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THE WANDERING LABOR EXEMPTION UNDER ANTITRUST LAW

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In the history of American Labor Law, perhaps the most persistent of the controversial issues awaiting a definitive judicial resolution concerns the application of antitrust law to the activities of organized labor. As early as 1914, and later in 1932, the United States Congress enacted a statutory exemption of such activities from the strictures of the Sherman Act of 1890.[1] This article reviews the court decisions dealing with that exemption and the supplementary nonstatutory exemption promulgated by the United States Supreme Court.

THE SHERMAN ACT

The Sherman Act (the Act) was passed in 1890 to protect the consuming public from the combinations of business enterprises which had been proliferating in the American economy. The conventional wisdom was that there was a resulting disappearance of business and commercial competition in the market place which was detrimental to the interests of the consuming public. The essence of the legislative attack was contained in the first two sections which proclaimed that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ."[2] Furthermore, "[e]very 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 . . . shall be deemed guilty of a felony."[3]

Jurisdiction to enforce the new law was conferred upon the federal courts and the Attorney General was given the responsi-

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1. 15 U.S.C. §§ 1—7 (1976).
2. *Id.* § 1.
3. *Id.* § 2.

bility of prosecuting violators.[4] Any person injured by a violation was given the right to file a suit for treble damages.[5]

The purpose of the Act was widely recognized and understood. The huge industrial and commercial enterprises of the day were controlling production and distribution of goods in the market place. Public and private enforcement of the law would restore "competition," and the resultant vying for consumer patronage would compel reductions in costs and prices.

The Sherman Act introduced no new legal concept. "Restraint of trade," condemned in the Act, had been condemned under the common law. The common law, however, provided no affirmative relief.[6] In contrast, the Act supplied criminal enforcement, triple damage relief and injunctive protection.

Whether Congress intended to apply the strictures of the Act to the activities of labor unions is an ongoing controversy. At the Act's inception, the courts were not condemning the existence of labor unions or other collective bargaining activities as "restraints of trade" under common law.[7] However, the primary purpose of the Act—to restrict business combinations which controlled market operations—was not given priority in enforcement for seventeen years. In that period, various federal courts applied the Sherman Act to restrict labor union activities in twelve cases and business activities in only one.[8]

THE *DANBURY HATTERS* CASE

The debate as to whether the Act applied to union activities was definitively resolved in 1908 when the Supreme Court decided the infamous *Danbury Hatters* case.[9] The Court held that union activities were subject to antitrust laws simply because § 1 of the Act provided that " 'every' contract, combination or conspiracy in restraint of trade was illegal."[10] The Court's con-

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4. *Id.* § 4.
5. *Id.* § 15.
6. C. GREGORY, LABOR & THE LAW 204 (1961). "The phrase 'restraint of trade' implied at common law the denial and suppression of freedom of independent and uncontrolled enterprise by contract and combination, and the control of supply and price of commodities through the same means." *Id.* at 205.
7. "It thus appears that the courts, in deciding that Congress intended that the antitrust law should reach labor unions, came to a conclusion which cannot be supported by a careful and thoroughgoing examination of the most substantial evidence available, the Congressional Record." BERMAN, LABOR AND THE SHERMAN ACT 83 (1930); *see also* United Mine Workers v. Pennington, 381 U.S. 657, 701 (1965) (Goldberg, J., dissenting).
8. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 31 (1963).
9. Loewe v. Lawlor, 208 U.S. 274 (1908).
10. *Id.* at 279.

demnation was not confined to the direct obstruction of commerce, but appeared to include the indirect impact on commerce caused by strikes or consumer boycotts.[11] The *Danbury* litigation lasted more than seven years. During that entire period the bank accounts and homes of 248 employees were attached by the trial court. To prevent mass foreclosures, the labor movement rallied behind the Danbury workers and paid the final judgment of $252,130.00 by the contribution of one hour's pay on "Hatters day."[12]

THE CLAYTON ACT STATUTORY EXEMPTION?

Judicial condemnation of the organizational activities of labor was viewed as a serious and unwarranted attack on the very existence of organized labor. In response to the widespread protest, Congress included §§ 6 and 20 in the 1914 Clayton Act.[13]

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11. If the purposes of the combinations were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial. *Id.* at 301.

12. E. LIEBERMAN, UNIONS BEFORE THE BAR 56 (1950).

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

15 U.S.C. § 17 (1976).

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by

These sections provided labor with a statutory exemption from the Sherman Act. Sam Gompers, President of the American Federation of Labor, hailed the Act as a "Magna Carta" for labor. The celebration, however, was short-lived; judicial interpretations soon circumvented the congressional purpose.

In *Duplex Printing Press Co. v. Deering*,[14] the Supreme Court dealt with a secondary boycott as though Congress had not legislatively overruled *Loewe v. Lawlor* (the *Danbury Hatters* case). The *Duplex* controversy involved an unsuccessful machinists' strike to organize a company plant. The union carried on a national boycott of company products, intensified by threats of secondary strikes against uncooperative customers and shippers. The Court, in enjoining the union action, held that § 6 did not confer immunity "where (unions) depart from normal and legitimate objects,"[15] *e.g.*, secondary boycotts. Section 20 was held to be applicable only to controversies between employers and their own employees.

The *Duplex* decision sent shock waves throughout the labor community, inasmuch as the Court had established itself as the sole dictator as to which union objectives were "normal and legitimate," thus usurping the legislative role of Congress. Moreover, it became obvious that the Court had inaugurated an era of "government by injunction."[16] This was because § 16 of the Clayton Act granted employers private injunctive relief which had not been available prior to the adoption of the Clayton Act.[17]

Through subsequent case law, the Court distilled various factors which might be considered in deciding whether union action constituted a "restraint of trade" in violation of the Sherman Act. The two *Coronado* decisions[18] present an anomaly: two nearly identical fact patterns resulted in contradictory decisions on the issue of whether a Sherman Act violation had occurred.

Coronado I considered the retaliatory activities of miners who had been locked out by the company in a campaign to repudiate the union contract and operate nonunion. The Court

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any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1976).

14. 254 U.S. 443 (1921).

15. *Id.* at 469.

16. B. King & J.L. Smith, *Labor Relations and Antitrust: Developments After* Connell, 3 INDUS. REL. L.J. 608 (1979).

17. 15 U.S.C. § 26 (1976).

18. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922) [hereinafter cited as *Coronado I*]; Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) [hereinafter cited as *Coronado II*].

found no evidence of any intent to obstruct interstate commerce. Even though the union action prevented company coal from being transported in commerce, it was not deemed a *direct* "restraint of trade." The Court distinguished *Danbury Hatters*.[19]

The retrial of *Coronado I* (*Coronado II*) resulted in an essentially unchanged factual record, except that new evidence was introduced to show that the company's nonunion operation was a direct threat to wages and working conditions. Therefore, it was no longer a "local" controversy, because the union's objective was to "stop the production of nonunion coal and prevent its shipment, . . . 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 . . . ."[20] The Court held this to be a direct restraint.[21]

The *Coronado* doctrine was another setback for labor. The case did not involve a secondary boycott as did *Danbury Hatters*.[22] The "illegal" purpose or intent in *Coronado II* was to protect union wages and working conditions from the unfair competition of nonunion operations. Even in *Coronado I* it was held that union conduct would be unlawful if the union intended to protect its economic standards by keeping an anti-union product out of the interstate commercial market.[23]

It is fair to say that in all of the cases decided during this period, "restraint of trade" was invoked as a judicial excuse to circumscribe and limit the labor union activities which the courts found improper or excessive. In fact, union activities condemned as improper or excessive could not necessarily be deemed restraints. Thus, the bias against the growth and expansion of the labor movement persisted despite the clear mandate of the Clayton Act.[24]

The Arrival of the Labor Exemption Under the Norris-LaGuardia Act

In 1932, Congress responded to the cumulative protests

19. 259 U.S. at 409.

20. 268 U.S. at 310.

21. The intent of those unlawfully affecting the supply of goods entering and moving in interstate commerce was held to be determinative of a direct violation of the Sherman Act. *Id.* at 310.

22. *See supra* notes 9-11. *See also* Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn., 274 U.S. 37 (1927) (like *Danbury Hatters*, involving a secondary boycott).

23. 259 U.S. at 410-11.

24. *See* 15 U.S.C. § 17 (1976).

against "government by injunction"[25] by enacting the Norris-LaGuardia Act.[26] Congress intended to overrule the earlier decisions of the Supreme Court which had so persistently ignored the Clayton Act.[27] The purpose of the Norris-LaGuardia Act was to reassert the legislative mandate of the Clayton Act. The frustrations experienced under the Clayton Act did not, however, disappear immediately after 1932. The first manifestation of a change did not come until 1940 when the Supreme Court decided *Apex Hosiery Co. v. Leader*.[28]

The *Apex* controversy developed within the social and economic context of the New Deal. The National Industrial Recovery Act of 1933[29] and the National Labor Relations Act of 1935[30] stimulated an upsurge in labor organizing. New unions were established and the C.I.O. was founded as a rival to the A.F. of L. Sit-down strikes evinced the new militancy in the labor movement of the country. By April of 1937, the American Federation of Hosiery Workers had organized most of the full-fashioned hosiery plants in Philadelphia, with the exception of Apex Manufacturing Co., which employed 2500 workers. William Leader, President of Local 706, requested a meeting with the company to negotiate a collective bargaining agreement and demanded a closed shop.[31] A large group of workers were assembled in front of the plant, and when the company rejected the union request, Leader declared a sit-down strike in the plant. Windows were subsequently broken and doors were battered down; the plant and offices were occupied by the strikers. Food and cots were brought in and the strikers remained in the plant for six weeks.[32]

The district court entered judgment against Leader and the local union for triple damages when the strike was found to be a conspiracy in violation of § 1 of the Sherman Act.[33] The district court, however, was reversed by the court of appeals.[34] The Supreme Court, in an opinion written by Justice Stone, affirmed the circuit court.[35]

25. *See supra* note 16 and accompanying text.
26. 29 U.S.C. §§ 101—115 (1976).
27. *See supra* note 13.
28. 310 U.S. 469 (1940).
29. 1 U.S.C. § 113(d) (1976).
30. 29 U.S.C. §§ 151—168 (1976).
31. The closed shop was not statutorily banned until 1947 with the passage of the Taft-Hartley Act, 29 U.S.C. § 157 (1976).
32. E. LIEBERMAN, *supra* note 12, at 227.
33. Apex Hosiery Co. v. Leader, 20 F. Supp. 138 (E.D. Penn. 1937).
34. 108 F.2d 71 (3rd Cir. 1939), *aff'd*, 310 U.S. 469 (1940).
35. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

The Court held that the sit-down strike did "restrict substantially the interstate transportation of its manufactured product"[36] and that the defendants did intend to prevent the company's shipments in interstate commerce. However, the Act "was not aimed at policing interstate transportation."[37] On the basis of an historical survey of what constituted a "restraint of trade" at common law and in previous court decisions, Justice Stone held that there was no antitrust violation because the union had not been motivated by the intent to restrain competition in the company's product; rather, "its object was to compel petitioner to accede to the union demands."[38] Acknowledging that strikes may incidentally restrict the power of an employer to compete in the market, the Court found that such incidental restrictions are not within the purview of the Act.[39]

In holding that the evidence showed only an "indirect" restraint and not the kind of restraint which the Act prohibits, the Court recognized the need for a "new dispensation" in the social and economic ferment of the period. Yet, Justice Stone did not (as did the Court only a year later when it decided *United States v. Hutcheson*[40]) inaugurate a new chapter in the history of labor under the Sherman Act. Justice Stone, in 1940, provided no recognition of the exemption of labor from antitrust law mandated by the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, or the National Labor Relations Act of 1935. He did not acknowledge *any* "exemption." None of the earlier decisions were overruled. They were distinguished on grounds which can be understood only as a means of removing Sherman Act coverage from simple strikes, if not from boycott activities.[41]

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36. *Id.* at 484.
37. *Id.* at 490.
38. *Id.* at 501.
39. [S]uccessful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & Co.* v. *Morris*, [289 U.S. 103]; cf. *American Steel Foundries Case*, supra, 257 U.S. 209; *National Ass'n of Window Glass Manufacturers* v. *United States*, 263 U.S. 403.

Id. at 503-04.

40. 312 U.S. 219 (1941).
41. The Court noted that it had *never* applied the Sherman Act to labor activities unless some form of restraint upon competition in the marketing of goods and services was involved. Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). Stone nonetheless found it necessary to state that Congress

Apex was hailed as an important advance in liberating labor from the confines of the Sherman Act. Clearly, it was an immediate victory for the union which was released from the lower court judgment of $711,732.55. Although *Apex* established a broadened tolerance for direct strike activities, it did not specifically recognize the exemption mandated by Congress in the Clayton Act and reemphasized in the Norris-LaGuardia Act.[42] However, Justice Stone specified that the Sherman Act would continue to apply to union activities which restrained "commercial competition."[43] Such judicial doctrine contradicted the congressional objectives of the Clayton Act and the Norris-LaGuardia Act in that it "exempted" traditional instruments of organization, but collective bargaining remained subject to the Sherman Act.

Supreme Court acknowledgement of the restrictive impact of the Norris-LaGuardia Act on the Sherman Act came shortly after *Apex* in *Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Products Inc.*[44] The controversy developed when dairy employees engaged in retail home delivery of dairy products encountered the competition of vendors who purchased milk from dairies and sold it wholesale to stores. The stores in turn sold the milk to retail customers at a price lower than dairy driver employees could charge their home customers. During the Depression, the vendors' share of the market increased substantially because of the reduced unit price. Local 753, representing the dairy employees, sought to eliminate vendor competition by organizing the vendors. Unsuccessful in its attempt to organize the vendors, the union picketed the "cut-rate" stores that were purchasing vendor milk, claiming unfairness to the union local. Violence ensued and windows were broken. The vendors organized a rival C.I.O. local union, and the controversy remained unsettled. The vendors and their dairy suppliers filed a complaint to enjoin the picketing and related activities on the ground that the conduct of the union and its officers violated the Sherman Act in that the controversy was not a labor dispute within the Norris-LaGuardia Act. Rather, the dairy employees were participating in an unlawful secondary boycott aimed at obtaining a "monopoly at a high price level."

