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# LABOR UNIONS AND THE SHERMAN ACT: RETHINKING LABOR'S NONSTATUTORY EXEMPTION

## I. INTRODUCTION

To what extent should labor unions be subjected to the proscriptions of the Sherman Act?<sup>1</sup> This question has generated much confusion and controversy amongst the legal community. It has been the subject of heated debate since the Sherman Act was passed in 1890.<sup>2</sup> After almost one hundred years, however, courts have done very little to clarify the confusion. The problem is two-fold. First, the antitrust laws<sup>3</sup> and the national labor laws<sup>4</sup> embody two important, but at times conflicting,<sup>5</sup> congressional declarations of public policy. On the one hand, the antitrust laws strive to create and maintain a freely competitive commercial environment.<sup>6</sup> On the other hand, the national labor laws seek to improve employment conditions by eliminating competition in the labor market over wages, hours and working conditions.<sup>7</sup> This conflict creates

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1. 15 U.S.C. §§ 1-7 (1982). At the present time, labor unions enjoy two exemptions from the Sherman Act: a statutory and nonstatutory exemption. See *infra* notes 216-473 and accompanying text for a discussion of these exemptions.

2. See 6 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 48.02, at 4 (1988).

3. The antitrust laws include the Sherman Antitrust Act, §§ 1-7 (1890) (current version codified at 15 U.S.C. §§ 1-7 (1982)) and the Clayton Act, §§ 1-8, 10-16, 20, 26 (1914) (current version codified at 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982)). References to the "antitrust laws" throughout this Comment are meant to include both the Sherman Act and the Clayton Act.

4. The national labor laws consist, in part, of the following: Norris-LaGuardia Anti-Injunction Act, §§ 1-15 (1932) (current version codified at 29 U.S.C. §§ 101-115 (1982)); National Labor Relations (Wagner) Act, §§ 1-19 (1935) (current version codified at 29 U.S.C. §§ 151-169 (1982)); Labor Management Relations (Taft-Hartley) Act of 1947 (current version codified at 29 U.S.C. §§ 141-197 (1982)); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

5. The United States Supreme Court recognized this conflict in *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 806 (1945), see *infra* note 269. See also *Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F. Supp. 1024, 1036 (D.N.J. 1977) ("It is a commonplace that the antitrust laws and the labor laws are antithetical. The antitrust laws are designed to promote competition; the unions are in the business of limiting it."), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).

6. See 6 J. VON KALINOWSKI, *supra* note 2, § 48.03[1], at 29. See generally 1 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES 93-112 (1949).

7. See *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 714 (1965) (Goldberg, J., dissenting in part and concurring in part).

confusion for labor unions in determining how far they can go, under the national labor laws, before they run afoul of the antitrust laws.

The second problem arises from the United States Supreme Court's decision to recognize two distinct exemptions from the Sherman Act for labor unions. These two exemptions are known as labor's statutory<sup>8</sup> and nonstatutory<sup>9</sup> exemptions. The statutory exemption applies only to controversies arising out of unilateral union activities.<sup>10</sup> The nonstatutory exemption applies only to controversies arising from the terms or the enforcement of union-employer agreements.<sup>11</sup> The Supreme Court's decision to bifurcate labor's exemption from the Sherman Act is inconsistent with both Congress' intent and the Court's own precedent.

At the outset, this Comment explores Congress' intent in passing the Sherman Act. More specifically, the Author focuses on whether the Sherman Act was meant to apply to labor unions, and discusses how courts' initially applied the Sherman Act to labor unions. The Comment then traces the period between 1914 and 1940. During that period, Congress passed several major pieces of legislation aimed at halting courts' continued application of the Sherman Act to labor unions. Next, the Comment analyzes in depth the present analytical framework for labor-antitrust cases, focusing primarily on the Supreme Court's decisions that created a nonstatutory exemption in the context of union-employer agreements. Finally, the Author proposes a new analytical framework from which courts might better analyze labor-antitrust problems.

## II. HISTORICAL BACKGROUND OF THE SHERMAN ACT

### A. *Historical Climate*

A proper analysis of the labor-antitrust problem necessitates a brief historical overview of the period leading up to the passage of the Sherman Act in 1890.<sup>12</sup> Prior to the Civil War, the distribution of economic

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8. For a discussion of the statutory exemption see *infra* notes 224-89 and accompanying text.

9. For a discussion of the nonstatutory exemption see *infra* notes 290-403 and accompanying text.

10. See *infra* note 254. For a discussion of the statutory exemption see *infra* notes 224-89 and accompanying text.

11. See *infra* note 255. For a discussion of the nonstatutory exemption see *infra* notes 290-403 and accompanying text.

