can be explained fairly consistently utilizing the liberty and virtue component.

In the early years after the passage of the Sherman Act, the Supreme Court tended to make little distinction between union and business restraints on competition. One of the first applications of the antitrust law to labor union activities was in the Danbury Hatters (Loewe v. Lawlor) case (1908). This case was one of the most famous of a series in which the Supreme Court held that the Sherman Act applied to
The United Hatters of North America had organized 70 out of the 82 firms manufacturing hats; in these firms wages, hours, and other conditions of employment were determined through collective bargaining with the union as the worker's agent. In 1902 the United Hatters attempted to organize Loewe and Company. As Taylor and Witney note, "The union requested that the company recognize it as the bargaining representative of its employees," and also "that only union members be permitted to work in the firm." The company turned down the union's demands. As a consequence, "the union called 250 workers out on strike" (a minor percentage of the entire working force), but "the company found replacements for the striking workers and was able to operate successfully" (pp. 46-47).

The Union Hatters next resorted to a nationwide boycott against the company's products. As Taylor and Witney recount the facts of the case, "By widespread publicity the union induced retailers and wholesalers not to handle the firm's hats." Moreover, "the general public was requested not to purchase any item from retailers or wholesalers handling Loewe's products." The boycott succeeded; in one year the company claimed a loss of $85,000 (p. 47).

In 1903 Leowe & Company sued the union for damages under the Sherman Act. In its ruling, the Supreme Court held that the union's secondary boycott "had the effect of restraining trade within the meaning" of Section 1 of the
The Court stated that

the combination described in the declaration is a combination 'in restraint of trade or commerce among the several states' in the sense in which those words are used in the act . . . and [this] conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts in that regard, the liberty of a trader to engage in business (p. 121).

This decision led to increased prosecution of unions on an antitrust basis (Taylor and Witney, p. 47).

The Court held that the secondary boycott was in restraint of trade. Taylor and Witney contend that "this resulted in a decline in the effectiveness of the collective bargaining process." Taking the unequal status of labor in the bargaining process as a given economic circumstance, they observe that the Court

was not sensitive to the fact that the boycott was instigated as a last resort in an effort to establish a bargaining relationship with the United Hatters. Essentially, the high court was of the opinion that 'the liberty of a trader to engage in business' was equal to the liberty of workers to move to other economic endeavors to improve their standard of life if a particular pursuit was deemed unsatisfactory (p. 48).

The Court did not subscribe to this type of market failure argument, or at least did not think it applied in this case. However, that does not mean that labor law in this era was insulated from interest group pressure.

Organized labor resolved to change the doctrine stemming from this case. Union leaders reasoned that Supreme Court justices held life tenure, and as a conse-
quence "were relatively insulated from whatever political pressures unions could bring to bear." They concluded that "political action to influence elective officials was the only effective weapon at their disposal." They sought to "change the law to preclude prosecution of labor unions under the antitrust statute" (Taylor and Witney, p. 48).

The American Federation of Labor (AFL) pushed for legislation designed to promote a more favorable environment for collective bargaining. The AFL sought to fashion a 'public interest' rationale for regulation by appealing to unbearably long hours and intolerably low wages. As Taylor and Whitney explain, it pushed labor unions to pledge their support to Woodrow Wilson "due to his campaign pledges approved by the AFL" in the presidential campaign of 1912. In 1914 the Democratic party "acted swiftly to fulfill its obligations to organized labor," and passed the Clayton Act. Labor leaders thought the Act would provide unions relief from the Sherman law (pp. 49-50).

The Clayton Act explicitly addressed the issue of the application of antitrust restraint of trade provisions to labor union actions. Section 6 declared that

the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, 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 (p. 145).
As Taylor and Witney observe, Samuel Gompers, president of the AFL, declared that Section 6 was labor's "Industrial Magna Charta upon which the working people will rear their construction of industrial freedom" (p. 50). This led some in organized labor to conclude that unions were now completely excluded from the provisions of the antitrust laws.

President Wilson considered his campaign promises to labor fulfilled with the passage of this statute; along with the leaders of the House, he "resisted union pressures for outright exemption from the Sherman law" from union leaders who later realized that the Act still allowed the judiciary to determine the lawfulness of union activities and purposes (Taylor and Witney, p. 51). Thus the Clayton Act did not fully satisfy labor's demands; indeed, Section 6 merely restated what was true already in American common law. The courts since 1842 had held labor unions in themselves to be legal organizations, and the Sherman Act did not change this status. Taylor and Witney observe that this provision of the law had to be understood in light of the Court cases of that time bearing on labor and trade restraints:

In the antitrust cases the Supreme Court did not deny that employees had the right to form labor unions. As a consequence the statements 'nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor organizations' and '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' added nothing new to labor law . . . The Supreme Court declared that the implementation of a boycott by a labor union did not constitute a lawful activity under the Sherman law. All Section 6 did in this respect
was to affirm the right of the courts to decide
the questions of lawful and unlawful union
activities and objectives (pp. 51-52).

In some ways the labor union's position was made worse by
this law. Though the statute constrained the bounds of the
use of injunctions in labor disputes, it also "provided
that private parties as well as law-enforcement officers of
the federal government could obtain injunctions in antitrust
cases. This meant that the ability of employers to obtain
injunctions against unions was considerably increased"
(Taylor and Witney, p. 52).

The Supreme Court had its first opportunity to wrestle
with the application of the antitrust law to labor unions
following the passage of the Clayton Act in a 1921 case. The
Duplex Printing Press Company had refused to recognize a
union or negotiate with it on a voluntary basis. The
International Association of Machinists called an organiza-
tional strike, which proved totally unsuccessful because
"only a fraction of the workers responded." The union
decided to undertake a secondary boycott against the
products of the Duplex Company; specifically, it sought "to
eliminate the firm from the New York market with the effect
of encouraging Duplex customers to purchase presses manufac-
tured by companies with which the union had contracts." As
Taylor and Witney go on to observe, "the economic circum-
stances surrounding the Duplex case were strikingly similar
to those involved in the Danbury Hatters case." The Court
ruled that the action of the union constituted restraint of
trade under the Sherman act (p. 55).

The Court declared that there was nothing in Section 6 of the Clayton Act to exempt a union from accountability where it departed "from its normal and legitimate objects" and engaged "in an actual combination or conspiracy in restraint of trade." The Court went to link its interpretation of the Clayton Act to previous statutory law:

. . . and by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws (p. 444).

Unions lacked a corporate status; "thus each union member was held liable under the Sherman Act for the unlawful acts in restraint of trade committed by all the others" (Dickman, p. 420, n.74).

After the decision was rendered, organized labor went before the Court in six antitrust cases. Taylor and Witney note that "Before 1921 the federal courts applied the antitrust statutes only to railroad strikes and union secondary boycott activities. After 1921 and the Duplex decision, the courts applied the Sherman law to ordinary factory and coal strikes" (p. 56). The most significant of these antitrust cases was the Coronado case, which was a sort of American Taff Vale (Dickman, p. 420, n.70).

In the early 1920s the United Mine Workers (UMW) sought to expand labor organization in the coal industry. It faced off with the Coronado Coal Mine, which decided in 1914 to
operate its properties under the open shop principle. The company "closed down a number of unionized mines and planned to open them on a nonunion basis." There was a violent confrontation between union and non-union employees which resulted in the destruction of the entire mine. The operators of the mine sued the UMW, "charging a violation under the Sherman law"; they requested treble damages (Taylor and Witney, p. 57).

The Supreme Court decided the first Coronado case in 1922 and held that the actions of the UMW were not in violation of the Sherman Act. It claimed that the company submitted no evidence by which it could be found that the union committed actions "in a conspiracy to restrain or monopolize interstate commerce" (p. 46). As Taylor and Witney observe, "It was not sufficient to show that a strike may have indirectly reduced the amount of coal in commerce, but proof must be adduced that the unionists conspired to restrain trade or suppress competition." However, they also note that the Court suggested that a more satisfactory case against the union could be made if Coronado Coal Mine could demonstrate that the UMW intended to eliminate the sale of nonunion products (p. 58).

In the second Coronado case (1925), the Supreme Court

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8 In this chapter, citations from the second Coronado case, the Slaughterhouse cases, the Butcher's Union case, Munn v. Illinois, Yick Wo v. Hopkins, and NLRB v. Jones & Laughlin Steel Corp. are found in the lawyer's edition of the United States Supreme Court Reports.
held that the 1914 strike did violate antitrust statutes.

The Court stated that

the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets in states other than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines . . . (69, p. 970).

The judges concluded that "a conspiracy existed to reduce the amount of coal in commerce" (Taylor and Witney, p. 59).

This ruling suggested that strikes could very readily bring labor unions into violation of antitrust law. The Court declared in the second Coronado case that when the intent of those preventing "the manufacture of production is shown to be to restrain or to control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act" (69, p. 970). Taylor and Witney contend that, as a consequence, organized labor feared that "every important strike could be subject to the jurisdiction of the Sherman law by virtue of the far-sweeping implications of the Coronado doctrine" (p. 60).

After this decision, the next major phase in the development of the concept of restraint of trade as applied to specific labor union activities was the Norris-LaGuardia Act of 1932, which served to restrict labor union prosecution under the antitrust laws. Before considering this law and other labor legislation of the 1930s, there is another feature of the development of the conspiracy doctrine in
labor markets which must carefully be considered. This facet of American labor law revolves around the concept of restraint of trade as violation of substantive due process.

II. SUBSTANTIVE DUE PROCESS AND POLICE POWERS

As seen in chapter two, the English common law did not hold to freedom of trade or 'liberty' as absolute rights above all others. American common law is based on the English common law; it shares a similar approach to economic freedom. As Dickman observes, both in American common law and in the U.S. Constitution, limits were set on economic liberty, as well as on the powers of government to interfere with economic freedom in the public interest:

From the juristic standpoint, property and contract rights in the Anglo-American common law tradition have virtually always been recognized and protected from government interference not on the basis of a political philosophy of natural rights, but only insofar as they were consistent with or did not conflict with a 'larger' 'public interest' or 'public policy' consideration . . . The political philosophy of natural rights reached its height in America when the Constitution was written; and among its fundamental goals, the Constitution was written to secure individual economic liberties (individual property rights) from legislative invasion, particularly by the states. This was accomplished, or so the framers of the Constitution believed, by prohibiting the states from passing laws impairing the obligation of contracts, by guaranteeing that the citizens of each state would be entitled to all the privileges and immunities of citizens in the several states, by making domestic free trade the constitutional norm, and by reserving to Congress alone the power to regulate commerce among the several states (p. 219).