"never intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. . . ." *Id.* at 487-89.

42. 29 U.S.C. §§ 101—115 (1976).

43. 310 U.S. at 495. *See also* B. MELTZER, LABOR LAW, CASES, MATERIALS AND PROBLEMS 496 (1st ed. 1970).

44. 311 U.S. 91 (1940).

The court of appeals, citing *Duplex*, ruled that the district court had jurisdiction to grant an injunction, even though the case involved a labor dispute, because the picketing constituted a secondary boycott in violation of the Sherman Act.[45] Justice Black, writing for the majority of the Supreme Court, rejected that concept and held that the Norris-LaGuardia Act deprived federal courts of jurisdiction to grant injunctions in cases growing out of labor disputes. Jurisdiction did not arise "merely because alleged violations of the Sherman Act are involved."[46] It was thus in *Lake Valley Farms* that the Supreme Court finally recognized the congressional purpose of the Norris-LaGuardia Act: to underscore and revitalize the Clayton Act restrictions *re* injunction proceedings in labor disputes.[47]

The effect of the Norris-LaGuardia Act in criminal prosecutions under the Sherman Act finally came before the Supreme Court in *United States v. Hutcheson*[48] where the Court considered the lawfulness of a union's secondary boycott and picketing in a dispute over work jurisdiction. The Anheuser-Busch Co. and a lessee company contracted to build an additional facility and a new building respectively. Each company employed a separate contractor. Anheuser-Busch assigned the work on both projects to the machinists, contrary to the demands of the carpenters. The carpenters rejected arbitration, struck both companies and the contractors, and carried on a consumer boycott of Anheuser-Busch beer. These activities constituted the basis of the indictment charging a criminal conspiracy in violation of the Sherman Act.

Justice Frankfurter invoked the Norris-LaGuardia Act in finding that the acts alleged in the indictment were made lawful by the Clayton Act.[49] His opinion explained the statutory exemption mandated by Congress:

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45. 108 F.2d 436 (7th Cir. 1939).

46. 311 U.S. at 103.

47. The Norris-LaGuardia Act passed in 1932, is the culmination of a bitter political, social and economic controversy extending over half a century. Hostility to 'government by injunction' had become the rallying slogan of many and varied groups. Indeed, as early as 1914 Congress had responded to a widespread public demand that the Sherman Act be amended, and had passed the Clayton Act, 38 Stat. 730, itself designed to limit the jurisdiction of federal courts to issue injunctions in cases involving labor disputes. But the proponents of the Norris-LaGuardia Act felt that the jurisdictional limitations of the Clayton Act had been largely nullified by judicial decision. Thus, the Senate Judiciary Committee, reporting the Norris-LaGuardia Act, said: 'That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion.'

Id. at 102.

48. 312 U.S. 219 (1941).

49. The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provi-

> It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.[50]

Thus, the conduct charged against the defendants was protected union activity under § 20 of the Clayton Act. Defining the statutory exemption, Frankfurter continued:

> Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct. . . . *So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.*[51]

In *Apex*, Justice Stone expressed a judicial predisposition to enlarge the area of permissible union activity under the Sherman Act, but deliberately, without resort to the statutes. In *Hutcheson*, Stone wrote a remarkable concurring opinion in which he contended that his thesis in *Apex* supported the *Hutcheson* decision and eliminated the need to rely upon the Norris-LaGuardia Act or a definitive labor exemption.

Although the Court construed the labor exemption broadly in *Hutcheson*, its definition contained an important qualification; *viz.*, the union may not "combine with non-labor groups."[52] That qualification was fully litigated in *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*[53] *Allen Bradley* involved a suit for an injunction filed by a group of manufacturers located outside of New York City. The plaintiffs contended that their products had been excluded from sale in Manhattan by a conspiracy among various companies, contractors, and the union in violation of the

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> sion. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, 38 Stat. L. 738, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rep. No. 669, 72d Congress, 1st Sess, p. 3.

Id. at 235-36 *citing* H.R. REP. No. 669, 72d Cong., 1st Sess. 3 (1931).

50. 312 U.S. at 236-37.

51. *Id.* at 231-32 (emphasis added).

52. *Id.* at 235.

53. 325 U.S. 797 (1945).

Sherman Act.[54] The union's participation in this complicated arrangement was concededly motivated by self-interest, as it sought to increase union membership and wages and to expand employment opportunities for its members.[55] In furtherance of this goal, the union waged aggressive campaigns for closed shop agreements, using conventional labor union methods, such as strikes and boycotts in the city area, and obliging contractors to purchase equipment only from local manufacturers who also had closed shop agreements with the Local.[56]

Justice Black applied the *Hutcheson* test to find the union guilty of a Sherman Act violation. The issue was framed as whether "labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they [aid] and [abet] businessmen to do the precise things which the Act prohibits."[57] In ruling against the union, the Court stated that "had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act."[58]

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54. The facts of *Allen Bradley* are summarized as follows:

> Local 3 of the IBEW, having jurisdiction only over metropolitan New York City, organized the employees of most of the electrical equipment manufacturers and contractors in the area. Under the collective agreements, the contractors agreed to buy electrical equipment only from manufacturers in contractual relations with Local 3, i.e. those in New York City, while the manufacturer agreed to sell only to those area contractors who employed members of Local 3. The Union, through the usual weapons of picketing and boycotts, prevented nonunion operations. Sheltered from competition, the Court found that the manufacturers were able to raise their prices, while the contractors, with the union's blessing and participation, could rig bids. The result, as determined by the Court, was higher wages and shorter hours for Local 3's members, greater profits for the manufacturers and contractors, exclusion for outsiders and monopolistic prices for the public.

Winter, *supra* note 8, at 45.

55. 325 U.S. at 799.

56. *Id.*

57. *Id.* at 801.

58. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co. v. Leader*, *supra*, 310 U.S. 503 . . . . But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

Id. at 809.