12. For a more detailed discussion of the social and economic conditions leading to the passage of the Sherman Act see Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1, 9-13 (1983). See also 1 J. VON KALINOWSKI, *supra* note 2, § 2.02, at 12-43; A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 23-27 (1960); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

power in the United States was never considered a major public problem.<sup>13</sup> However, the period between the Civil War and 1890 saw unprecedented economic expansion in the United States.<sup>14</sup> Moreover, during this period of enormous economic growth, trusts<sup>15</sup> and pools<sup>16</sup> flourished in the United States.<sup>17</sup> Those who controlled these entities substituted combinations for competition in an effort to control the economic power of the nation.<sup>18</sup> These powerful trusts and pools proved highly successful, dominating the economic and political life of America.<sup>19</sup>

However, by the end of the nineteenth century, public opinion sharply turned against these trusts and pools.<sup>20</sup> The public viewed the entities as powerful and ruthless,<sup>21</sup> squeezing life out of the small, independent businessperson.<sup>22</sup> President Grover Cleveland, in his last annual message, graphically depicted the evils inflicted by these trusts and pools.<sup>23</sup> While applauding America's tremendous economic growth in its first one hundred years, President Cleveland warned:

As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.<sup>24</sup>

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13. See H. THORELLI, *supra* note 12, at 160.

14. *Id.* at 63-66, 160; see also 1 J. VON KALINOWSKI, *supra* note 2, § 2.02[2], at 12.

15. Trusts were the most widely used business organization in the latter part of the nineteenth century. See 1 J. VON KALINOWSKI, *supra* note 2, § 2.02[2][b], at 19. Trusts are characterized by two or more corporations which, by agreement, secure control over the businesses of all trust members. *Id.* For a more detailed discussion of trusts see *id.* at 19-22.

16. A pool is defined as a combination of persons or corporations whose object is to eliminate competition between the pool members. See 1 J. VON KALINOWSKI, *supra* note 2, 2.02[2][a], at 17. Pools were extensively used in the latter part of the nineteenth century. *Id.* For a more detailed discussion of pools see *id.* at 17-19.

17. See H. THORELLI, *supra* note 12, at 161.

18. *Id.* See also *id.* at 85-96 for examples of the anticompetitive practices in the railroad and oil industries.

19. *Id.* at 161.

20. See Letwin, *supra* note 12, at 222 ("In the years immediately before the Sherman Act, . . . there were few who doubted that the public hated the trusts fervently."); see also 1 J. VON KALINOWSKI, *supra* note 2, § 2.02[3][a], at 23-24.

21. See 1 J. VON KALINOWSKI, *supra* note 2, § 2.02[3][a], at 23. These powerful trusts and pools constantly engaged in practices injurious to the public. Such practices included the arbitrary raising of prices, lowering wages, and controlling the supply of basic commodities. See Hoffmann, *supra* note 12, at 10; see also Limbaugh, *Historic Origins of Anti-trust Legislation*, 18 MO. L. REV. 215, 236-38 (1953).

22. See 1 J. VON KALINOWSKI, *supra* note 2, § 2.02[3][a], at 23.

23. See *infra* note 24 and accompanying text.

24. Fourth Annual Message of President Grover Cleveland (Dec. 3, 1888), *reprinted in* 1

Thus, by the end of the nineteenth century legislative action was clearly needed to restrain these powerful entities and to restore free competition in the commercial market place.

### B. *Legislative History of the Sherman Act*

Against this backdrop, Senator John Sherman of Ohio introduced an antitrust bill before the fifty-first Congress on December 4, 1889.<sup>25</sup> It was entitled "A BILL to declare unlawful trusts and combinations in restraint of trade and production."<sup>26</sup> According to Senator Sherman, the bill's purpose was to outlaw those combinations that existed solely to destroy competition in the commercial market place.<sup>27</sup> In addition, Sen-

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E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 57-58* (1978); see also H. THORELLI, *supra* note 12, at 157. In fact, during the 1888 Presidential campaign both major parties adopted antitrust platforms. See H. THORELLI, *supra* note 12, at 151. The Republican party adopted the following resolution: "We declare our opposition to all combinations of capital, organized in trusts . . . to control arbitrarily the condition of trade among our citizens; and we recommend to Congress . . . such legislation as will prevent the execution of all schemes to oppress the people . . ." *Id.* The Democratic platform declared, "the interests of the people are betrayed when . . . trusts and combinations are permitted to exist, which, while mainly unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition." *Id.*

One year later, newly elected President Benjamin Harrison referred to the powerful trusts as "dangerous conspiracies against the public good, [which] should be made the subject of prohibitory and even penal legislation." First Annual Message of President Benjamin Harrison (Dec. 3, 1889), reprinted in 1 E. KINTNER, *supra*, at 60; see also H. THORELLI, *supra* note 12, at 159.

25. S. 1, 51st Cong., 1st Sess. (1889), reprinted in 1 E. KINTNER, *supra* note 24, at 89-90. Actually there were several antitrust bills introduced before the fiftieth Congress. In fact, the bill introduced by Senator Sherman in 1889 was identical to a bill he had introduced the previous year. See 1 E. KINTNER, *supra* note 24, at 16, 89 n.1.264.

26. See 1 E. KINTNER, *supra* note 24, at 89. Section 1 of Senator Sherman's original bill stated in pertinent part:

That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, . . . and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

*Id.*; see also S. 1, 51st Cong., 1st Sess. (March 18, 1890), reprinted in 1 E. KINTNER, *supra* note 24, at 112-13 (amended version of the December 4, 1889 proposal).