Later, as Letwin notes, the Fifth Amendment prohibited "the
federal government from depriving any person of life, liberty, or property without due process of law." He adds that "The constitutions of some states set an equivalent or identical limit on the power of state government, and this limit was extended to all the states by the Fourteenth Amendment, ratified in 1868" (1979, p. 30-31). The Fourteenth Amendment declared that

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (p. 800).

Furthermore, the Constitution did qualify three broad economic powers that have always been seen as integral to the sovereignty of the state. These are the trinity of the power of taxation, the power to take private property for public purposes (eminent domain), and the police power (Dickman, p. 219). The latter power is especially significant for our consideration of the way in which the doctrine of restraint of trade in labor markets was affected by the Supreme Court's interpretation of the Fourteenth Amendment for a period of seventy years after its passage.

The post-Civil War Court had to determine the extent to which it would interpret the due process requirement "as subjecting legislation only to a procedural test as against calling for a determination of its substantive merits" (Kahn, 1, p. 4). What the Court did in many cases was move towards a substantive due process interpretation. Among other
things, the Court reconsidered and imposed new limitations on the scope of the states' police powers; as McCurdy observes, "the outcome was a constitutional revolution that set the legal basis of government-business relations upon an entirely new footing" (p. 971).

Some have taken this to mean that private business interests were deliberately enhanced by the jurists. Roche's analysis of this era reflects this type of "capture" perspective. According to Roche, the new principle of "entrepreneurial liberty" became entrenched in constitutional law against what had previously been held in the common law:

Essentially this doctrine was a break with the common law and the common law premise of the overriding interest of the community, or police power. The right to use one's property, to exercise one's calling, was given a natural law foundation - in a philosophically vulgar fashion - over and above the authority of the society to enforce the common weal. The consequence of this doctrine was not a laissez-faire universe, but one dominated by private governments which demanded (and to a great extent received) freedom for their activities and restraints on the actions of their competitors, e.g., trade unions, regulatory commissions, or reform legislatures. In historical terms, 'free enterprise' thus involved two concomitant propositions: freedom of the entrepreneur to follow his calling, and a governmental, constitutional protection of the entrepreneur from his institutional enemies, public and private (pp. 433-434).

It seems that Roche has misinterpreted the common law. He does not consider the distinction it sets forth between legitimate regulation and arbitrary restraint of trade. It is no doubt true that during the 'substantive due
process era' "the concept of contract was broadened to include the substantive right to pursue a calling," and that "the right to make contractual arrangements to exercise one's calling became a 'property' right protected from state infringement by the due process clause of the Fourteenth Amendment" (Roche, p. 412). But this did not mean that all regulation of labor markets was overruled, or that business interests made the judiciary their captive ally.

A. ECONOMIC DUE PROCESS IN THE LATE NINETEENTH-CENTURY SUPREME COURT

The Slaughterhouse Cases first brought the due-process clause of the Fourteenth Amendment before the Supreme Court. The original cases arose from a challenge to a Louisiana law passed in 1869. As McCurdy recounts the facts of the cases, New Orleans city boosters had advocated "the construction of efficient slaughtering facilities that could withstand the competitive pressures imposed by packers in St. Louis and Chicago." These commercial interests ultimately succeeded in procuring an exclusive grant by "improperly influencing members of the state legislature" according to the Louisiana Supreme Court (p. 976). This act granted to a corporation of 17 persons for a 25 year period an exclusive franchise for the slaughtering of animals for meat in New Orleans and the two next adjacent parishes (Hamilton, 1938, p. 171). This meant that other butchers who for years practiced this trade were no longer free to follow
it. They challenged the law in the courts, and argued before the Supreme Court that it "deprived them of property contrary to the Fourteenth Amendment" (Letwin, 1979, p. 31).

John Campbell represented their position before the Court. In his argument, Campbell sounded themes familiar in the English common law. He claimed that man has a right to labor "which right is property." The property of the butchers without privilege was destroyed by the act; it was destroyed not by due process of law, but by a grant of monopoly privilege to a sole company, for "the rights, privileges, and immunities of the citizen have been diminished and impaired, that this corporation shall have a monopoly" (21, p. 397). Campbell argued that no state can deprive a man of his right to work by an "unreasonable" ordinance (21, pp. 395-399).9

The majority of the Court did not accept Campbell's usage of the Fourteenth Amendment against the one corporation. Delivering the majority opinion, Justice Miller argued that "the wisdom of the monopoly granted by the legislature

9 Strong (1986) argues that "Campbell's emphasis on English and American hostility to monopoly, which he ultimately related to Due Process, was to him as significant as was his contention based on Privileges and/or Immunities" (p. 58). Campbell's briefs reviewed the English constitutional struggle over monopoly grants. He notes Coke's statements on the deleterious consequences of monopoly. Campbell's survey of legal history also included an appeal to Turgot's decree in 1776 and the decree of the French Assembly of 1791, both of which abolished all special privileges of corporations, guilds, and trading companies. Campbell also appealed to Adam Smith's concept of the "property every man has in his own labor" (21, p. 396).
may be questioned" as to whether or not granting an exclusive privilege was the proper method to be utilized for protecting the public health. Nonetheless, it was not a monopoly that deprived butchers of "the right of labor in their occupation." The state had granted the company "the slaughter-house privilege." But it did not thereby "prevent the butcher from doing his own slaughtering." The company was required, "under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses . . . [for a] reasonable compensation" (21, pp. 403-404). Miller seemed to be distinguishing "between destroying property and regulating it" (Letwin, 1979, p. 31). Siegan takes a slightly different interpretation, claiming that "at that time the majority was not prepared to regard a person's calling, trade, occupation, or labor as property, or the right to engage in it as liberty (or property)" (p. 51).

Letwin has observed that the Slaughterhouse Cases are part of a series of cases in the late nineteenth-century Court distinguished by starkly contrasting dissenting opinions, with those of Justice Field particularly standing out (1979, p. 32). Each dissent in the Slaughterhouse Cases "viewed property and liberty in the more expansive terms that would in time become judicially acceptable" (Siegan, p. 51). There are several interpretations of this development of judicial rulings in regards to economic activity. Justice Field's positions are often the focal point of the discussion. Some see the jurists of this era, and Field
especially, as advocates of absolute property rights and enemies of all forms of government regulation; Scheiber (1971) describes Field as the "paragon of judicial activism on behalf of laissez-faire doctrine" (pp. 348). Others push this viewpoint further and claim that Field and the other jurists were the spokesmen for business interests which in effect were "private governments." This is basically an inchoate version of the Marxian capture theory applied to the judiciary, without the economic apparatus of the supply and demand for regulation spelled out. Roche's view is characteristic of this interpretation:

While Field never denied the existence of the police power, his whole position was based on the proposition that in any conflict between private economic rights and public authority the burden of proof rested on the state. The state, in other words, had to demonstrate to the satisfaction of the Court that its regulations were justified (p. 413).

Porter notes that "most standard histories and accounts of the Court between the 1880s and the 1940s assume a pro-business, anti-labor bias on the part of the majority" of the justices (p. 138). McCloskey (1962), Twiss (1942), Jacobs (1954), and Corwin (1948) offer variations on the theme that laissez-faire was written into the Constitution by a conspiracy of lawyers and/or business-minded jurists, though Corwin offers a more balanced treatment of the issue. Others such as Brown (1927) and Hamilton (1938) see no way to make sense of the different rulings of the Court in this period; they claim there are no consistent, clear-cut
principles which the judges followed in deciding the limits of the police powers of the state and the extensiveness of economic due process.

A more viable interpretation is that, as McCurdy suggests, Field dealt as sensibly as he could with "the great underlying problem" of his day: what was "government's legitimate role in American economic life"? McCurdy contends that Field set forth "an extraordinarily consistent body of immutable rules designed to separate the public and private sectors into fixed and inviolable spheres" (p. 973). Letwin adds that Field's opinions are "constitutional objections to excessive regulation of economic activity, for to portray Field as a doctrinaire opponent of all regulation is radically to distort the truth" (1979, p. 32). Field is a jurist with a commitment to certain principles which rise above political considerations; these principles are consistent with the liberty and virtue component.

Field attributed a "broad scope" to the police power (Letwin, 1979, p. 32). As he stated in the Slaughterhouse cases: "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways" (21, p. 412). This power could be misused when legislation only masqueraded in the public interest. In the case of the Louisiana law, its title stated that it was "An Act to Protect the Health of the City of New Orleans . . ." (21, p. 403). Field argued that
"the health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing buildings from a large part of the state for the benefit of a single corporation." As Letwin comments, if the public health was "protected by having one slaughterhouse outside the city, then it would have been equally well protected by allowing many . . ." (1979, p. 32). Field concluded then that "the pretense of sanitary regulations . . . is a shallow one" (21, p. 412).

Following Campbell's argument, Field referred to Coke's report of the Case of Monopolies. Field noted that grants of monopoly which restrained "persons from getting a honest livelihood" were "held void at common law" because they "restrained [individuals] of the freedom or liberty they previously had in any lawful trade . . ." The Louisiana monopoly grant "equally restrains the butchers in the freedom they previously had, and hinders them in their lawful trade." Moreover, this grant violated the privileges secured to every U.S. citizen by the Fourteenth Amendment "against abridgement" by the creation of a monopoly (21, p. 417). As Strong observes, Field claimed that "freedom from monopoly in the common callings was one of the fundamental rights now constitutionally protected against state action" by the Fourteenth Amendment (Strong, p. 61).

Justice Bradley joined in Field's dissent. Bradley also contended that the Louisiana statute was not a legiti-
mate public health regulation. He stated that

To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughterhouse and to pay him a toll therefore, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the qualities of a police regulation (21, p. 422).

In addition, Bradley appealed to the due process clause of the Fourteenth Amendment. He argued that the butcher's trade was a "lawful employment" (21, p. 423) and "the keeping of a slaughter-house is part of and incidental" to that trade (21, p. 422). The butcher had liberty to follow this trade, and thus

a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property (21, p. 423).

The restrictions upon entry into a legitimate occupation constituted a violation of due process.