The statutory exemption explained and withheld by Justice Black in *Allen Bradley* was applied the same day by Justice Jackson in *Hunt v. Crumboch*.[59] The *Hunt* controversy arose out of a strike called by the Teamsters' Union against the A & P Company and various trucking companies hauling merchandise for A & P. The union sought a closed shop agreement.[60] Hunt, a hauling contractor for A & P, rejected unionization and attempted to operate during the strike. One of the union men was killed, and a Hunt partner was tried for the murder and acquitted. The strike was settled with an agreement in which all contract haulers for A & P, including Hunt, were to be subject to the closed shop provision. The union refused to negotiate with Hunt or to accept its employees as members. Accordingly, A & P cancelled its contract with Hunt. Hunt was unable to obtain any further hauling contracts in Philadelphia. The Court held that although the "destruction" of Hunt's business resulted from the fact that union members, in concert, had rejected employment or association with it, no conspiracy, within the meaning of the Sherman Act, had occurred;[61] there was no combination with nonlabor or business entities, as in *Allen Bradley*. Citing *Apex* and *Hutcheson*, the Court rejected the vigorous dissent filed by four justices.[62]

Significantly, although the Court spoke of the union workers acting "alone," the union objective was accomplished through an agreement with the employer. Thus, in *Hunt*, the labor exemption survived a collective bargaining setting. The exemption remained applicable, as in *Allen Bradley*, even though the union had become the instrumentality for business monopoly, price fixing, or the like. This treatment of the exemption foreshadowed the development of the nonstatutory exemption in later cases.[63]

JUDICIAL ARTICULATION OF THE LABOR EXEMPTION— THE *PENNINGTON* AND *JEWEL* DECISIONS

After 1945, the labor exemption remained unaltered by

59. 325 U.S. 821 (1945), *reh'g denied*, 326 U.S. 803 (1945).

60. *See supra* note 31.

61. 325 U.S. at 824.

62. The Court stated that there was "[an] absolute right of employees to work or cease working according to their own judgements. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." *Id.* at 825.

63. Under the *Connell* doctrine (discussed *infra* at pp. 607-10), *Hunt* would be considered in connection with the more restricted nonstatutory exemption.

Supreme Court action for twenty years.[64] However, in the post-war world, labor came under attack from various quarters. The antagonistic response to the growth of the labor movement and the expansive developments in collective bargaining programs became increasingly virulent. Anti-labor forces succeeded in their efforts to curtail the allowable area of labor union activities. The Taft-Hartley Act of 1947[65] and the Landrum-Griffin Law of 1959[66] outlawed the closed shop, imposed unfair labor practice restrictions, subjected unions to NLRB injunctions, and effected innumerable restrictions on union activities, not the least of which was the ban on secondary boycotts. It was in this changed regulatory context that the labor bar awaited the 1965[67] decisions of the Supreme Court in *United Mine Workers of America v. Pennington*,[68] and *Amalgamated Meat Cutters and Butcher Workmen of North America Local 189 v. Jewel Tea Co.*[69]

In *Pennington*, trustees of the union welfare fund sued the Phillips Tool Co. for royalty payments due under the company's agreement with the union. Phillips filed a counterclaim contending that the union and the trustees had conspired with large name companies in violation of the Sherman Act by entering into agreements imposing prescribed wage scales on all other companies regardless of size. Phillips alleged that the union had the unlawful purpose of forcing small companies out of business. The union agreed to refrain from opposing mechanization and any resulting reduction in the work force. The employers agreed to refrain from doing business with any coal companies which did not have UMWA contracts with the same wage provisions. The higher wages under the agreements would be vouchsafed as the large companies gained control of the market and raised productivity through mechanization.[70]

Justice White's opinion, supported by Chief Justice Warren and Justice Brennan, rejected the union's claim that under the facts before the court the union was exempt from the Sherman

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64. A new area of explication developed in Local 24 I.B. of T. v. Oliver, 358 U.S. 283 (1959), concerning the role of independent contractors in labor relations. This area is examined separately beginning on p. 612 *infra*.

65. 29 U.S.C. §§ 141-44 (1976).

66. 29 U.S.C. §§ 151, 158-59 (1976).

67. In the intervening period, the Court applied its *Allen Bradley* doctrine when it decided United States v. Employing Plasterers Assoc., 347 U.S. 186 (1954), and United States v. Employing Lathers Assoc., 347 U.S. 198 (1954). In both cases, the Court found that the union had entered into combinations with contractors in the area to suppress competition, to keep out-of-state contractors out, to bar the entry of new contractors, and to prescribe conditions under which contractors could do business in the area.

68. 381 U.S. 657 (1965).

69. 381 U.S. 676 (1965).

70. 381 U.S. at 660.

Act.[71] Zeroing in on the illegal phase of the union's conduct, White first spelled out the allowable area of the union's conduct under the Sherman Act. Citing the Clayton and Norris-LaGuardia Acts, he agreed that the antitrust laws do not bar the existence and operation of labor unions. "Agreements between the union and employers in a multi-employer bargaining unit" were similarly allowable.[72] Under such agreements, a union may, "beyond question . . . as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers."[73]

An agreement such as the one in *Pennington*, however, whereby the union agrees to impose the wage scales of the agreement on any agreement with other employers outside the bargaining unit, is not exempt. The key ruling was as follows:

> But we think an union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.[74]

Justice White explained that the "salient characteristic" of the agreement being scrutinized by the Court was "that the union surrenders its freedom of action with respect to its bargaining policy" *vis á vis* other employers. As a result, the union bound itself to serve the interest "of the favored employer,"[75] which, in this case, was a "competitive interest rather than an interest in regulating its own labor relations."[76] Thus, the gravamen of the Court's ruling was that the union forfeited its labor exemption when it became an instrumentality of the "favored employer" by seeking the elimination of competition in the marketplace. The labor exemption is forfeited "without regard to

71. Three separate opinions concurred in the result, but only on a jury instruction issue. *Id.* at 674.

72. 381 U.S. at 665.

73. The Court stated:

> [W]ages lies at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. * * * The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to prescribe.

Id. at 664 *quoting* Apex Hosiery v. Leader, 310 U.S. 469, 503-04 (1940).

74. 381 U.S. at 665-66.

75. *Id.* at 668.

76. *Id.* at 667.

predatory intention or effect in the particular case."[77] This would indicate the possibility that the Court regarded the union's conduct as a *per se* violation. Indeed, the concurring opinion by Justice Douglas so found.[78]

Justice Goldberg's dissent rejected the majority thesis, and asserted that the union had simply pursued "a philosophy of achieving uniform high wages, fringe benefits, and good working conditions" in return for accepting the "burdens and consequences of automation."[79] Goldberg's point was that the provisions of the agreement were mandatory subjects of collective bargaining under the National Labor Relations Act, and, therefore, to be fully protected in accordance with congressional policy.[80] He also invoked § 6 of the Clayton Act and the *Apex* rationale that "the antitrust laws do not prohibit the elimination of price competition based on differences in labor standards," finding that here the agreement was a restraint of competition in wage standards only.[81] At any rate, labor lawyers in the post-*Pennington* period would agree that the "union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation . . . without being straitjacketed by some prior agreement. . . ."[82]

The agreement examined in *Amalgamated Meat Cutters and Butcher Workmen of North America Local 184 v. Jewel Tea Co.*[83] arose out of negotiations between representatives of 9,000 Chicago meat retailers and the union which represented virtually all Chicago butchers. The union rejected proposals by the employers to remove prior contract restrictions on the sale of meat in the stores before 9 a.m. and after 6 p.m. All employers, except Jewel Tea Company and National Tea Company, agreed to retain the provision.[84] The union took a strike authorization vote, after which Jewel agreed to union demands. Jewel then sued the union and the Association of Food Retailers, alleging a conspiracy in violation of the Sherman Act. The case reached

77. *Id.* at 668. The Court remanded *Pennington* because of an erroneous jury instruction in the district court trial. On remand, the terms of the agreement were reevaluated, and, despite Justice White's dictum, the district court found that the provisions did not justify any inference that the union was a participant in a antitrust conspiracy, inasmuch as the court could not find a "predatory intent." Lewis v. Pennington, 257 F. Supp. 815 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968).