27. See generally 21 CONG. REC. 2457 (1890), reprinted in 1 E. KINTNER, *supra* note 24, at 115-18. Senator Sherman made it clear that the purpose of his bill was not "to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." *Id.* (emphasis added), reprinted in 1 E. KINTNER, *supra* note 24, at 116. Senator Sherman explained that his bill was aimed at combinations characterized by a desire to "control the market, raise or lower

ator Sherman expressly declared that the bill was not intended to proscribe legitimate labor union activities.<sup>28</sup>

From March 21 through March 27, 1890, the Senate, sitting as a Committee of the Whole, vehemently debated Senator Sherman's anti-trust proposal.<sup>29</sup> During these debates, several Senators expressed concern that Senator Sherman's proposal, if adopted, might be used to outlaw labor unions.<sup>30</sup> Those Senators focused primarily on the language contained in Senator Sherman's bill that specifically denounced conduct that tended to raise consumer prices.<sup>31</sup> Since many legitimate union activities, such as obtaining wage increases for union members, resulted in higher consumer prices, presumably such union activities would be prohibited under Senator Sherman's bill.<sup>32</sup> To alleviate these concerns, Senator Sherman reassured the Committee that a labor union seeking a wage increase for its members would not be affected by the bill.<sup>33</sup> However, many Senators remained unconvinced prompting Senator Sherman to propose an amendment to his bill.<sup>34</sup> In effect, the amendment expressly

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prices, as will best promote [their] selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist." *Id.*, reprinted in 1 E. KINTNER, *supra* note 24, at 117; see also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940).

28. See *supra* note 27.

29. 21 CONG. REC. 2455-74 (March 21, 1890), 2556-72 (March 24, 1890), 2597-616 (March 25, 1890), 2639-62 (March 26, 1890), and 2723-31 (March 27, 1890), reprinted in 1 E. KINTNER, *supra* note 24, at 113-274. See also Roberts, *Reconciling Federal Labor and Anti-trust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 45-46 (1986).

30. Those who expressed concern included Senators Hoar, Hiscock, Stewart, Teller and George. See Roberts, *supra* note 29, at 46. Summing up these concerns, Senator Teller stated:

While I am extremely anxious to take hold of and control these great trusts, these combinations of capital which are disturbing the commerce of the country and are disturbing legitimate trade, I do not want to go to the extent of interfering with organizations which I think are absolutely justifiable . . . .

I believe [this bill] will interfere with [labor unions]. . . . [W]e can not deny to the laborers of the country the opportunity to combine either for the purpose of putting up the price of their labor or securing to themselves a better position in the world . . . .

21 CONG. REC. 2561 (1890), reprinted in 1 E. KINTNER, *supra* note 24, at 160.

31. See *supra* note 26 for the contents of Senator Sherman's bill.

32. See Hoffmann, *supra* note 12, at 16 n.69.

33. 21 CONG. REC. 2562 (1890), reprinted in 1 E. KINTNER, *supra* note 24, at 162. Senator Sherman stated, "combinations of workmen to promote their interests, promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill . . ." *Id.*

34. 21 CONG. REC. 2611-12 (1890), reprinted in 1 E. KINTNER, *supra* note 24, at 205-08. Senator Sherman's amendment provided in pertinent part: "Provided, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number or hours of their labor or of increasing their wages

exempted labor unions from the bill's proscriptions.<sup>35</sup>

The Committee of the Whole, without a roll call, adopted Senator Sherman's amendment.<sup>36</sup> The original bill and all adopted amendments were then sent to the Judiciary Committee for reworking.<sup>37</sup> While in the Judiciary Committee, Senator Sherman's bill was dropped, and an entirely new bill was drafted.<sup>38</sup> Whereas Senator Sherman's bill focused on conduct that tended to raise consumer prices, the Judiciary Committee's bill focused on conduct that restrained trade.<sup>39</sup> Although the Judiciary Committee's bill did not contain Senator Sherman's proposed labor exemption, the Senate passed it on April 8, 1890.<sup>40</sup> On June 20, 1890, the House of Representatives passed the Judiciary Committee's bill without making any substantial changes.<sup>41</sup> Newly elected President Benjamin Harrison signed the Sherman Antitrust Act<sup>42</sup> into law on July 2, 1890.<sup>43</sup>

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. . . ." *Id.* Subsequent to Sherman's proposed amendment, Senator N.W. Aldrich of Rhode Island offered his own additional amendment:

*Provided further*, That this act shall not be construed to apply to or to declare unlawful combinations or associations made with a view or which tend, by means other than by a reduction of the wages of labor, to lessen the cost of production or reduce the price of any of the necessaries of life, nor to the combinations or associations made with a view or which tend to increase the earnings of persons engaged in any useful employment.

*Id.* at 2654-55 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 245.

35. See *supra* note 34 for the text of the proposed Sherman amendment.

36. 21 CONG. REC. 2612 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 206. The Committee also adopted other amendments including one proposed by Senator N.W. Aldrich of Rhode Island. *Id.* at 2654-55 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 245. See *supra* note 34 for the text of the proposed Aldrich amendment. See also 21 CONG. REC. 2727 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 265-66 (Senator Edmunds' remarks indicating his strong opposition to the labor exemption amendments).