The differences between the majority and minority of the jurists in ruling on the Slaughterhouse Cases essentially boiled down to this issue: Was the Louisiana grant "an authentic exercise of the police power, carrying with it an incidental, questionable, but not unconstitutional grant of monopoly," or was it "a pretended exercise of the police power, a mere subterfuge for an unconstitutional grant of monopoly, which excluded a thousand men from part of their trade in order to benefit the seventeen incorporators of the
company"? (Letwin, 1979, p. 33). Strong observes that the majority of the Court "accepted a view of substantive due process as protective of property against expropriation, violation of which they did not find in the Louisiana law . . ." However, they "wholly rejected the concept of substantive due process, pressed by Campbell and embraced most completely by Bradley, as guaranteeing freedom of participation in the common callings." Strong adds that the majority of the Court in this case did not accept the English common law precedent appealed to by Field and Bradley, for "... the majority did not repudiate the American concept of expropriation as a denial of substantive due process; what it did spurn was reception in American constitutional law of the English view of monopoly as deprivation of substantive due process" (p. 62).

A new constitution was implemented in Louisiana in 1879, which "withdrew the power of regulating slaughtering from the state legislature, transfering it to local authorities . . ." (Letwin, 1979, p. 33). Moreover, the slaughterhouse monopoly was stripped of its franchise; other butchers were again free to follow their trade. The Crescent City Company challenged this action. They claimed they were denied "liberty and property without due process of law" (Hamilton, 1938, p. 177).

In *Butchers' Union Co. v. Crescent City Co.* (1884), the Supreme Court upheld the new action by the Louisiana legislature. Bradley argued that the privilege given to the
seventeen butchers "was not a valid contract" to begin with (28, p. 588). Field agreed, and stated that "the Act, in creating the monopoly in an ordinary employment and business, was to that extent against common right and void" (28, p. 592).

Field concurred with Justice Miller's official "opinion of the court" that "the Legislature cannot, by contract with an individual or corporation, restrain, diminish or surrender its power to enact laws for the preservation of the public health or the protection of the public morals" (28, p. 590). He joined with all the other jurists in holding that, as Letwin notes, "although in general a legislature could not act so as to abrogate the rights of contract, this limitation did not operate with respect to the police power" (1979, p. 33). Moreover, Field and the rest of the Court "agreed that the police power did not generally or necessarily come into conflict with the due-process clause" (1979, p. 33-34). In addition, it should be noted that Field did not view the union as an illegal conspiracy; on the other hand, he did not think the state of Louisiana should grant the union a favored position under the law without sufficient justification.

In the previous decade the Court had utilized the notion of a 'business affected with a public interest' in an important case which shaped the concept of economic regulation for many years. In Munn v. Illinois (1876), the state's regulation of grain warehouse rates was sustained because
this was a 'public calling.' Writing the opinion for the Court in the case, Chief Justice Waite quoted from the English common law jurist Lord Hale. In his tracts on De Jure Maris and De Portibus Maris, governmental regulations of rates and usage were justified where there existed a "virtual" monopoly, that is, public not private monopoly (Strong, p. 72). The Court declared that grain warehousing was not an ordinary calling, but a 'business affected with a public interest' because of its significance for the nation's commerce. It was similar to the many 'public callings' that could be regulated at common law (as discussed in chapter two). These included "ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. . ." (24, p. 84). The Court also ruled that the grain warehouse business was a "virtual" monopoly because the nine firms controlling the fourteen grain elevators in Chicago did not directly compete, but set prices jointly (24, p. 86). Due to the existence of a 'virtual' monopoly, the state had the power to regulate the rates charged by the grain warehouse.

It was a case in which "substantive due process squared off against private monopoly in constitutional combat"; and "Due process, the ancient enemy of monopoly, became a sword undergirding, rather than a shield undercutting, governmental power" (Strong, p. 72). An employment or business that was a 'virtual' or practical monopoly was subject to regulation by the legislative power. As Strong observes,
this was substantive due process as "sword" against private monopoly (p. 72).\(^\text{10}\)

In this era substantive due process was also utilized as shield against public monopoly in cases involving labor market regulation. The most significant case in this regard was *Yick Wo v. Hopkins* (1886), which involved a suit by an Oriental who was denied the right to work as a launderer. A San Francisco board of supervisors had denied permission to practice laundering to some 200 Chinese applicants. But it had allowed 80 non-Chinese individuals to practice the trade (30, p. 223). The Court noted that the board admitted the fact of discrimination. It was illegal discrimination because "no reason exists for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified." The board thus had denied the Oriental "equal protection of the laws" and had violated the Fourteenth Amendment (30, p. 228). In this case, the Court held that "major discrimination with respect to entry could suggest monopoly intent" (Strong, p. 63).

Perhaps the most famous instance in which the Supreme

\(^{10}\) Consistent with his other opinions, Field's dissent in this case stressed "the inclusiveness of due process." As Siegan comments, Field "maintained that the Fourteenth Amendment's due process clause prohibits regulation of prices charged by public warehouses. He interpreted the provision as safeguarding from government regulation a wide variety of economic activities." In sum, Field "denied the power of any legislature to fix the price that a person should receive for his property, regardless of what that property might be" (p. 54).
Court overturned a labor market regulation occurred in 1905. It involved a case dealing with a New York labor statute. Lochner, the owner of a small bakery, violated the statute which had limited the hours of employees in bakeries to ten hours a day and sixty hours a week. In *Lochner v. New York*, speaking for the majority of the Supreme Court, Justice Peckham argued that the right of freedom of contract between employer and employees was a part of the liberty of the individual protected by the Fourteenth Amendment, which a state might not deprive a person of without due process of law. He also contended that, on the other hand, "...the State, in the legitimate exercise of its police power, has the right to prohibit" a contract and "it is not prevented from prohibiting it by the Fourteenth Amendment" (p. 827).

Justice Peckham gave several grounds by which the statute would be justified as an exercise of the police power. As Letwin observes, they included three instances: "if bakers needed special protection because they were unable to look after themselves, because the occupation threatened their health, or because the conditions of their work threatened the public health" (1979, p. 49). The Court dismissed the first and third possibilities rather quickly; the remaining question was whether the work of a baker endangered his health. Peckham's opinion was that the hours of bakers had little or no relation to their health:

In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some
other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health . . . It might be safely affirmed that almost all occupations more or less affect the health (p. 829).

Peckham claimed that "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . . " They could only be upheld if there was "some fair ground, reasonable in and of itself, to say that there is a material danger to the public health, or to the health of the employes, if the hours of labor are not curtailed . . . " (p. 829). Such ground was "negated by the evidence that baking was neither absolutely nor relatively perilous" (Letwin, 1979, p. 50).

In Peckham's mind, as Letwin notes, the statute "could not rationally have been intended to protect the health of bakers." Thus, it must have "aimed at some other objective." Letwin observes that the judge likened it to other recent laws, including those purporting "to regulate and license the trade of horseshoeing." Peckham argued that while such statutes purported to be health laws, they were in reality passed from other motives. This was to be inferred from the outcome of their implementation, not from their stated intention (1979, p. 50). Peckham held that the New York law was not a "health" measure but an unconstitutional violation
of liberty of contract. As Letwin observes, in holding this opinion the judge followed the claims of Lochner's attorneys, who maintained that the statute was never meant to promote the public health but was enacted as a labor law alone. They produced a great deal of evidence which showed that "the ten-hour day had been demanded by bakers, that a bill had been promoted in the New York legislature by the secretary of the Journeymen's Bakers Union, and that the union continued to work for it until the act was passed in 1896." Moreover, the legislature "included its provisions not in the consolidated Public Health Act" but in the New York Labor Law. Letwin suggests that the way Peckham saw the issue, "restricting all bakers to ten hours a day was a regulation by which the legislature tipped the scales against bakers who wanted to work more than ten hours ... which constitutionally amounted to unjust discrimination if not outright unfairness" (1979, p. 53).

Peckham was concerned to scrutinize carefully labor regulations passed under what was claimed to be the police power for the purpose of protecting the public health or welfare in order to protect economic freedom. He believed that labor markets were in general characterized by "liberty of contract" which included both parties, buyers and sellers of labor services. Thus, in evaluating labor market laws, the question will necessarily arise, as Peckham put it:

Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary
interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? (p. 827).

Peckham echoed some of the same criteria which Coke had used to evaluate guild regulations in his allusion to the question of arbitrary restraint of trade and the need to protect the right of individuals to freely earn a livelihood. In Peckham's view, these regulations were, again in terms of the common law, arbitrary and unreasonable restraints of trade in favor of certain labor groups, laws which masqueraded as legitimate labor market regulations.11

In sum, considering the doctrine of substantive or economic due process as applied by the Court to labor, it is

11 This case is also famous for its statements in dissent by Justice Holmes. He accused the majority of interpolating economic doctrine; he insisted that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." He caustically stated that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" (p. 832). Letwin observes that this was in fact a gratuitous remark; "Spencer was not cited as authority by anyone in the case, and Social Statics had no direct bearing on it" (1979, pp. 53-54). It missed the point to argue, as Holmes did, that "this case is decided upon an economic theory which a large part of the country does not entertain" (p. 832). Letwin comments that it was decided, no doubt, by justices who held economic views, but they decided the case on a well-established constitutional principle that a health law would be constitutional where there was a danger to health and unconstitutional where the danger to health was insubstantial (1979, p. 54).

However, as Roche observes, Holmes "did not deny that there might be circumstances when the Court should reject state regulations as violative of due process." Roche argues that "Holmes was not opposed to judicial oversight per se, but he was ready to give the wisdom of the legislature far greater weight than most of his colleagues" (p. 432).
clear that the jurists of the late nineteenth century held to a doctrine of economic liberty balanced by public good considerations. They were dubious of claims that legislation always promoted the public good, without completely rejecting every such statute. Justice Field was representative of the viewpoint of the majority of the Court in several cases. He affirmed that government's police regulations had to provide 'general benefits',\textsuperscript{12} so that private interests might not gain special privileges by imposing burdens on other groups, as McCurdy has observed:

\[ \ldots \text{Field imposed limitations on the police power not to protect individuals from enactments designed to 'promote \ldots the general good,' but rather to prevent powerful socioeconomic interests, through the use of corruption or the force of sheer numbers, from utilizing the legislative process as a weapon to improve their own position at the expense of other individual's 'just rights' (p. 981).} \]

Moreover, the view that business interests captured the judiciary and procured favorable rulings does not stand up under scrutiny. As Letwin observes, "at no time, not in 1873 or 1905 or 1922, did the Supreme Court subscribe to the dogma, often ascribed to it, that the Fourteenth Amendment made property immune to all regulation" (1979, p. 34). The question in the late nineteenth- and early twentieth-century courts revolved around the proper types of and general

\textsuperscript{12} In other cases of this era, Field wrote that, under the 'pretense of prescribing a police regulation,' states could not create monopolies in the 'ordinary trades' or "solve unemployment problems by forbidding Chinese workers to work for railroad companies" (McCurdy, pp. 980-981).
bounds to labor market regulation in light of substantive due process.