78. 381 U.S. at 672-73 (Douglas, J., concurring).

79. *Id.* at 698 (Goldberg, J., dissenting).

80. *Id.* at 723.

81. *Id.*

82. *Id.* at 666.

83. 381 U.S. 676 (1965).

84. Jewel contended that its self-service facilities made the restriction on sales after 6 p.m. unreasonable. 381 U.S. at 682.

the Supreme Court after a trial court ruling that no Sherman Act violation had occurred,[85] was reversed by the court of appeals.[86] In the appellate court's opinion, the evidence established an "unreasonable restraint of trade"; the hour limitation was a proprietary function, and consequently, outside the labor exemption.[87]

The Supreme Court held that the market hour restriction was well within the realm of wages, hours, and other terms and conditions of employment "about which employers and unions must bargain."[88] The Court observed that "this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[89] Justice White, applying the two-step *Hutcheson* test, declared first that no union-employer conspiracy could be found in the face of the district court's finding that there was no conspiracy. As to the second test, the self-interest of the union's activities, he wrote:

> Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.[90]

In this connection, the key finding of the district court, accepted by Justice White, was that during store marketing hours, the presence of butchers was essential.[91] Thus, the limitation on store hours was a limitation on working hours. White reasoned that if these limits did not pertain to hours, they would not be *per se* exempt, and the questions to be determined by a trial court would be whether there was a conspiracy in restraint of commercial trade and, if so, whether it was "unreasonable."

The major caveat in *Jewel* is the Court's formulation of a balancing test to determine a "grant" of labor exemption. Although acknowledging the NLRB determination of mandatory subjects of bargaining, the Court did not accept the Goldberg thesis that the exemption applies to all such bargaining, but, as noted, imposed the requirement that the agreement provisions be "intimately related" to wages, hours, and working conditions.

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85. 215 F. Supp. 837 (N.D. Ill. 1963).
86. Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, 331 F.2d 547 (7th Cir. 1964).
87. *Id.* at 549.
88. 381 U.S. at 691.
89. *Id.* at 689.
90. *Id.* at 689-90 (footnote omitted).
91. *Id.* at 694-97.

The fair inference is that if the provisions in an agreement are not so construed by the trial court, the labor exemption may well be barred.

THE BIFUCATION OF THE LABOR EXEMPTION— THE *CONNELL* DECISION

In both *Pennington* and *Jewel*, the Court split three ways. No opinion was decisive; no reliable or precise guidance as to the application or extent of the labor exemption was provided. In 1975, the Court was afforded an opportunity to resolve its doctrinal schism and effectuate a national labor policy *vis á vis* the antitrust law when it decided *Connell Construction Co. v. Plumbers and Steamfitters Local 100.*[92]

Connell Construction Company was a general contractor that subcontracted all of its plumbing and mechanical work on a competitive bidding basis. Local 100 represented the plumbing and mechanical tradesmen pursuant to a contract with the area contractors' association. The Local did not represent any of Connell's employees, nor did it seek to, when it asked Connell to enter into an agreement to subcontract all of its mechanical work only to companies which signed a current contract with Local 100. Connell refused, and the local union posted a picket at one of the company's large construction sites. Members of various craft unions, refusing to break the picket line, left work. The Company filed an action in Texas state court seeking to enjoin the alleged violation of state antitrust laws. Local 100 removed the case to federal court, after which Connell signed the agreement under protest and amended its complaint to charge a violation of §§ 1 and 2 of the Sherman Act.[93]

The district court held that the agreement governing subcontracting was exempt from antitrust restrictions because it was authorized under the Building Trades proviso to § 8(e) of the National Labor Relations Act.[94] The court of appeals held that there was no conspiracy involved and that because the union's conduct was pursuant to a lawful purpose, it was exempt.[95]

The five to four decision of the Supreme Court, written by Justice Powell, held that Local 100 could not invoke the labor

92. 421 U.S. 616 (1975).

93. *Id.* at 619-21.

94. 29 U.S.C. § 158(e) (1959) reads: "That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . ."

95. 483 F.2d 1154 (5th Cir. 1973).

exemption to shield its conduct from an antitrust charge. In developing the Court's rationale, Justice Powell divided the labor exemption into two separate classifications: statutory and nonstatutory. The explication deserves study:

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. [Citation omitted]. They do not exempt concerted action or agreements between unions and nonlabor parties. [Citation omitted]. The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. [Citation omitted].
>
> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. [Citations omitted]. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, [citation omitted], the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market [citations omitted].[96]

The newly established dual classification provided a basis for limiting the scope of the labor exemption. In the context of the new dichotomy, the *Connell* Court withheld the nonstatutory exemption from the union because the agreement "imposed direct restraints on competition among subcontractors that would not have resulted from elimination of competition based on differences in wages and working conditions."[97] The Court's conclusion first points to the impact of the "most favored nation" clause in the multi-employer agreement which Connell signed.[98] The Court conjectured that this provided a shelter for the union

96. Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. at 621-23.

97. *Id.* at 617.

98. *Id.* at 623.

contractors against the competition of nonunion contractors "even on subjects unrelated to wages, hours, and working conditions."[99] Since the union obtained arbitrary power under the agreement, it could create a monopoly for its unionized contractors by refusing to accept agreements from Connell's contractors, thereby excluding them from the market and preventing them from competing for available work.[100]

However, it was not the magnitude of the restraint which caused the union's exemption to be withheld. The Court specifically held that, absent any conspiracy, the union's goal was simply to organize as many subcontractors as possible. If this legitimate goal was accomplished under a "lawful collective-bargaining agreement," the antitrust exemption would apply.[101]

In *Connell*, the union engaged in illegal means to accomplish its goal. The legality of the goal did not immunize the illegality of the union's methods. Central to the Court's decision was the finding that the union did not represent or seek to represent Connell's employees.[102] Thus, the agreement was not a "collective bargaining" agreement which the Court could consider in balancing the federal policy in favor of collective bargaining against the market competition restraints prohibited under the Sherman Act.[103]

A considerable portion of the Court's opinion deals with the union's contention that its agreement was "explicitly allowed by the construction industry proviso to § 8(e) and that antitrust policy therefore must defer to the NLRA,"[104] as had been decided by the court of appeals. The Court rejected the contention. First, it held that federal courts may decide labor law questions that emerge as collateral issues in suits brought under antitrust laws.[105] Then it concluded that the union's agreement was not protected under § 8(e) because it was outside of the context of collective bargaining. The Court ruled: "Congress did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors."[106] Finally, the Court held that the NLRA does not provide the exclusive remedy for violations of § 8(e), a view which met with vigorous dissent from Justice

99. *Id.* at 624.
100. *Id.* at 624-25.
101. *Id.* at 625-26.
102. *Id.* at 626.
103. *Id.*
104. 29 U.S.C. § 158(e) (1959).
105. 421 U.S. at 626.
106. *Id.* at 627-28.