37. 21 CONG. REC. 2731 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 274.

38. *Id.* at 2901 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 278-79.

39. See Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1289 (1939).

40. 21 CONG. REC. 3153 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 275-77, 294. Interestingly, four of the eight members of the Judiciary Committee had earlier supported an exemption from the Sherman Act for labor unions. Thus, presumably since these same members supported the final bill, they must have believed the final bill exempted legitimate labor union activities. The four supporters were Senators Hoar, Wilson, Coke and George. See *id.* at 2613-16, 2658, 2728 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 208-13, 250-52, 268-70.

41. *Id.* at 6312-14 (1890), *reprinted in* 1 E. KINTNER, *supra* note 24, at 359-63.

42. Although the Sherman Act bears Senator Sherman's name, there has been considerable debate on who really authored the final version as reported by the Judiciary Committee. See Boudin, *supra* note 39, at 1288-93; Hoffmann, *supra* note 12, at 17 n.73; see also H. THORELLI, *supra* note 12, at 210-14.

43. Act of July 2, 1890, 26 Stat. 209, *reprinted in* 1 E. KINTNER, *supra* note 24, at 51-52 (current version codified at 15 U.S.C. §§ 1-7 (1982) (hereinafter the Sherman Act)); see also 1 E. KINTNER, *supra* note 24, at 366. Section 1 of the Sherman Act originally stated:

Every contract, combination in the form of trust or otherwise, or conspiracy, in re-

1. Was the Sherman Act meant to apply to labor unions?

The legislative history surrounding the Sherman Act reveals one thing unequivocally—Congress intended to curtail the blatant anticompetitive activities of the powerful trusts and pools.<sup>44</sup> However, the Sherman Act's application to labor unions was less clear. In 1910, Samuel Gompers, President of the American Federation of Labor, wrote: “[w]e know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again.”<sup>45</sup> Thus, for labor leaders the answer was clear—Congress had not intended the Sherman Act to curtail legitimate union activities.

However, the Sherman Act, in its final version, did not contain an express labor exemption.<sup>46</sup> This factor suggests Congress may have in-

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straint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sherman Antitrust Act § 1, Ch. 647, 26 Stat. 209 (1890), reprinted in 1 E. KINTNER, *supra* note 24, at 51. The Sherman Act has undergone several changes since it was originally enacted in 1890. For instance, the fine for a violation was increased from \$5,000 to \$50,000 in 1955. Act of July 7, 1955, Ch. 281, 69 Stat. 282. In 1974, the fine was raised to \$1,000,000 for corporations and \$100,000 for individuals. Act of December 21, 1974, Pub. L. 93-528, 88 Stat. 1706. The 1974 Act also elevated criminal violations to felony status, carrying a maximum prison term of three years. *Id.* Parties who are successful in claims brought under the Sherman Act are entitled to treble damages and reasonable attorney's fees. See section 4 of the Clayton Act, 15 U.S.C. § 15 (1982).

44. See E. BERMAN, *LABOR AND THE SHERMAN ACT* 3 (1930); A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 16 (3d ed. 1980); M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *TRADE REGULATION* 15 (2d ed. 1983).

In *Apex Hosiery*, 310 U.S. at 492-93, the Court stated:

[The Sherman Act] was enacted in the era of “trusts” and of “combinations” of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers . . . .

See also *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 n.7 (1959) (“the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives.”).

45. See E. BERMAN, *supra* note 44, at 5. Commissioner Lennon of the United States Commission of Industrial Relations further wrote in 1916, “I had the pleasure of interviewing Sen. Sherman and Sen. Plumb and a large number of gentlemen in the Senate at the time [of the Sherman Act], and they did not look upon it [as applying to labor unions].” *Id.*

46. See *supra* note 40 and accompanying text.



tended the Sherman Act to apply to labor unions.<sup>47</sup> A careful reading of the legislative history, however, suggests that Congress, although not wholly exempting labor unions,<sup>48</sup> never intended the Sherman Act to proscribe labor unions pursuing legitimate goals.<sup>49</sup> Several strong arguments support this proposition.<sup>50</sup>

*a. lack of criticism*

When the final bill was reported out of the Judiciary Committee,<sup>51</sup> it was extensively debated in the Senate.<sup>52</sup> None of these debates, however, concerned the bill's applicability to labor unions.<sup>53</sup> This was significant, because in the earlier debates over Senator Sherman's bill, many Senators expressed concern over the bill's applicability to legitimate labor union activities.<sup>54</sup> However, none of those Senators, who earlier expressed concern over Senator Sherman's bill, criticized the Judiciary Committee's bill as proscribing such activities.<sup>55</sup> In fact, Senators George, Hoar, Stewart and Teller, all of whom supported the express labor exemption

47. The legislative history does not indicate why the labor exemption was dropped in the Judiciary Committee. This has led to confusion and speculation over whether Congress meant to include labor unions within the Sherman Act. For an argument that Congress did intend to include labor unions within the Sherman Act's proscriptions, see 63 CONG. REC. 13908 (1914), reprinted in 2 E. KINTNER, *supra* note 24, at 1837-40 (remarks of Senator Atlee Pomerene of Ohio).