Field, Bradley, Peckham, and the other jurists often affirmed the legitimacy of different types of labor market regulations as proper uses of the police power. Indeed, Field was joined by a majority of the rest of the Court in sustaining "all challenged labor legislation" during his time on the bench, with the exception of the Lochner case and the Adair case (which dealt with the yellow-dog contract) (Porter, p. 142). An examination of the outworking of this perspective in several Supreme Court rulings on the yellow-dog contract and the labor injunction will add to our understanding of the American development of the economic conspiracy doctrine.

B. LABOR UNIONS AND LIBERTY OF CONTRACT

By the end of the 1880s, there was legislative and judicial recognition that "the long range goal of union organizations had always been job control; that is, the power to require union membership as a condition of employment" (Roche, p. 416). As a result employers began to increasingly respond with court injunctions. An injunction may be described as "a court order directing a person, and if necessary his associates, to refrain from pursuing a course of action" (Taylor and Witney, p. 26). Taylor and Witney further explain that in the great majority of injunction cases involving labor, the protection of property
rights was the issue. When a labor union interfered "with the free access of an employer to labor and commodity markets," there was "damage to property." If a strike, picketing, or a boycott reduced "the opportunities for profitable operation of the business," there was "an injury to property" (pp. 26, 30).

Strikes, boycotts, and picketing threatened "future expectancies or good will," such as profits from sales to costumers. Rayback adds that "By 1895 the courts were beginning to recognize the principle that these expectancies were property rights with a market value." Moreover, the principle was being established that strikes, picketing, and boycotts were illegal by way of the common-law conspiracy doctrine, as Rayback goes on to explain: "The old doctrine was that conspiracy was a criminal offense because it threatened the public. The new doctrine being developed from the old was that conspiracy was a civil offense because it endangered the property involved in probable expectancies" (p. 205).

Again adopting the capture explanation, Roche argues that by granting injunctions on this basis state and federal judges rushed "to the aid of corporations having difficulties with a labor union...." (p. 414). He contends that when the Supreme Court ruled in favor of economic due process ("incorporated ... the dogma of entrepreneurial freedom into the Fourteenth Amendment") it crippled the efforts of the trade unions to organize (p. 420). The Court
in general based its rulings on what Roche sees a fictionary equilibrium between labor and management, that is, that a labor contract was "the outcome of bargaining between equals" (p. 414).

We will consider and evaluate some of the more significant Court decisions which used "liberty of contract" as the rationale for overturning state laws which forbid employers from requiring a person, as a condition of employment, to agree not to become or remain a member of a labor union. This agreement was known as the yellow-dog contract. The capture perspective is inadequate to fully explain the Supreme Court's philosophy of regulation of this institutional feature of labor markets; it is better understood in light of the traditional common law view of labor relations.

The first important example of Congressional action on the yellow-dog contract occurred after the Pullman strike of 1894. When the Pullman Company refused to enter into collective bargaining negotiations with its workers, they struck the railroads. The various strikes resulted from both demands by railroads that workers execute yellow-dog contracts, and from the discharge of workers because of union activities.¹³

¹³ The case that followed the Pullman boycott, In re Debs (1895), was important "because it gave the highest legal sanction to the growing concept that conspiracy in restraint of trade was not only a criminal but a civil offense." Henceforth, "labor activities could be forestalled by civil action" (Rayback, p. 206).
Congress passed the Erdman Act (1898) in response to the Pullman boycott. It set up "a voluntary arbitration system to help prevent the violent and destructive strikes that had occurred on the railroads" (Dickman, p. 233).

Section 10 of this law contained two significant provisions: it declared that the requirement of yellow-dog contracts was now a "misdemeanor" which "shall be punished by fine . . ."; and it made it unlawful for an employer to "threaten any employee with loss of employment, or . . . unjustly discriminate against any employee because of his membership in a labor corporation, association, or organization" (30, p. 428). Over twenty states in the 1880s and 1890s also enacted laws either declaring the yellow-dog contract a criminal offense or "prohibiting in some way or another employers from discharging or otherwise discriminating against employees for union membership or activity." These measures typically relied on the police power rationale of the laborer's unequal bargaining power (Dickman, p. 234).

In several key cases, a majority of the Supreme Court overturned state laws prohibiting yellow-dog contracts. Dickman notes that

The Court maintained that these laws were not a proper exercise of the legislature's inherent police power, but an arbitrary invasion of constitutionally protected property rights and personal civil liberties. And because the interference was arbitrary, the court claimed that it was a denial of due process of law and of equal

14 The text of this act is found in United States Statutes at Large, 30, pp. 424-428.
Moreover, it might be argued, along the lines suggested by Taylor and Witney, that "the jurists were not impressed with the social and economic factors justifying the attempts of government to protect workers in their employment relationship." The Supreme Court during the 'economic due process' era "was not convinced that collective bargaining was a needed institution in light of its definition of individual property rights. Economic welfare was determined by the manner in which property was utilized." As we will see, they are correct in contending that the Court believed that "interference with the use of property could stifle competition" and reduce the nation's economic welfare (p. 136).

In *Adair v. United States* (1907), a railroad agent had been convicted of violating the Erdman Act by discharging an employee for belonging to a union. In its defense the railroad claimed that this statute was unconstitutional, partly on the basis that the banning of the yellow-dog contract was a violation of the due process clause of the Fifth Amendment as an infringement of "liberty of contract." A majority of the Court concurred, and reversed the decision, stating that Congress could not make criminal the firing of an employee because of "his membership in a labor organization" (pp. 238-239).

Speaking for the majority, Justice Harlan declared that

15 Citations from this case are found in Raushenbush and Stein (1947).
the power to regulate labor contracts was not "within the power of Congress to regulate interstate commerce" (p. 240). In addition, Section 10 of the Erdman Act deprived both the railway operators and their employees of their property without due process of law. Harlan contended that freedom of contract is a liberty guaranteed by the Fifth Amendment; the legislature could pass no law that deprived people of their freedom, including "the right to make contracts for the sale of one's own labor" (p. 238).

Intellectual opponents of the yellow-dog contract in the Progressive movement objected to the court's reasoning. As Reynolds observes, many claimed that "the yellow-dog contract gave employers a psychological edge, intimidated some workers, deluded workers into believing that they had a moral obligation to abide by a contract, or that the tactic discredited unionists" (1984, p. 98). But the most frequently mentioned objection was that the Court assumed that there was already balanced power between employer and employee. A typical critical response to the Court was that in fact the employer, "who possesses infinitely greater economic power than the worker, could use his power to deny the worker his right to collective bargaining" (Taylor and Witney, p. 138). Following this line of reasoning, Justice Holmes dissented, arguing that the statute was "a very limited interference with freedom of contract, no more" (p. 241).

In Coppage v. Kansas (1915), a majority of the Court overturned the conviction under a Kansas statute of a
railroad agent for firing "an employee who would neither sign an agreement to withdraw from a union nor resign from it" (Siegan, p. 122). The jurists utilized the Adair decision as a precedent to strike down the Kansas law; as Dickman notes, "the Court gave short shrift to the argument that parties who are not equal in wealth, power, or position cannot or do not bargain equally" (p. 235).

Moreover, the Court found a significant "disparity between the standards an employer might use to choose his employees and those a union might use to choose its members" (Dickman, p. 235). The majority opinion proclaimed

Can it be doubted that a labor organization - a voluntary association of working men - has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any nonunion man? . . . And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not . . . (p. 847).

The Court ruled that the Kansas statute held no relationship to the promotion of the general welfare of the people of the state, as it asked "... what possible relation has the residue of the Act to the public health, safety, morals, or general welfare?" The Kansas law was not "... a legitimate object for the exercise of the police power" (p. 846). In addition, the Kansas law arbitrarily interfered with "the liberty of contract" of employers and employees "without due process of law" in violation of the Fourteenth Amendment
Those who adopt the perspective of monopsony power see both Court decisions as maintaining, if not augmenting, the superior bargaining powers of employers. Noting that the Court said that the railroad worker had the right not to accept employment under yellow-dog conditions, Taylor and Witney find the Court to have been mistakenly implying that the employee was free to pursue other employment:

What the Court failed to consider was that the worker might have few alternative employment possibilities. Either he worked for the railroad or he was forced to seek another job, which might be an inferior alternative. The facts of economic life might have forced him to sign the agreement even though he objected vigorously to such an employment agreement (p. 137).

But there is another side to this market failure critique. For example, there is reason to believe that the Court had serious questions about the effectiveness of state regulations which were intended to offset inequalities. The Court apparently thought that "the labor market itself would operate to support the welfare of both workers and employers." Since both decisions came at a time when less than 9% of the labor force belonged to a union (Siegan, p. 123), it is likely that the Court was not impressed with the ability of organized labor to deal with unequal bargaining power.

16 Holmes again dissented, stating that "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him"; this belief "... may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins" (p. 848).
even if given special privileges by law.\textsuperscript{17}

These two cases stand out among a number of labor injunction cases in the federal and state courts involving unions and employers between 1880 and 1932. The courts enjoined unlawful union conduct because it was in restraint of trade under the common law. Following English precedents, American courts came to recognize the tort of inducing or procuring a breach of contract. This was the context in which the courts utilized the notion of 'liberty of contract' in evaluating labor market regulation.

As we have seen, one of the most controversial applications of the tort of interfering with contractual relations involved the yellow-dog contract. In a highly significant 1917 ruling, the Supreme Court held that the labor injunction could be employed to enforce the yellow-dog contract. The concept of conspiracy in labor markets resurfaced in this case by being tied to freedom of contract.

The case was \textit{Hitchman Coal and Coke Co. v. Mitchell},\textsuperscript{18} in which the Court sustained an injunction prohibiting the

\textsuperscript{17} There is perhaps another facet to the background to the court's substantive due process rulings. According to Nelson (1974), judges who had begun their professional careers during the Civil War era were influenced by the antislavery movement which espoused liberty of contract for both employer and employee. Some judges feared that unions would destroy a worker's right "to bestow his labor as he pleased," and replace slaveholders by issuing orders that workers were under constraint to carry out (p. 557).