Stewart.[107] The majority ruled: "There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA."[108]

One issue of importance to labor interests was decided almost offhandedly by the Court in favor of labor. After deciding that the union's activities were nonexempt, the Court ruled that future court proceedings were necessary to determine whether the agreement illegally restrained trade within the meaning of the Sherman Act.[109] The Court thus rejected the *per se* rule and established a precedent of considerable significance. Loss of the labor exemption, following *Connell*, does not result in an automatic finding of a Sherman Act violation; a rule of reason must be applied. *Connell* thus resolved a crucial issue raised in *Apex*, and left unresolved in *Pennington* and *Jewel*.

LABOR'S EXEMPTION IN THE AFTERMATH OF *CONNELL*

The Identity of the Separate Branches of the Labor Exemption

Since *Connell*, federal courts have dealt with alleged antitrust law violations in a wide variety of contexts. In all cases, however, the court has found it necessary to first determine which of the two separate labor exemptions are applicable in the given fact situation. In view of the disparate judicial treatment of the separate statutory and nonstatutory labor exemptions, the initial judicial classification is, or course, crucial. A unique chart which appears in a faculty article published by the *Seton Hall Law Review*[110] portrays the criteria for application of the statutory and non-statutory exemptions:

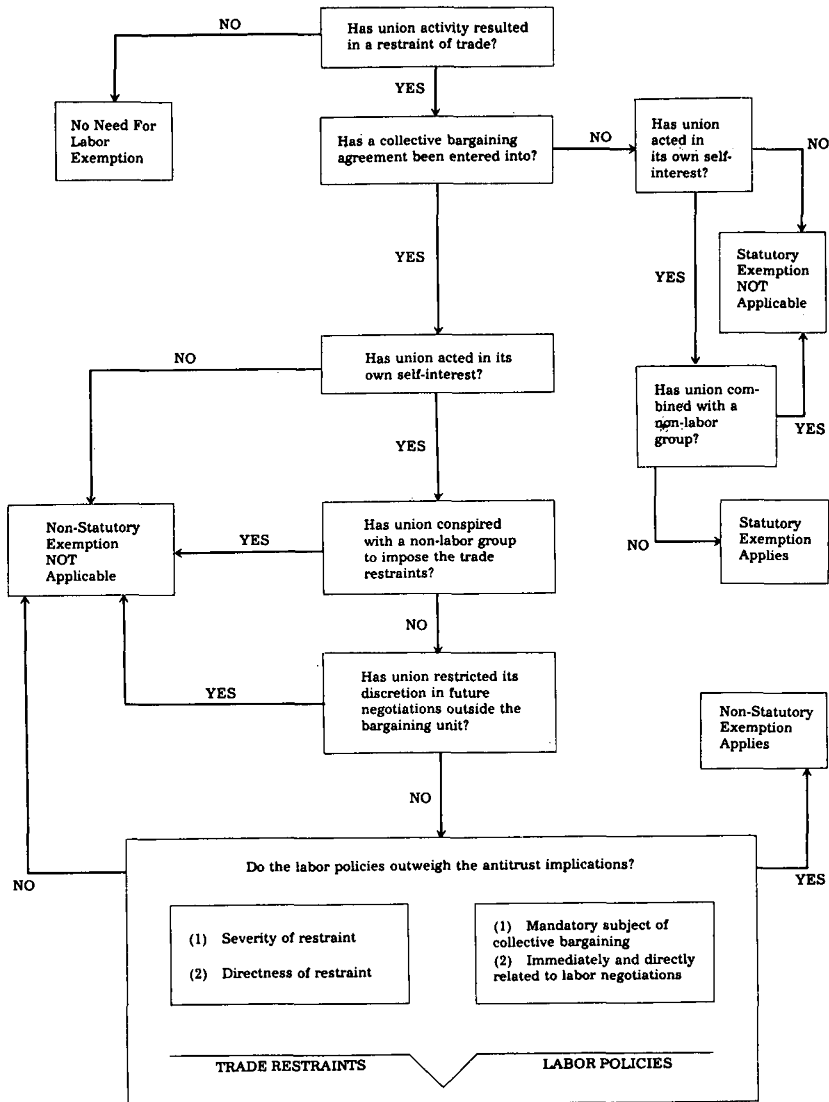
107. 421 U.S. at 638 (Stewart J., dissenting).

108. 421 U.S. at 634 (footnote omitted).

109. *Id.* at 637.

110. MANN, POWERS & ROBERTS, *The Accomodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 9 SETON HALL L. REV. 744, 755 (1978).

THE LABOR EXEMPTION



The Survival of the Statutory Exemption

Connell did not signal any change in the availability or scope of the statutory exemption delineated in *Hutcheson*. This was confirmed in May 1981, when the Supreme Court decided *H.A. Artists Associates v. Actors' Equity Associates*.[111] Justice Stewart wrote the opinion which underscored the continuing viability of the statutory exemption. The case concerned the licensing system established by Actors' Equity in 1928 to protect its members in their dealings with agents. The agents were independent contractors (not members of Equity) who obtained employment for Equity members with theatrical producers. The licensing program established a limitation on the commission rates to be paid to the agents. Equity members were forbidden to use any agent not licensed by Equity. Agents were required to pay a moderate franchise fee to Equity. There was a collective bargaining agreement between Equity and the producers, but no formal agreement with the agents.[112] The district court[113] and the court of appeals[114] ruled that the licensing system was within the statutory exemption, inasmuch as there was no combination with a nonlabor group. Justice Stewart affirmed the circuit court and upheld the regulatory scheme.

Stewart's determination that the franchise arrangement with the agents did not constitute a combination between labor and nonlabor groups was key because the statutory exemption does not apply when a union combines with a "non-labor group."[115] The existence of an agreement between Equity and the producers was considered irrelevant to the relationship between Equity and the agents. Determining that the agents constituted a "labor group," the Court sanctioned the franchise arrangement under the statutory exemption.

Justice Stewart relied heavily on the Court's earlier decision in *American Federation of Musicians v. Carroll*[116] in affirming a broad exemption for a combination between a union and independent contractors where the relationship arises out of mutual labor interests. In *Carroll*, members of the musicians' union sued the union, challenging the union's system of regulating "club dates" or single engagements by requiring orchestra

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111. 451 U.S. 704 (1981).

112. *Id.* at 707.

113. H.A. Artists & Associates, Inc. v. Actors' Equity Assoc., 478 F. Supp. 496 (S.D.N.Y. 1979).

114. H.A. Artists & Associates, Inc. v. Actors' Equity Assoc., 622 F.2d 647 (2nd Cir. 1980). On the issue of whether the license fees must be limited to costs incurred by Equity, the Supreme Court remanded.

115. 451 U.S. at 717.