48. It is clear that a union that conspires with non-labor groups in an effort to directly restrain the commercial market violates the Sherman Act. See *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 808 (1945) ("we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."); see also *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962); *United States v. Brims*, 272 U.S. 549 (1926); 6 J. VON KALINOWSKI, *supra* note 2, § 48.02, at 23 & n.27.

49. As one commentator has noted:

The most reasonable interpretation of the legislative history is that a political compromise was reached in the Judiciary Committee. . . . Senator Teller, a supporter of an express labor exemption, had stated his opposition to union "methods" that were "beyond what was legitimate and proper." Only if unions used then "lawful means" would they be outside the scope of the Act. Thus, the senators apparently drafted a bill intended to outlaw direct interference with any product market but not proscribing activities that tended only to restrain competition in the labor market.

Roberts, *supra* note 29, at 51; see also *infra* note 75.

50. See generally E. BERMAN, *supra* note 44, for an excellent discussion concerning the applicability of the Sherman Act to labor unions. See also *supra* note 44 and accompanying text; *infra* note 75 and accompanying text.

51. See *supra* notes 37-43 and accompanying text.

52. See E. BERMAN, *supra* note 44, at 37-38.

53. *Id.*

54. See *supra* notes 29-35 and accompanying text.

55. See E. BERMAN, *supra* note 44, at 38.

attached to Senator Sherman's bill,<sup>56</sup> voted in favor of the Judiciary Committee's bill.<sup>57</sup> Moreover, Senator Sherman, who clearly supported an exemption for legitimate labor union activities,<sup>58</sup> also voted in favor of the Judiciary Committee's bill, without ever questioning its applicability to labor unions.<sup>59</sup>

Thus, the fact that those pro-labor Senators voted for the Judiciary Committee's bill, without ever debating its applicability to labor unions, suggests they must have believed the bill, as drafted, would not have prohibited legitimate labor union activities.<sup>60</sup> Had those Senators entertained the slightest doubt as to whether the bill applied to labor unions, presumably they would have raised an objection. The absence of any objection strongly suggests that the Judiciary Committee's bill was not intended to proscribe legitimate labor union activities.<sup>61</sup>

*b. express language*

Senator Sherman's proposal, to which the express labor exemption was attached, specifically denounced conduct that tended to raise consumer prices.<sup>62</sup> Since legitimate union activities, such as obtaining wage increases for union members, resulted in higher consumer prices, many Senators believed that Senator Sherman's proposal would prohibit such union activities.<sup>63</sup> Hence, an express labor exemption became necessary.<sup>64</sup> However, the Judiciary Committee's bill, which ultimately be-

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56. See *supra* note 30.

57. See E. BERMAN, *supra* note 44, at 38. Furthermore, the Judiciary Committee, which drafted the final bill, included several pro-labor Senators. See *supra* note 40. Presumably, those pro-labor Senators would not have supported the bill had they believed the bill would prohibit legitimate labor union activities. The fact that those Senators supported the Judiciary Committee's bill, without objection, indicated that the bill was not meant to apply to legitimate labor union activities.

58. See *supra* note 27 and accompanying text.

59. See E. BERMAN, *supra* note 44, at 38.

60. Any other result would mean that those Senators, who earlier had defended labor's rights during the course of the debates over Senator Sherman's proposal, completely abandoned their support for labor in the debates over the Judiciary Committee's bill. Such a result is not supported by the record. See E. BERMAN, *supra* note 44, at 38-39.

61. This argument is particularly compelling in light of the scope of the proposed labor exemption. The labor exemption also included an express exemption for farmers' organizations. Therefore, if the defeat of this exemption meant the inclusion of both these organizations, then farmers' organizations would be subjected to the Sherman Act. However, as one commentator has pointed out, "[c]ertainly no one would contend that the Congress which adopted the Sherman Act intended to include farmers' organizations within its purview." Boudin, *supra* note 39, at 1285 n.5.

62. See E. BERMAN, *supra* note 44, at 51.

63. See *supra* notes 30-35 and accompanying text.

64. See *supra* notes 30-36 and accompanying text.

came the Sherman Act, did not expressly prohibit conduct that tended to raise consumer prices.<sup>65</sup> Instead, the Judiciary Committee's bill focused on conduct that restrained trade.<sup>66</sup> Presumably, the need for an express labor exemption became unnecessary.<sup>67</sup>

The absence of a labor exemption within the express terms of the Sherman Act was not indicative of Congress' intent to restrict legitimate labor union activities. Rather, an express labor exemption was no longer necessary in light of the express language of the Judiciary Committee's bill. To suggest that Congress abandoned its desire to exempt legitimate labor union activities under the Sherman Act when the labor exemption was dropped in the Judiciary Committee would be wrong. The desire remained. However, because of the marked difference in language between Senator Sherman's bill and the Judiciary Committee's bill, an express labor exemption was no longer required to fulfill Congress' desires. Simply stated, Congress no longer believed that the Sherman Act, as drafted by the Judiciary Committee, could be interpreted as to prohibit legitimate labor union activities.