\textsuperscript{18} Citations from this case and other cases and statutes in the remainder in this chapter are found in Raushenbush and Stein (1947), unless otherwise noted.
United Mine Workers from attempting to organize non-union coal workers. The Hitchman company contended that such an effort amounted to a conspiracy to induce breach of contract. Hitchman could not resolve its differences with striking UMW workers at one mine, so it had opened the mine on a non-union basis. Subsequently the UMW sought to organize the workers at this mine (Reynolds, 1984, p. 98; Taylor and Witney, p. 38).

As in previous cases, the Court relied upon the notion of equal liberty in labor markets:

Whatever may be the advantages of 'collective bargaining', it is not bargaining at all, in any just sense, unless it is voluntary on both sides . . . the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and . . . this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power (pp. 100-101).

In essence, the Court ruled that "by inducing a breach of contract, the labor organization was interfering with the right to contract." Thus the Court enjoined the union "from further interference" with this right (Taylor and Witney, p. 39).

The critics of the Court's ruling contend that with this opinion "the labor movement was effectively barred from ever attempting to unionize workers who had signed 'yellow-dog' contracts"; in addition, this ruling "enshrined the injunction as the primary weapon against unionization" (Roche, p. 420). Both implications from the Court opinion
are seen to be unreasonable due to the nature of labor markets in the early twentieth century. For example, it is said that because close to 10% of manufacturing and mining workers were unemployed, this would cast doubt on the Court's declaration that the workers in this case "voluntarily made the agreement and desired to continue working under it" (p. 102). Taylor and Witney ask how in this situation could these contracts be signed "with the free assent" of the employee, when they had "no actual liberty to refuse to execute the agreement"? (p. 38)

There is no question that the economics of the labor markets of the late nineteenth and early twentieth century cannot be ignored. Did the nature of labor markets at this time mean that the application of common law notions was unrealistic? The American economic historian Don Lescohier has shown that in the period of 1890 to 1930 there were a limited number of employers in some markets due to consolidations of businesses, no serious enforcement of antitrust regulations against employer cartels, low educational levels among workers, and a tremendous inflow of immigrant labor (pp. 293-302). As Posner observes, these factors could be seen to lead in turn to certain consequences. For example, "if many workers were ignorant of their alternative employment opportunities, wages would frequently have been below the competitive level." Moreover, "if many workers (especially, perhaps, older workers) would have incurred heavy costs by changing jobs . . . employers would have monopsony
power, and the workers might be paid less than the competitive wage" (1984, p. 991).

In response, it can be said that while these conditions may have been common, there was nonetheless also a chronic excess demand for labor in the period from 1870 through 1920. Moreover, as Posner points out, "wages were much higher in the United States than in the rest of the world"; thus, "competition for workers must have been intense and should have limited the extent of monopsony power in labor markets" (1984, pp. 991-992).

Hence it does not seem reasonable to suppose that the yellow dog contract was unfair to the worker due to his or her 'weak' economic position. Any worker who accepted such a contract would likely "demand some compensation for giving up the possibility of the gains of union membership" (Epstein, p. 1382). The laws struck down in Adair and Coppage would have denied many employees the opportunity to receive this compensation, as Siegan observes:

Workers who rejected joining unions and/or worked for employers who overestimated the union threat received more than they relinquished when they bargained away their right to join a union. Nor would union membership necessarily be more materially rewarding. The Coppage Court believed that workers benefited from having the right to enter into such agreements (pp. 124-125).

Along these same lines Epstein comments that, "One has to assume an enormous degree of incompetence or ignorance by workers to ban the yellow dog contract on paternalistic grounds" (p. 1382).
But this interpretation can be pushed too far by those who take a libertarian understanding of the common law. Dickman contends that the Court's decisions on state legislation supporting the ban of yellow-dog contracts appear to be put in no uncertain terms. The Court had set forth "seemingly impregnable, absolutist condemnations of interference with liberty of contract" that, nonetheless, "were far less than they were cracked up to be, either by critics or supporters," since the Court "littered its decisions with repeated affirmations of the legislature's police power." According to Dickman, the precedents of these cases "were a dead letter even before the New Deal began" (p. 236); leaving the door open to the legitimate exercise of police power meant it was also open to social engineering as took place in the 1930s.

But this is not an argument against the police power per se, unless one accepts the premises of libertarianism with freedom and efficiency as one's ultimate normative criteria. For example, Justice Harlan explained in Adair that, while "personal liberty, as well as . . . the right of property, [is] guaranteed by" the Fifth Amendment, "... no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order or as detrimental to the common good . . . ." (p. 238). Dickman asks, "Who was to say what is reasonable, if not the legislature acting under its police power? The
Court had in numerous cases sanctioned legislative interference with, or regulation of, contract and property rights, including those in employment" (p. 236). Of course there may be different interpretations of the police power with regard to various economic issues, such as discrimination against unions or monopoly grants of power to occupational associations; this is part of the tension of the liberty and virtue approach.

The Adair, Coppel, and Hitchman decisions led union leaders and progressive intellectuals who supported the cause of organized labor to step up their efforts "to prohibit employer boycotts of union labor while providing virtually limitless power to unions to boycott nonunion labor" (Dickman, p. 237). Thus in the AFL Reconstruction Program of 1918 was included a request for new laws making it a criminal offense for any employer to interfere with union efforts to organize workers (Dickman, p. 238).

The efforts of organized labor to obtain such privileges bore fruit in the early 1920s. At this time many railroad corporations established "closed shop company unions maintained by a compulsory dues checkoff" (Dickman, p. 245). These actions were a factor in the support of labor for the independent LaFollette presidential campaign in 1924 (Rayback, p. 299). The Congress elected in this campaign eliminated the Railway Labor Board and replaced it with the
Railway Labor Act of 1926. It was drafted largely by a railway union attorney, Donald Richberg, who played a controversial role during the administration of the National Recovery Act (Dickman, p. 245) (and became quite critical of unions later). As a result the law "was passed by Congress almost in the identical form agreed on by the railroad unions and the major railroads" (Reynolds, 1984, p. 96). The chief purpose of the law was to establish a variety of procedures, including mediation and voluntary arbitration, to reduce labor conflict in the railroads (p. 101). Railroad employees had a right to organize, and also freely elect collective bargaining representatives, with whom their employers were required to negotiate in order to settle labor disputes (p. 102). While it did not prohibit company unions, nonetheless it was the first durable legislative help for unions (Reynolds, 1984, p. 95).

A suit was brought to test the constitutionality of the Railway Labor Act. It was upheld by the Supreme Court in the Texas & New Orleans Railroad case (1930). The Court ordered this railroad to stop "interfering with the right of workers to choose whatever bargaining agents they wished" (Taylor and Witney, p. 144). The Court stated that promotion of labor organizations and the collective bargaining process was of the "highest public interest," for such a procedure prevents "the interruption of interstate commerce by labor

19 The text of this act is found in Labor Relations and the Law, pp. 100-113.
disputes and strikes" (p. 245). Moreover, the Court declared that the law did not violate the due process clause of the Fifth Amendment:

The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. . . [the railroad carriers] have no constitutional right to interfere with the freedom of employees in making their selections . . . (p. 248).

While the Court denied it, in effect, the jurists overruled the Adair and Coppage decisions, finding this doctrine no longer applicable in railroad disputes (Dickman, p. 246). The Court had begun to turn away from applying the common law principles of labor relations. This was even more evident in several Court rulings on labor legislation enacted during the New Deal.20 As will be seen in the next section, since 1937 the Supreme Court has explicitly

20 As discussed infra, later in the same court term, the National Labor Relations Act, which also required employers to bargain exclusively with the union selected by a majority of workers, was also sustained against due process attack. The line of reasoning utilized by the court in these cases was also expressed in West Coast Hotel Co. v. Parrish (1937), which upheld a minimum wage law for women. Summarizing the majority opinion of Justice Hughes, Siegan notes that Hughes contended that "legislative restraints were consistent with, and not antagonistic to, the liberty contemplated by the due process clause" (p. 185). Hughes essentially stated that his only concern was whether or not the regulation of minimum wages for women was reasonable: "]The legislative judgment] cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effect uncertain, still the legislature is entitled to its judgment" (p. 445).
rejected "the view that a legislature might deprive a person of property in a manner that justified redress in accordance with the due process clause" (Letwin, 1979, p. 23).  

III. LABOR CASES AND LEGISLATION IN THE 1930S

The period from around 1880 to 1930 was characterized by the inception and growth of modern labor unions. The chief preoccupation of unions during this time was the extension of their organizations. In the political arena, we have seen that their efforts were largely aimed at eliminating the labor injunction and in discouraging the use of the Sherman Act against them in the federal courts. Until the late 1920s, organized labor "did not fully appreciate the importance of co-ordinated political pressure to achieve their ends" (Gregory and Katz, p. 184).

The decade of the 1930s saw a significant increase in union political activities. Of course, this was also the era of the Great Depression, which had an important influence on attitudes toward competition in the labor market. In addition, this period witnessed some key changes in American labor law. The task of this section is to explain the labor

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21 Letwin argues that substantive due process was ruled out "for unconvincing and indeed dangerous reasons" (1979, p. 23). Hayek's rule of law "requires something more than rule by statutes rather than fiat; it requires that the statutes themselves should be rational and general, not arbitrary, capricious, whimsical, or discriminatory." Letwin believes that American courts seem to have forgotten this general proposition in the field of economic regulation (1979, p. 73).
legislation and Supreme Court rulings from 1930 through 1941 in light of the models of economic regulation. We have to consider the role played by each of the features mentioned above in undergirding both the elimination of the concept of conspiracy as applied to union activities and the affirmation in law of the union's right to collective bargaining.

The economic rationale for labor law in this era stemmed in part from the increased scepticism towards the social utility of widespread competition among individuals. An increasing number of people contended that "institutional defects in the economic environment rather than personal inadequacies caused business failure, unemployment, and poverty" (Taylor and Witney, p. 71). As a consequence, some proponents of labor legislation believed that giving enhanced privileges to unions was the right method to raise living standards. While the "sole motive of unionists and their political allies" appeared to be "political idealism," the political opponents of the labor legislation were generally seen as "motivated by self-evident financial gain rather than deep ideological commitment" (Reynolds, 1984, p. 93).