116. 391 U.S. 99 (1968).

leaders to hire a minimum number of musicians, prescribing minimum prices for various engagements, and requiring leaders to deal only with booking agents licensed by the union.[117] The *Carroll* Court held that the orchestra leaders were employers and independent contractors, but, nevertheless, a "labor group" and thus parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act. The *Carroll* test was whether there was a "job or wage competition or some other economic interrelationship affecting legitimate union interests between union members and the independent contractors."[118]

Justice Stewart invoked the *Carroll* analysis even though there was no actual job or wage competition between the union and the booking agents in *H.A. Artists*. Stewart determined that because there was indeed an "economic interrelationship" between the parties, *e.g.*, the union members' dependency on agents for protection from exorbitant agent fees and substandard bookings,[119] the *Carroll* test was met: "As in *Carroll*, Equity's regulations of agents developed in response to abuses by employment agents who occupy a critical role in the relevant labor market. The agent stands directly between union members and jobs, and is in a powerful position to evade the union's negotiated wage structure."[120] Citing *Hutcheson*, the Court held that Equity's regulations "are clearly designed to promote the union's legitimate self-interest."[121] The Court went on to reaffirm its earlier decisions which upheld the right of a union to regulate the practices of independent entrepreneurs if they affect wages or working conditions of union members.[122]

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117. These facts formed the basis of the plaintiffs' charge that the musicians' union was seeking to enforce a closed shop arrangement. 391 U.S. at 105.

118. 391 U.S. at 106.

119. 451 U.S. at 722.

120. *Id.* at 719-20.

121. *Id.* at 721 (citing United States v. Hutcheson, 312 U.S. 219, 232 (1941)).

122. 451 U.S. at 721. Several cases before *Carroll* also upheld the union regulation of the practices of independent entrepreneurs affecting the wages or working conditions of union members. *See* Milk Wagon Drivers' Union v. Lake Valley Co., 311 U.S. 91 (1940); Teamsters Union v. Oliver, 358 U.S. 283 (1959) (*Oliver I*); Teamsters Union v. Oliver, 362 U.S. 605 (1960) (*Oliver II*). In *Milk Wagon Drivers*, the Court held that the union had engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it attempted to organize independent "vendors" who supplied milk to retail stores. There the union feared that the "vendor system" was designed to escape the payment of union wages and the assumption of union-imposed working conditions. In *Oliver I*, the *Milk Wagon Drivers* decision was invoked to protect from state antitrust challenge a union's successful efforts to prescribe through collective-bargaining agreements a wage scale for truck drivers, and minimum rental fees for drivers who owned their own trucks. The union feared that driver-owners, whose fees included not only

The statutory exemption has been withheld in those cases where there was a combination between a union and independent contractors, acting as entrepreneurs, but not promoting any legitimate labor union self-interest as defined in the foregoing case discussion. The key case finding an antitrust law violation under these circumstances was *Los Angeles Meat and Provision Drivers Union, Local 626 v. United States*,[123] where the Court ruled that grease peddlers, who were independent businessmen, were a nonlabor group because:

> There was no showing of actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers and the other members of the union. It was stipulated that no processors had ever substituted peddlers for employee-drivers in acquiring restaurant grease, or had ever threatened to do so. The stipulation made clear that the peddlers and the processors had essentially different sources of supply and different classes of customers. Based on these stipulated facts, the District Court affirmatively found that "there was no competition between [the employee and peddler] groups because each is engaged in a different line of work. . . ."[124]

The Qualification of the Nonstatutory Exemption

In *Connell*, as noted above, the subcontracting agreement with its "favored nation" provision was not accorded a nonstatutory exemption, despite the fact that there was no allegation or showing of any combination or conspiracy between the union and Connell or any of the union contractors who were designated as beneficiaries of the agreement. Notably, the case could be distinguished from *Allen Bradley* or *Pennington* where the Court withheld the labor exemption, because the agreement promoted an illegal combination or conspiracy between the union and nonlabor groups to restrain commercial trade or competition or to establish an illegal monopoly.

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an entrepreneural component but also a "wage" for the labor of driving, might undercut the union scale by charging a fee that effectively included a sub-scale wage component. The Court stated that "[t]he regulations embod[ied] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." 358 U.S. at 294. *See also Oliver II*, 362 U.S. at 606 (after remand to the state court).

123. 371 U.S. 92 (1962).

124. *Id.* at 98. Antitrust liability was also found under similar circumstances in Taylor v. Local No. 7, International Union of Journeymen Horseshoers of the U.S. and Canada, 353 F.2d 593 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966); United States v. Olympia Provision and Baking Co., Inc., 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 480 (1969), *reh'g denied*, 393 U.S. 1124 (1969); United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227 (S.D.N.Y. 1960).

The *Connell* delineation of the nonstatutory exemption prohibits direct restraints on competition even absent indications of conspiracy. *Connell* imposes the additional requirement that a judicial balance be struck between union objectives and any resulting restraint. Of primary importance in this weighing process is the lawfulness of the union's methods as well as the legitimacy of its objectives under the labor laws. The "harmonizing" thesis espoused by Justice Frankfurter in *Hutcheson*,[125] a thesis which would allow legitimate pro-union action so long as nonlabor groups are not involved, is converted into an arguably vague formula for identifying prohibited union conduct.

The *Connell* balancing test of national labor policy and antitrust policy, applied after a union has complied with the requirements of the nonstatutory exemption, provides an uncertain guide to labor. The problem for labor is that this test leaves too much room in the adjudication process for the personal, social, economic or political viewpoints of judges or juries.[126] Indeed, the legitimacy of this concern is immediately apparent in comparing the Court's contrasting treatment of traditional labor objectives and interests in *Connell* and *Jewel*. In *Jewel*, Justice White's opinion contained a comprehensive treatment of the labor interests which were to be protected from antitrust attack. No similar treatment appears in *Connell*, other than a perfunctory statement that the union's goal of organizing was legal;[127] a goal which the Court refused to sanction on the premise that the union was not seeking to organize Connell's own employees, and, therefore, was engaging in "noncollective bargaining" activities.[128]

Perhaps the greatest cause for concern by the labor community arises out of the *Connell* Court's introduction of the new "means" test in determining the availability of the nonstatutory exemption. It has been noted by various commentators that the

125. A typical district court interpretation was recorded in Adams Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403 (D.C. Cal. 1976):

> The nonstatutory exemption applies to a labor-nonlabor combination if the controversy is 'intimately related to wages, hours and working conditions' (Local 819, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965)) and does not have 'a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions' (Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 635 (1975)) . . . .

411 F. Supp. at 411.

126. Justice Goldberg verbalized this fear in *Jewel*: "Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under the cover of the antitrust laws." 381 U.S. at 716.

127. 421 U.S. at 625.