*c. subsequent legislative history*

The legislative history surrounding the passage of the Clayton Act in 1914<sup>68</sup> provides further support for the proposition that Congress never intended the Sherman Act to proscribe legitimate labor union activities.<sup>69</sup> During the debates over the Clayton Act, many Senators expressed their disbelief that the Sherman Act was used to restrain legitimate labor union activities.<sup>70</sup> For example, Representative Martin Madden of Illinois noted:

When the Sherman antitrust law was passed in the Senate it was *clearly and unequivocally stated that its provisions would*

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65. See *supra* note 39 and accompanying text.

66. *Id.*

67. This is a very plausible argument. After all, it was the prohibition on increased consumer prices, the gravamen of Senator Sherman's bill, that raised the concerns of many senators that the bill would be applied to restrict legitimate labor union activities. See *supra* notes 30-35 and accompanying text. Since the Judiciary Committee's bill did not condemn conduct which tended to raise consumer prices, the need for an express labor exemption became unnecessary.

68. 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982). See *infra* notes 99-131 and accompanying text.

69. See *infra* notes 70-72 and accompanying text.

70. See, e.g., Report of the House Comm. on the Judiciary, H.R. Rep. No. 627, 63d Cong., 2d Sess. 14-16 (1914), reprinted in 2 E. KINTNER, *supra* note 24, at 1095-97; 51 CONG. REC. 9086-87 (1914), reprinted in 2 E. KINTNER, *supra* note 24, at 1221-22; see also *infra* notes 71-72.

*not cover [labor unions].* But history shows that the victories won under [the Sherman Act] have been the suits against labor organizations, while great trusts and monopolies have grown and flourished.<sup>71</sup>

Moreover, Senator William Thompson of Kansas stated:

It was never intended that [labor unions] should be included within the terms of the Sherman Antitrust Act, and it was a source of great surprise to the country when some of the courts took a different view. The [Sherman Act] was originally designed to cover industrial combinations, as is clearly demonstrated by a review of the various speeches made in 1890, at the time of the passage of the act.<sup>72</sup>

Hence, the legislative history surrounding the passage of the Sherman and Clayton Acts suggests that Congress never intended that the Sherman Act restrain legitimate labor union activities. Rather, the Sherman Act was a product of an era in which giant trusts and combinations of business and of capital were organized in an effort to control the commercial market by suppression of competition.<sup>73</sup> Congress passed the Sherman Act specifically to confront those anticompetitive practices.<sup>74</sup>

### C. *Early Judicial Interpretations of the Sherman Act*

Although doubt existed that Congress intended to apply the Sherman Act to legitimate labor union activities,<sup>75</sup> early twentieth century federal courts nevertheless subjected labor unions to the Sherman Act's proscriptions.<sup>76</sup> Courts justified applying the Sherman Act to labor un-

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71. 62 CONG. REC. 9087 (1914) (emphasis added), *reprinted in* 2 E. KINTNER, *supra* note 24, at 1222; *see also infra* notes 72, 75 and accompanying text.

72. 51 CONG. REC. 13,844 (1914), *reprinted in* 2 E. KINTNER, *supra* note 24, at 1791. Furthermore, Representative Webb of North Carolina stated, "[p]ersonally I have never had any idea that the existence and operation of labor organizations, . . . were ever intended to come within the provisions of the antitrust law." *Id.* at 9540, *reprinted in* 2 E. KINTNER, *supra* note 24, at 1509.

73. *See Apex Hosiery*, 310 U.S. at 492-93 & n.15.

74. *Id.* at 493 n.15.

75. *See* E. BERMAN, *supra* note 44, at 51 ("On the basis of the congressional debates [regarding the Sherman Act] . . . no valid evidence can be found in the records of the legislative proceedings that Congress intended the Anti-trust Act to apply to labor organizations."); Boudin, *supra* note 39, at 1285-87 ("the evidence . . . conclusively shows that labor organizations were not intended to be included within the purview of the [Sherman] Act."); *see also* A. MASON, *ORGANIZED LABOR AND THE LAW* 120-31 (1925); Boudin, *The Sherman Act and Labor Disputes: II*, 40 COLUM. L. REV. 14 (1940); Emery, *Labor Organizations and the Sherman Law*, 20 J. POL. ECON. 599 (1912); St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); *supra* notes 44-74 and accompanying text.