But another explanation of this labor legislation relies on the notions related to interest group politics. Labor leaders, bureaucrats, politicians, and a minority of big businessmen played key roles in "fostering a major expansion in the labor-representation industry, a develop-
ment that was essentially in their financial and non-financial interests" (Reynolds, 1984, p. 93). This explanation has stronger evidence in its favor, as will be shown below.

A. THE NORRIS LA-GUARDIA ACT AND THE SUPREME COURT

The fact that federal courts upheld the use of injunctions by employers against labor beginning in 1894 henceforth gave rise to a campaign by the AFL to engineer the passage of state and federal legislation "designed to provide protection from the equity power of the courts" (Taylor and Witney, p. 72). Section 20 of the Clayton Act had provided that the federal courts could not restrain employees involved in a labor dispute from "persuading others in a peaceful manner" to strike, nor restrain them from engaging in a peaceful boycott. Yet this law also stated the conditions for the issuance of injunctions; they could be "necessary to prevent irreparable injury to property, or to a property right, of the party making the application . . ." (Sayre, pp. 145-146). Seeing this mixed success on the federal level, organized labor leaders pushed for state anti-injunction laws. During the immediate years following the Clayton Act, there were some states that enacted such legislation. However, after 1921, there were no such state laws passed, for the Supreme Court declared an Arizona anti-injunction law unconstitutional (Taylor and Witney, pp. 72-73).
Moreover, based on the Duplex decision of 1921, the principle was laid down that the restrictions on the use of injunctions in the Clayton Act were not operative when labor unions restrained trade within the meaning of the Sherman Act. Thus for the next decade "the antitrust laws served as a basis for the issuance of labor injunctions." As a result organized labor sought legislation "which would effectively limit the equity power of the courts in labor disputes and stand the test of constitutionality" (Taylor and Witney, pp. 74, 79-80).

There was significant intellectual aid to labor in its crusade against the use of the injunction in labor disputes. Felix Frankfurter and Nathan Greene wrote an influential treatise, The Labor Injunction (1930), which contended that too many judges habitually found actual or threatened violence and other specifically unlawful conduct where nothing of the sort had occurred or was imminent as the basis of issuing injunctions against unions. Their work served as the intellectual basis for labor's crusade against "government by injunction" (Dickman, p. 238).

This facet of the labor movement "sought to eliminate restraint of trade in labor disputes," and to ban employer discrimination against union members. As Dickman points out, the crusade essentially achieved its victory before the New Deal began. It was implemented in legislation that was the American analogue of the TDA, for it essentially eliminated restraint of trade (under the Sherman Act) "as it applied to
unions involved in labor disputes" (p. 238).

In 1932 this legislation, known as the Norris-LaGuardia Federal Anti-Injunction Act, was passed by Congress and signed by President Hoover. Among its provisions, most significant were those which declared yellow-dog contracts unenforceable in U.S. courts (Section 3); relieved labor organizations from any applicability of the conspiracy concept as well as liability for wrongful acts under the antitrust law (Sections 4-5); and nullified the equity powers of federal courts in labor disputes (Sections 7-12).

Congress justified this act by pointing to the need for collective bargaining. This was the theory (cast in a public interest rationale) for the legislation. In fact this statute fairly explicitly makes the market failure case for labor's unequal bargaining power. In Section 2, the law states that

...under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker was commonly helpless to exercise actual liberty of contract and to protect his freedom of labor... (p. 78).

The authors of the law reasoned that a job to a worker was infinitely more important than was a single employee to a modern corporation, and thus there existed "no liberty of contract between single workers and employers in modern industry, as was assumed in litigated cases prior to 1932." The single employee was said to have "little or no freedom in selling his labor"; despite the fact of quitting
or preparation for better jobs, the typical individual worker tended to remain at his job as long as the employer would keep him (Taylor and Witney, p. 80).

Section 2 also argued that workers tended to increase their bargaining strength by forming labor unions (p. 78). While an employer was not greatly affected by one worker leaving his employment, he would likely be vitally concerned when all his employees ceased working. Thus, "by organizing into labor unions, workers are in a better position to sell their services . . . ." (Taylor and Witney, pp. 80-81).

By checking the power of the courts to intervene in labor disputes, this law facilitated the ability of labor unions to act as effective collective bargaining agencies and rectify what was perceived to be an inherent inequality of bargaining power between employers and employees.

In addition, the Norris-LaGuardia Act stated that yellow-dog contracts are not enforceable in any U.S. court. Since "they could no longer serve as the basis for an injunction," this provision nullified the effect of the Hitchman decision (Dickman, p. 239). Section 3 of the law condemned the yellow-dog contract as "contrary to the public policy of the United States", which was support and endorsement of the collective bargaining process (p. 78). While it did not directly outlaw this type of employment agreement, nonetheless this provision of the law removed an important obstacle in the path of unionization of the workforce.

Most significantly, this legislation abolished the
conspiracy law as applied to labor disputes. Section 4 specified actions persons might commit "singly or in concert" which were exempt from the use of injunctions. These activities included joining a union, striking, threatening to strike, "causing or inducing without fraud or violence" anyone else to strike or otherwise break a yellow-dog contract, and picketing "without fraud or violence" (pp. 78-79). Section 5 abolished the 'conversion' principle. There was no longer any circumstance wherein the actions described in Section 4 done "in concert" would make the participants into an unlawful "combination or conspiracy" (p. 79).

The statute did state that the worker "should be free to decline to associate with his fellows." However it went on to emphasize the role of freedom of association as a positive freedom. The worker seeking to organize other laborers should be free from employer interference:

... it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (p. 78).

In this statute, Congress's intention was to provide unions with the benefits they had wished for under the Clayton Act but were denied by reason of its interpretation by the federal courts. As a result of this law, all
labor union activities were virtually eliminated from antitrust liability. The legislation "virtually destroyed the ability of private parties to secure injunctions to influence the outcome of labor disputes" (Taylor and Witney, pp. 95, 100); its effect ". . . was to prohibit or severely limit federal courts from protecting employers who sought to exercise their rights to resist unions" (Dickman, p. 239).

It is true that this law "did not provide labor unions with any new rights. It merely allowed them a greater area in which to operate free from court control." Nonetheless, there is no question that "the statute was passed to promote the union movement and collective bargaining . . . It is extremely doubtful that the growth of the union movement could have taken place in the absence of an effective law controlling the use of injunctions in labor disputes" (Taylor and Witney, pp. 81, 97).

In the Hutcheson v. United States case (1941), the Norris-LaGuardia Act was interpreted in a manner that allowed for secondary boycott actions by unions. This case centered around a jurisdictional controversy involving the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists. As Taylor and Witney note, "The dispute was over the issue of which of these unions was to install and dismantle machinery in the Anheuser-Busch property in St. Louis." The Carpenters union lost the job; as a result it refused to permit its members to work on new construction taking place on the property,
and initiated a secondary boycott against the company's beer (pp. 102-103).

The Supreme Court ruled that the action of the Carpenters Union was protected by the Norris-LaGuardia Act. Justice Frankfurter, who wrote the majority opinion of the court, contended that this legislation "reasserted the purpose of the Clayton Act and broadened its terms" (Taylor and Witney, p. 104). The concept of "labor dispute" had been expanded by Congress; it now included prosecution of a union involved in an interunion jurisdictional dispute (p. 192). The controversy was a labor dispute within the meaning of the statute, and for this reason the courts were not permitted to restrain the activities of the labor unions.

Moreover, secondary boycotts by unions in order to keep non-union goods or goods produced by members of other unions out of the market were held immune from the Sherman Act, provided the union acted in its self-interest and did not conspire with non-labor groups (pp. 192-193). The Court also affirmed that the statute was a disapproval of the Duplex case as an authoritative interpretation of Section 20 of the Clayton Act (p. 193). Organized labor was thus permitted to "undertake economic activities to expand the area of collective bargaining" (Taylor and Witney, p. 104).

B. NEW DEAL LABOR LEGISLATION AND THE SUPREME COURT

The status of labor unions in the law changed significantly with the Norris-LaGuardia legislation, since
it limited the power of the courts in labor disputes. However, as Taylor and Witney note, it set up no blanket prohibition on interferences with a union's right to engage in collective bargaining. Some contended that there was significant evidence of "practices calculated to prevent workers from the enjoyment of this right"; hence, it was believed that "the government should protect the right of workers to self-organization and collective bargaining" (p. 117).

There were several arguments by which collective bargaining reforms were enacted during the 1930s. The Norris-LaGuardia Act itself gave one such rationale; as seen previously, it contended that individual employees were helpless to exercise actual freedom of contract. They must be organized into unions in order to increase their bargaining power and obtain decent wages. Dickman asserts that this notion was extended into the argument that "The government must guarantee the right to organize, strike, and bargain collectively against private discrimination by employers, in order to secure the public interest in promoting industrial peace by removing the cause of industrial strife . . . ." With the onset of the Great Depression in the early 1930s, it was also argued that public policy towards organized labor ought to promote stabilization of wage rates and purchasing power in order to prevent underconsumption and unemployment. These ideas about the roles of both the state and labor unions "were held by a
culturally and politically significant cross-section of Americans on the eve of the New Deal" (pp. 257-258).

After the election of President Roosevelt in 1932, the federal government implemented a variety of legislative measures designed to secure economic recovery. A common purpose of these new federal actions was to increase people's purchasing power so as to bolster the demand for goods and services. The National Industrial Recovery Act (NIRA) of 1933 contained the general plan of the New Deal to accomplish this end (Taylor and Witney, p. 146). Under the authority of the executive branch of the government, this law set up groups of self-governing business cartels which executed "codes" regulating production and prices. Such an arrangement violated the Sherman Act, so the law provided that "the antitrust statutes were not to apply to parties to the codes" (Taylor and Witney, p. 146).

Organized labor leaders both inside and outside of Congress lent their support to this legislation. They endorsed its declaration of governmental policy "favoring collective bargaining between employers and employees" (Dickman, p. 259). They also approved the fact that the law stipulated that every business code contain two provisions pertaining to labor. First, "each code was required to establish a minimum wage for the workers it covered," so as to increase their purchasing power (Taylor and Witney, p. 146). Second, Section 7(a) of the NIRA had to be included in each code, which provided that "employees shall have the
right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers . . ." in the choice of representatives "for the purpose of collective bargaining" (p. 288). The economic motivation behind this provision was that "legal protection of collective bargaining would mean stronger unions," leading to more "effective pressure by labor unions for higher wages" (Taylor and Witney, p. 146). Section 7(a) also provided that "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . ." (p. 288).