128. *Id.* at 626.

objectives of the union and the means utilized to achieve these objectives are to be first judged under labor standards without, however, according exclusive jurisdiction to the NLRB.[129] The contention that the NLRB does not have exclusive jurisdiction over NLRA violations, and that such violations may be remedied in antitrust lawsuits, is profoundly disturbing. However, a closer analysis of the *Connell* opinion indicates a limitation in that only the union's violation of § 8(e) was not remediable exclusively under NLRB procedures.[130]

It is to be carefully noted that the nonexclusivity determination of the Court is specifically limited to the 1959 amendments of the Landrum-Griffin Act. The Court did not rule out the exclusive application of the entire complex of remedies provided in the Taft-Hartley Act.[131] What may be beyond cavil is that the majority opinion, which rejected Justice Stewart's dissent as to the exclusive character of "labor law remedies for § 8(e) violations,"[132] did not respond to Stewart's authoritative explanation that the 1947 Taft-Hartley Amendments established exclusive jurisdiction in the remedies for violations of unfair labor practices, including § 8(b)(4).[133] Justice Stewart wrote:

> The House-Senate Conferees and then both Houses of Congress agreed to regulate union secondary activity by making specified activity an unfair labor practice under § 8(b)(4) of the National Labor Relations Act authorizing the Board to seek injunctions

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129. *See, e.g.*, Moeller, *Employer Rights and Antitrust Liability: Organized Labor's Exemption After* Connell, 48 MISS. L.J. 713, 730 (1977).

130. "There is no legislative history in the 1959 Congress suggesting that labor remedies of § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA." 421 U.S. at 634.

131. "But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by § 8(b)(4), it has no relevance to the question whether Congress meant to preclude antitrust suits based on 'hot cargo' agreements that it outlawed in 1959." *Id.* at 634.

132. *Id.*

133. In *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904 (1976), Prof. Douglas Leslie states:

> *Connell* strongly suggests that labor must look to the nonstatutory exemption for protection of its vital interests against antitrust attack, and that the Court is prepared in the appropriate case to hold that the comprehensive scheme of the NLRA does not preclude antitrust liability for conduct violating section 8(b)(4).

Id. at 920. However, he notes that "such a holding would be disturbing," *id.* at 920 n.69, inasmuch as secondary boycott conduct would eliminate the non-statutory exemption and subject the union to an antitrust suit. In view of the treble damage award, in antitrust cases, the Section 303 remedy would be little used and would be reduced to "but little purpose." But "it is not likely that Congress intended the remedy under Section 303 to play such a supplementary role." *Id.* (This writer suggests that Professor Leslie's comments would not apply in statutory exemption cases.)

> against such activity, 29 U.S.C. § 160(1), and providing for recovery of actual damages in a suit by a private party under Senator Taft's compromise proposal, which became § 303 of the Labor Management Relations Act, 29 U.S.C. § 178. Congress in 1947 did not prohibit all secondary activity by labor unions, [citation omitted]; and *those practices which it did outlaw were to be remedied only by seeking relief from the Board or by pursuing the newly created, exclusive federal damages remedy provided by § 303* [citation omitted].[134]

This is a significant area for consideration by labor advocates involved in litigation where NLRA violations other than under § 8(e) are involved.

Although *Connell* has effectively reduced the range of labor activities protected under the nonstatutory exemption, courts have allowed the exemption where unions have engaged in normal organizational and collective bargaining activities, even though the pursuit of their objectives may have resulted in economic loss to affected employers. A post-*Connell* case in point is *California Dump Truck Owners Assoc. v. Associated General Contractors*.[135] Teamster Local 36 entered into a master labor agreement with three contractor associations in which it was provided that dump truck owner-operators would not be hired by any contractor unless they obtained "clearance" from the union, by presenting themselves to show proof of ownership of the trucks and by showing that they maintained the wage scales in the master agreement. The dump truck owners sued under the Sherman Act. The Court held that the union was entitled to the nonstatutory exemption described in *Connell*, on the ground that here, unlike *Connell*, there was no "favored nation" provision, and the only restrictions on the dump truck owners did not include union affiliation.[136] The agreement, negotiated in a traditional collective bargaining context, did not preclude the hiring of independent owner-operators.[137] The decision applies the basic *Connell* and *Jewel* criteria for application of the nonstatutory exemption in that: (1) the union employed the agreement in furtherance of the union's self-interest; (2) there was no "favored nation clause" whereby the union limited its options in bargaining outside the current unit; (3) there was no combination with nonlabor agencies to directly restrain market operations (the sole objective here was to protect union wage levels); and (4) on the facts, labor policy considerations clearly outweighed any antitrust interests.[138]

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134. 421 U.S. at 645-46 (emphasis added).
135. 562 F.2d 607 (9th Cir. 1977).
136. *Id.* at 613.
137. *Id.*
138. *Id.*

A more complex fact situation won a nonstatutory exemption in *Berman Enterprises v. Local 333 International Longshoremen*.[139] The antitrust issues arose out of the union's efforts to compel Berman to accept an agreement which had been negotiated with the Marine Towing and Transportation Employers Association, of which General Marine Company was a member and Berman Enterprises was not. Both of the latter companies were commonly owned and there was a mutual interchange of employees. When Berman refused to accept the manning requirements of the union agreement, the union demanded that all association members refuse to tow any barge without a two-man crew. Berman sued under the Sherman Act and § 303 of the NLRA, contending that he had been illegally excluded as a competitor and that the contract demand was a non-mandatory bargaining subject.[140]

The court held that the two companies constituted a single employer, and that "for the purposes of application of the antitrust exemption it was a legitimate union objective to protect employees against shifts of work days designed to avoid the standards and wages established in the collective bargaining agreement."[141] On the basis of the merits, the court held that "the true purposes behind the clauses were job preservation, maintenance of working conditions, and safety, none of which is competitive in nature."[142] The latter finding also justified the dismissal of the § 8(b)(4) charge. Job preservation, maintenance of working conditions, and safety remain judicially approved union objectives under the antitrust laws, as well as in NLRA litigation, regardless of the resulting impact on the economic interests of employers.[143]

CONCLUSION

There is widespread agreement that *Connell* has provided inadequate guidelines in an area of law where definitive guidelines are sorely needed. As Professor Milton Handler, commenting on post-*Pennington* changes, has written: "I do perceive how

139. 644 F.2d 930 (2nd Cir. 1980).

140. *Id.* at 932.

141. *Id.* at 936.

142. *Id.* at 937.

143. *Cf.* California Dump Truck Owners v. Associated General Contractors, 562 F.2d 607 (7th Cir. 1977); Cannon v. Teamsters Local 627, 108 LRRM 2288 (7th Cir. 1981) (agreement between union and liquor distributors exempt under antitrust law because restricted delivery schedule constituted a condition of employment for the drivers, despite resultant loss of deliveries to 15 liquor dealers within proscribed area).

they compound the confusions and uncertainties with which this murky field abounds."[144]

A review of the court decisions that have applied antitrust law to the activities of labor unions inspires the title of this article. In 1914, Congress established a broad labor exemption which subsequently was fully buttressed in 1932 in a clear congressional mandate. In 1982, that mandate has been substantially modified by judicial "interpretation" (including the nonstatutory exemption), so that the area of labor's exemption from the strictures of antitrust law is somewhat less than that intended by Congress.

144. M. Handler, *Changing Trends in Antitrust Doctrines*, 77 COLUM. L. REV. 979, 1025 (1977).