Senator Robert Wagner and his fellow members of the National Labor Board (NLB) read Section 7 as a mandate for "compulsory collective bargaining between employers and majority unions exercising complete and unalloyed exclusive bargaining power." Their view was that it was crucial "that collective agreements take place; no interpretation of the 'right to organize' that interfered with this overarching policy goal was permissible" (Dickman, p. 261). As described in Gross (1974), the NLB pursued this goal through a series of administrative decisions that formed the basis of the National Labor Relations Act in 1935.

Organized labor interpreted Section 7(a) of the NIRA as "an invitation to form independent unions under governmental protection." During the next year "one third of the federa-
tion unions increased their rolls; one-fourth doubled their membership. The greatest increase came in the industrial unions." For the first time since the heyday of the Knights of Labor, semiskilled and unskilled laborers began to organize on a large scale (Rayback, pp. 328-329).

At the same time that labor unions were responding so favorably to the new law, the Supreme Court declared that the entire statute violated the Constitution. In the case of *Schechter Poultry Corp. v. United States* (1935), Justice Hughes asserted that it was unconstitutional for Congress to delegate to others (in this instance the executive branch) its legislative functions (p. 448). He went on to state that "the attempt through the provisions of the Code to fix the hours and wages of employees . . . was not a valid exercise of federal power . . ." (p. 449).

This decision undercut the legal basis for the actions of the National Labor Relations Board (NLRB), the successor to the NLB. Taylor and Witney observe that "Since its legislative authority was swept away, the orders of the Board had no legal validity." This ruling ended all federal government protection of the employees' right to collective bargaining (p. 152).

After this decision Senator Wagner led a drive for more extensive labor relations legislation. Wagner was a strong proponent of "the purchasing-power doctrine of forcing up wage rates to end the Great Depression" (Reynolds, 1984, p. 125). Wagner's bill was supported by the AFL, which
conducted a campaign centered around the Section 7(a) provisions. Taylor and Witney emphasize the seriousness with which the AFL pressed for new legislation:

Mass meetings to urge the passage of the Wagner Act were held under the sponsorship of the AFL and other labor groups. Organized labor made letter clear the character of its future political program. It threatened to work for the defeat of each and every senator or congressman who opposed the Wagner Act. Never before did organized labor conduct such an all-out campaign to urge the passage of a particular bill (pp. 152-153).

Why was there such a determined effort to enact Wagner's legislation, formally entitled the National Labor Relations Act (NLRA)? It was the climax of a very long struggle for a radical restructuring of the labor market "to favor monopolistic collective bargaining over competition" and individual bargaining between employer and employee (Dickman, p. 266). Gregory and Katz contend that

it is fairly clear that it was the political power of the AF of L that achieved the enactment of the NLRA . . . in passing the NLRA, Congress was doing its best to provide the AF of L with the means to promote the unlimited expansion of its member unions, free from the interference of employers (p. 226).

The Wagner Act was passed in 1935. As an assertion of "legislative approval of the collective bargaining process," it was "a law passed specifically and deliberately for the purpose of protecting and encouraging the growth of the union movement" (Taylor and Witney, p. 153). This was not to be an end in itself, but was seen to be necessary to achieve the economic objectives of the legislation.

What was the economic rationale of the Wagner Act? Just
as the Railway Labor Act, the Norris-LaGuardia Act, and the NIRA relied on a labor market failure justification, so the Wagner Act affirmed that there was an "inequality of bargaining power between employees" and "employers organized in the corporate or other forms of ownership association . . ." This tended to "aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry . . ." (p. 289). The statute further stated that "protection by law of the right of employees to organize and bargain collectively" promotes the flow of commerce "by restoring equality of bargaining power between employers and employees" (pp. 289-290).

One of the reasons for economic instability seen by the authors of this law was their belief that the non-union employee did not "possess actual liberty of contract" (p. 289). Taylor and Witney explain that

Such an employment relationship meant that an employer could keep for the firm a disproportionate share of its revenues under conditions of persistent excess supply of labor. This condition could contribute to and prolong a business cycle in the downturn stage for the purchasing power to buy the commodities and services turned out by industry might not be available (p. 157).

By implementing collective bargaining, wages would tend to rise and there would be an increase in the effective demand for the goods and services produced by business.22

22 Another economic rationale is seen in the fact that Congress linked the Wagner Act to the power of the federal government to regulate interstate commerce as its specific authority in the Constitution for this legislation. Congress reasoned that industrial strikes obstructed "the free flow
Thus the substance of the law centered around Sections 7 through 10, which dealt with various aspects of the collective bargaining process. Section 7 guaranteed to employees the right to self-organization and collective bargaining (pp. 290-291). Section 8 stated that it was an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees" (p. 291). The National Labor Relations Board was established to enforce the Wagner Act. As stated in Sections 9 and 10, the Board was required to conduct elections in appropriate bargaining units. It was empowered to prevent employer interference with the collective bargaining rights of the workers covered by the law (pp. 291-293).

Initially, the NLRB had difficulty enforcing the provisions of the law because it was hamstrung by legal proceedings. As Dickman notes, "Employers resisted the Board mightily because they were convinced that the Wagner Act invaded their constitutional rights" (pp. 275-276); indeed there was a lot of anticipation awaiting a decision by the Supreme Court as to the law's constitutionality.

Labor coalitions had wrestled for years with the of commerce" by impairing "the flow of raw materials or manufactured or processed goods" among the states (pp. 289-290); thus, "the reduction of the frequency of such strikes would promote trade among the states" (Taylor and Witney, p. 158). The Wagner Act aimed to eliminate the cause of such strikes by outlawing anti-union practices. It was also believed that the number of such strikes would diminish if in collective bargaining the contesting parties possessed equality in bargaining power (p. 289).
problem of Supreme Court rulings overturning favorable legislation. For example, as discussed previously, state and federal attempts to control the injunction in labor disputes antedated the Court's recognition of the need for control of this instrument. Labor union leaders felt that "This troublesome flaw could be remedied . . . by seeing that the 'right' personnel was appointed to the Court" (Gregory and Katz, p. 177). No doubt this influenced their support for Roosevelt in the 1936 election. This is implicitly acknowledged by academic defenders of New Deal labor law such as Taylor and Witney. Recognizing the nature of judicial appointments as being outside the direct influence of the voters, they argue that "it took the cataclysmic events of the 1930s plus the 'court packing' threat by Roosevelt to change the structure of the Supreme Court to effect judicial approval of social legislation enacted by Congress and the states" (p. 134).

There is little question that the threat of Roosevelt to "pack" the Supreme Court, while it was in the midst of deliberations of several significant cases, must have had some influence on the sitting justices. Taylor and Witney contend that "Roosevelt was reluctant to permit the Court complete freedom to evaluate New Deal policies . . . accordingly he proposed legislation which would have minimized the influence of the conservative element of the Supreme Court" by giving the President authority to reorganize the court system. Even though Congress was un-
willing to follow Roosevelt's proposal, "the attempt undoubtedly left its mark" on the high Court jurists (p. 163). In April 1937, right in the midst of the uproar over Roosevelt's request, the Supreme Court decided the NLRB v. Jones & Laughlin Steel Corp. case. The Court upheld the Wagner Act by a slim majority of a single vote. Appealing to previous rulings on labor legislation, Justice Hughes spoke for the majority in reiterating the Court's acceptance of the concept of the worker's right to organize because "a single employee was helpless in dealing with an employer"; organization into unions gave workers the "opportunity to deal on an equality with their employer" (81, p. 909).

Hughes argued that it was proper for Congress to prohibit unfair labor practices such as employer interference with collective bargaining because organizational strikes might result in "catastrophic" effects on commerce. Strikes involving manufacturing could burden interstate commerce just as strikes involving railroads. Congress properly endorsed the employee's right to bargain collectively because it was "necessary to protect interstate commerce from the paralyzing consequences of industrial war" (81, pp. 914).

Hughes also asserted that the statute did not violate the Constitution on "due process" grounds. In regards to substantive due process, the Wagner Act did not deprive an employer of his property or liberty without due process of law. Labor legislation which involves "restraint for the
purpose of preventing an unjust interference" with the right to self-organization "cannot be considered arbitrary or capricious" (81, p. 915). Hughes added that "The Act does not compel agreements between employers and employees" (81, p. 916). Here the Court seemed to misunderstand the meaning of Section 9(a), for in requiring exclusive representation by a union chosen by majority vote the Wagner Act did not truly leave the employer and individual employee free to negotiate with each other. In regards to procedural due process, the procedural provisions of the Wagner Act afforded employers "adequate opportunity to secure judicial protection against arbitrary action" by the NLRB (81, p. 917). As Taylor and Witney note, "An employer aggrieved with a decision of the Board has the right to appeal to the courts" (p. 165).

In its ruling, the Court seemed to employ a curious reasoning. As Dickman suggests, Section 9(a) of the law gave a power to a majority union (in relation to non-union workers) to exercise its exclusive bargaining rights which was "analogous to the power of the code authorities under the NIRA." Hence, "it would have been logical for the Court either to declare exclusive representation unconstitutional or to overturn its precedent in Schechter . . ." But the Court followed neither of these routes. Instead, "it upheld majority rule unionism" yet still allowed its precedent to stand "against the delegation of government power to private
groups" (Dickman, p. 277).23

This decision represented, perhaps, the most important pronouncement of the Supreme Court with respect to organized labor. After this decision, due process and freedom of contract took on a new look; in Reynolds's view, this decision "marked the judiciary's general abandonment of constitutional protection of economic rights and economic due process" (1987, p. 21).

The Court opinion sustaining the constitutionality of the Wagner Act gave full force to the administration by the NLRB of the principle of exclusive bargaining by union representatives of employees. Dickman notes that this was in line with the intentions of the authors of the New Deal legislation to implement compulsory collective bargaining: "In 1934 individual bargaining between employer and employee as an alternative to collective bargaining after a majority union was chosen had been declared a violation of 'right to organize.' After 1937, the NLRB declared it a violation of the employer's 'duty to bargain'" (p. 279).

23 The justices who dissented in this case had exhibited in previous decisions support for the beneficent effects of competition in the labor market. As Taylor and Witney describe their philosophy, they believed that "if a worker was dissatisfied with the conditions of work determined unilaterally by the employer, the worker was free to quit and seek employment elsewhere" (p. 161). These jurists asserted that the Wagner Act was unconstitutional because it granted the NLRB excessive power (81, p. 924). They contended that the lower courts were correct in holding on the basis of the Schechter case that "the Board has no authority to regulate relations between employers and employees engaged in local production" (81, p. 924).
C. AN EVALUATION OF AMERICAN LABOR LAW

How are we to understand the labor legislation and Court rulings of the 1930s in light of the models of regulation? It is my contention that the interest group theory best explains the enactment of the labor law of this era. It can be argued that four primary groups sought and obtained the enactment of the 1930's labor legislation: "unionists, politicians and bureaucrats, academics, and an influential minority of businessmen." Reynolds observes that "the labor representation industry" greatly expanded during the 1930s and 1940s, especially as compared to previous eras. The labor legislation of the New Deal reversed an ongoing contraction of this industry "by creating abundant profit opportunities, a reliable way to attract new entrants, innovation, and new competition" (Reynolds, 1984, p. 111). These gains were won despite the "active opposition" which "came from the business community, especially the National Association of Manufacturers, and portions of the legal community" (1984, p. 123).

Considering more specifically each of the statutes dealing with labor in this period, it should be noted that the NIRA provided benefits to both business and labor groups by the provision of joint price fixing and minimum wages. By contrast, the Norris-LaGuardia and Wagner laws had a more limited scope. As Reynolds observes,

The ability of unionists to interfere with trade ... rests largely on immunities from damage suits and equity relief granted by Norris-
LaGuardia and, more important, on government machinery set up by the Wagner Act to impose labor representation and collective-bargaining procedures on those employees and enterprises who would otherwise refuse to accept and participate with unions in collective bargaining. These laws have proven effective and durable (1984, pp. 96-97).

Each of these pieces of legislation clearly provided tangible benefits to unions, which makes it evident why they sought them.

Union actions were consistent with the rent-seeking component of the interest group model. This is evident as we consider some of the specific benefits of the laws, especially the provisions of the Wagner Act which enhanced the market power of labor unions. Organized labor's purpose was achieved in a distinct way, as Dickman explains:

... the law did not mandate closed shops, nor did it impose any particular bargaining unit standard for the American economy. The function of the law was, in effect, to supplement union power. The unions would go about organizing and bargaining, without having to worry overmuch about the power of the federal courts to bring their violent or otherwise unlawful activities to heel, while the NLRB would systematically weaken or destroy employers', and nonunion workers', power to resist. The 'right to organize', the 'duty to bargain', the principle of exclusive representation by majority rule, and the employer's obligation to abide by collective bargains were all instruments to facilitate or achieve the larger end: a 'cartellized' labor market. Each provision of the law supported, and was supported by, the others; the law as a whole was meant to help unions to organize workers, and to supplement unions' strike threat power (pp. 266-267).

The Wagner Act was a major means by which the government aided union efforts towards the cartelization of the labor supply. Instead of competing in the sale of their labor
services by means of individual bargaining, organized workers were able to raise the price of their services by means of collective bargaining.

Sections 9 and 10 which provided a specific role for the NLRB in the labor market were especially significant. The Board has performed the role of cartel enforcer, solving two key problems which typically break up cartels eventually: entry of new competitors and cheating. In regards to the former, Reynolds notes that "union officials are safe from rival unionists or employee decertification efforts for at least one year after a decertification vote." This arrangement has some significant economic implications:

This legal situation is much like the historical meaning of the word 'monopoly,' a grant from the state of the exclusive right to sell some good. Exclusive bargaining is a legal barrier to entry in the labor representation industry, protecting incumbent unionists by raising the costs to rival unionists interested in competing for greater membership (1984, p. 109).

The NLRA solved the cheating problem by means of granting a union elected by a majority of its members exclusive bargaining rights. The employer was required to deal with the union's representative in 'good faith.'

In sum, the Wagner Act revolutionized the American law of labor relations. As Posner observes

The common law was displaced by a system of federal regulation administered by a new agency, the National Labor Relations Board, and designed - as its sponsors and supporters made clear and is anyway obvious from the structure of the Act - to foster unionization (1984, p. 992).
The establishment of the NLRB as the primary agency enforcing the Wagner Acts' provisions, rather than the courts, is best understood in the light of this purpose of facilitating organization of laborers, as Posner suggests:

Since the Act turned labor policy on its head, transforming a public policy of fostering competitive determination of wages and working conditions into one of fostering cartelization, it was quite sensible for Congress to be concerned that state and federal judges - who after all had largely fashioned the former policy - might resist its inversion (1984, p. 1009).

Over the twelve year period between the original Wagner Act and its modification by the Taft-Hartley Act, the NLRB administered the unfair labor practice portion of the law in a vigorous manner, conducted representation elections, and thus gave substantial support to the growth of unions. Taylor and Witney note that "Union membership increased from about 4 million in 1935 to about 16 million in 1948." Moreover, under the protection of the Wagner Act, the Congress of Industrial Organizations "was able to organize the mass production industries on an industry-wide basis." The NLRA also facilitated a great increase in the number of effective collective bargaining contracts, totaling over 50 thousand by the year 1946 (pp. 187-188).

As noted previously, organized labor groups were not the only ones to benefit from this legislation. There were also incentives for bureaucrats (in the form of larger budgets, greater authority, etc.) and academic supporters of organized labor (in the form of new research centers, con-
sulting income, etc.) to actively support the enactment of the new laws (Reynolds, 1984, pp. 126-127).

Considering the supply side of regulation, there were economic and political changes which helped to pave the way for the enactment of the legislation the various interest groups sought after. Reynolds notes the role that some of these factors played in the implementation of the changes in the labor law by Congress in the 1930s rather than in the 1920s. He posits that it was

... because the cost of voting yes had been reduced drastically for congressmen. Opponents from the business community had been discredited by the Great Depression; sympathy for unions and the unemployed was widespread; there was a general urge to 'do something'; and the Democratic party rolled up large electoral gains in the 1930, 1932, and 1934 elections, for all practical purposes eliminating opposition from the Republican party (1984, p. 123).

The change in the treatment of organized labor under the American common law also needs to be accounted for. The common law in the nineteenth century and early twentieth century evaluated labor union actions under the concept of conspiracy in restraint of trade. By the end of the 1930s, the judiciary had upheld the legal enforcement of cartelization of the labor supply. The change was from the early notion of the right of an employer to obtain labor competitively, violation of which was restraint of trade, to legal acceptance of union efforts to restrain competition in the labor market.

It can be argued that prior to the late 1930s the
Supreme Court most often had ruled on labor cases consistent with the liberty and virtue component. Legislation which had been aimed at outlawing yellow dog contracts was consistently held to be an unconstitutional interference with freedom of contract. The Supreme Court decided that some efforts of state legislatures under their police powers to grant labor unions and other labor groups certain exclusive privileges violated the provisions for economic due process in the Fourteenth Amendment.

The liberty and virtue component does not work as well in explaining the approach taken by the Supreme Court in the latter half of the 1930s. After the 1936 election a majority of justices "discovered a power within the Court to reverse the traditional attitude of that body toward legislation affecting labor relations . . ." The Court abandoned the substantive due process concept. Moreover, during the years after the Court's membership changed, beginning around 1940, "the Court showed a tendency not only to foster legislation directed at improving the conditions of labor and strengthening unions, but also to invalidate legislation aimed in the opposite direction" (Gregory and Katz, pp. 291-292).

We have seen that the models of economic regulation can enhance the economist's understanding of historical approaches to labor law. An application of these models to the Taft-Hartley and Landrum-Griffin Acts would likely provide an equivalent reward to future study. Such research would be enhanced by a normative consideration of the
American labor law of the 1930s. Let us make a few comments in this regard.

The advocates of the interest group model oppose the special privileges and immunities given to unions under the laws passed in the 1930s, without opposing labor unions themselves. For example, Epstein contends that there are insufficient reasons for the special privileges unions obtained with this legislation:

Where unions are necessary to foster communication, they can emerge in any voluntary situation, in a form less formal and less adversarial than it is today. The frequently cited goals of labor organization do not justify the essential features of the modern law (p. 1406).

Reynolds also argues along the same lines. He would seek "a wholesale repeal and abolition of all the labor legislation supporting bilateral labor monopoly in the private and public sectors." He recommends the abolishment of the Norris-LaGuardia Act and the Wagner Act (as amended). He would favor "dismantling the associated commissions, boards, executive orders, state laws, rulings, administrative orders, and regulations" which have been set in place by these statutes. This would eliminate the special immunities for organized labor in the law: "Unions and their members would then be treated like everyone else under ordinary contract, tort, and criminal law" (1987, p. 31).

There is no question that in fact the Wagner Act granted unions significant legal immunities. As Pound observes, this law "went a long way to establish a practi-
cally complete immunity of labor organizations for torts" (p. 71). Section 7 of the Act guaranteed to employees the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (p. 291). Pound notes that "There is no limit imposed upon the measures employed or the effects of their concerted activities" (p. 71). Moreover, though the law provided in Section 10 for the prevention of "any unfair labor practice" engaged in by employers (pp. 291-293), as Pound rightly points out, "No provision is made defining unfair practices by employees or unions and no means of prevention or securing against them are provided" (p. 71).

An analysis based on the liberty and virtue component would also conclude that such immunities for unions ought to be reevaluated. Given the lack of empirical evidence for any general condition of monopsony in modern labor markets, there is little reason to retain the concept of labor's disadvantage as embodied in labor law. Furthermore, while advocates of the interest group model argue for a return to the common law because they argue that "the common-law process tends toward efficiency in the enforcement of rights and hence promotes efficiency in the operation of markets" (Reynolds, 1987, pp. 32-33), from the standpoint of the liberty and virtue component, there are substantive reasons besides efficiency for a prudential reconsideration of the labor law, such as the way of life it promotes. Such a reexamination might conclude that while the right to
organize is necessary, because labor combinations have historically often facilitated the promotion of quality workmanship and moral virtue, special immunities in the law are most often unnecessary, for they tend to encourage a deleterious 'aristocracy of labor.' They have historically been associated with violence in labor disputes (Baird, p. 93). We could benefit significantly from a return to the common law approach to labor market regulation which, without fostering confrontations between workers and employers, encourages unions in the role of fostering character formation.


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