76. In fact, courts applied the Sherman Act more frequently to union conduct than to

ions on the grounds that Congress specifically rejected including an express labor exemption within the Sherman Act.<sup>77</sup> Thus, labor activity that arguably interfered with the commercial product market came within the scope of the Sherman Act. For example, in *Loewe v. Lawler*,<sup>78</sup> the United States Supreme Court interpreted section 1<sup>79</sup> of the Sherman Act as applying to the United Hatters of North America (the Union).<sup>80</sup> In *Loewe*, the Union attempted to secure a closed shop agreement<sup>81</sup> with

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business monopolies in the years immediately following the Act's passage. See *United States v. Cassidy*, 67 F. 698 (N.D. Cal. 1895); *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894), *aff'd on other grounds*, 158 U.S. 564 (1895); *In re Grand Jury*, 62 F. 840 (N.D. Cal. 1894); *In re Grand Jury*, 62 F. 834 (S.D. Cal. 1894); *In re Grand Jury*, 62 F. 828 (N.D. Ill. 1894); *United States v. Agler*, 62 F. 824 (D. Ind. 1894); *Thomas v. Cincinnati*, 62 F. 803 (S.D. Ohio 1894); *United States v. Elliot*, 62 F. 801 (E.D. Mo. 1894), 64 F. 27 (E.D. Mo. 1894); *Waterhouse v. Comer*, 55 F. 149 (W.D. Ga. 1893); *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (E.D. La.), *aff'd*, 57 F. 85 (5th Cir. 1893). See also E. BERMAN, *supra* note 44, at 3.

The courts' favorite weapon for halting union conduct was the injunction. See 1 T. KHEEL, *LABOR LAW* §§ 2.06-2.07, at 57-111 (1988). See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930).

77. In justifying its application of the Sherman Act to a labor union, the Supreme Court in *Loewe v. Lawler*, 208 U.S. 274 (1908), stated that "[t]he records of Congress show that several efforts were made to exempt, by legislation, organizations of . . . laborers from the operation of the [Sherman Act], and that all these efforts failed . . ." *Id.* at 301. However, Professor Berman suggested that the Court in *Loewe* was misled by counsel for the union and the company:

One cannot leave the discussion of the argument of counsel in the case without calling attention to the failure of the attorneys for the workers to present their case properly. They permitted counsel for the firm to present a misleading account purporting to show that Congress intended that the act should apply to labor; and they made no effective answer to that account. An adequate presentation of the Hatters' case to the Supreme Court might have greatly changed the history of labor cases since 1908.

E. BERMAN, *supra* note 44, at 86; see also Boudin, *supra* note 39, at 1287. This misinformation, combined with the Court's failure to scrutinize the congressional records, may explain why the Court applied the Sherman Act to the union.

78. 208 U.S. 274 (1908). This famous case is known as the Danbury Hatters case. For a further discussion of the Danbury Hatters case, see E. BERMAN, *supra* note 44, at 77-87.

79. Section 1 of the Sherman Act provides:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982). See *supra* note 43 for the original text of section 1 of the Sherman Act.

80. *Loewe*, 208 U.S. at 309. The district court had sustained the Union's contention that its conduct did not violate the Sherman Act. See *Loewe v. Lawlor*, 148 F. 924 (D. Conn. 1906).

81. A closed shop agreement requires an employer to hire only union members and to discharge all non-union employees. As a further condition of continued employment, employees must remain union members. See 8 T. KHEEL, *supra* note 76, § 40.01[1], at 3 n.10. Con-

the Loewe hat factory (the Company) located in Danbury, Connecticut.<sup>82</sup> The Union's efforts failed when the Company refused to open up its factory doors to Union workers.<sup>83</sup> After the Company refused, the Union called a strike at the hat factory and boycotted the Company's goods.<sup>84</sup> In addition, the Union organized a nationwide boycott against the Company.<sup>85</sup>

The Union engaged in these activities in an attempt to gain recognition at the Company's factory.<sup>86</sup> Despite this legitimate goal, however, the Court<sup>87</sup> held that the Union's primary<sup>88</sup> strike and secondary<sup>89</sup> boycott<sup>90</sup> violated the Sherman Act.<sup>91</sup> The Court concluded that the Union, by interfering with the manufacturing and distributing of the Company's hats, sought to restrain trade in interstate commerce—a direct violation of section 1<sup>92</sup> of the Sherman Act.<sup>93</sup> That a union was involved made no

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gress outlawed closed shop agreements in 1947 with the passage of the Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1982); see *infra* note 193 and accompanying text. Congress did, however, allow for modified closed shop agreements in the construction industry. See section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1982).

82. *Loewe*, 208 U.S. at 304-05. For the contents of the Company's complaint, see *id.* at 284 n.1.

83. The Company maintained that it was in its best interest to operate an open factory, and thus declined to unionize. *Id.* at 284 n.1.

84. *Id.* at 307-08.

85. *Id.* at 304-09.

86. *Id.* at 305.

87. Chief Justice Fuller delivered the opinion for the unanimous Court. *Id.* at 283.

88. Union pressure tactics are characterized by the object of the pressure. Union pressure aimed at an employer with whom the union has a labor dispute is primary. Pressure exerted on a neutral or third party employer is secondary. See Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 461 n.8 (1981).

89. See *supra* note 88.

90. A secondary boycott involves a union applying economic pressure upon an employer with whom the union has no labor dispute. This is done to induce that employer to cease doing business with another employer with whom the union has a dispute. See A. COX, D. BOK & R. GORMAN, *LABOR LAW* 617 (10th ed. 1986). Congress outlawed secondary boycotts in 1947 with the passage of the Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1982). See § 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1982).

91. *Loewe*, 208 U.S. at 309.

92. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

93. *Loewe*, 208 U.S. at 300-01. Finding a Sherman Act violation conflicted with the Court's earlier holding in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). In *E.C. Knight*, the Court defined commerce to only include the actual transportation of goods. *Id.* at 13-14. Thus, the manufacturing of goods was not defined as commerce for purposes of the Sherman Act. However, in *Loewe*, the Court expanded *E.C. Knight* to include manufacturing within the definition of commerce for purposes of the Sherman Act. *Loewe*, 208 U.S. at 297-301. The *Loewe* Court justified this expansion of *E.C. Knight* on the grounds that the company's purpose

difference to the Court.<sup>94</sup> The Court reasoned that the Sherman Act applied because Congress had failed to include within the Act a specific labor exemption.<sup>95</sup> The Court stated:

[T]he congressional debates show that the [Sherman Act] had its origin in the evils of massed capital; . . . [however, Congress] made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them.<sup>96</sup>

The *Loewe* case was significant in that it was the first time the Supreme Court had expressly held that the Sherman Act applied to legitimate labor union activities.<sup>97</sup> Even more important than the Supreme Court's *Loewe* decision, however, was that in the period following the passage of the Sherman Act, federal courts routinely applied the Act to circum-

in *E.C. Knight* was not to restrain trade, whereas in *Loewe*, the Court found the Union's purpose was to restrain trade. *Id.*

Moreover, the *Loewe* Court did not concern itself with the fact the Union was pursuing legitimate objectives, that is, attempting to organize employees. Also, the Court failed to link the Union's activity with any attempt to monopolize the commercial market or eliminate competition in the commercial market—the supposed goals of the Sherman Act.

94. *Loewe*, 208 U.S. at 301. The Court unanimously agreed with the Company, who argued:

Congress did not provide that one class in the community could combine to restrain interstate trade and another class could not. It had no respect for persons. It made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal . . . Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade and this refusal is the more significant, as it followed the recognition by the courts that the Sherman Anti-trust law applied to labor organizations.

*Id.* at 279-80 (argument of plaintiff in error); see also *supra* note 77 (Company presented highly misleading account of congressional record to Court).

95. *Loewe*, 208 U.S. at 301; see also *supra* notes 77, 94.

96. *Loewe*, 208 U.S. at 301-02 (quoting *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (E.D. LA.), *aff'd*, 57 F. 85 (5th Cir. 1893)); see *supra* note 77 and accompanying text.

Some commentators have suggested that the early approach courts took in applying the Sherman Act to labor unions was characteristic of courts' early literal construction of the Sherman Act. See, e.g., R. SMITH, L. MERRIFIELD & J. ST. ANTOINE, *LABOR RELATIONS LAW* 595 (6th ed. 1979). However, not all courts applied this literal interpretation. For example, in *United States v. Patterson*, 55 F. 605 (C.D. Mass. 1893), Circuit Judge Putnam refused to apply the Sherman Act to union strike and boycott activity. He did not believe that the Sherman Act covered such union conduct, but rather only applied to monopolists or aggregators of capital. *Id.* at 640-41. However, this case represents an anomaly during this early period. See *supra* note 76 and accompanying text.

97. See E. BERMAN, *supra* note 44, at 80. Actually, prior to the *Loewe* case the Supreme Court affirmed a lower court's issuance of an injunction restraining union activity. However, the Court did not rely on a Sherman Act analysis in its opinion. See *In re Debs*, 158 U.S. 564 (1895), *aff'g*, 64 F. 724 (N.D. Ill. 1894).

scribe labor union activities.<sup>98</sup>

### III. THE PERIOD FROM 1914-1940

#### A. *The Passage of the Clayton Act*

In 1914, congressional efforts to reverse federal courts' application of the Sherman Act to labor unions<sup>99</sup> culminated in the passage of sections 6<sup>100</sup> and 20<sup>101</sup> of the Clayton Act.<sup>102</sup> Specifically, these two sections carved out an express labor exemption from the Sherman Act.<sup>103</sup>

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98. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (Court held that union magazine which printed employer blacklists violated § 1 of Sherman Act); 1 T. KHEEL, *supra* note 76, § 4.02[1][b], at 29-39; see also *supra* note 76.

99. See *supra* notes 70-72 and accompanying text; see also Comment, Connell, *Five Years After: Labor's Antitrust Exemption and the Scope of the Construction Industry Proviso to Section 8(e)*, 29 CATH. U. L. REV. 799, 801 (1980) ("The Sherman Act . . . was probably intended to regulate only monopolistic business practices and commercial restraints on trade, [but] it was soon applied to labor activity . . . [and] . . . [i]n response, Congress passed the Clayton Act's labor exemption.").

100. 15 U.S.C. § 17 (1982). Section 6 of the Clayton Act provides in pertinent part: 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.

*Id.*

101. 29 U.S.C. § 52 (1982). Section 20 of the Clayton Act provides in pertinent part: No . . . injunction shall be granted by any court of the United States . . . 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 . . . .

And no such . . . 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 any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be in violations of any law of the United States.*

*Id.* (emphasis added).

102. In fact, the Clayton Act was the result of more than two decades of congressional efforts to reverse judicial application of the Sherman Act to labor unions. See Hoffmann, *supra* note 12, at 21 n.97. For a further discussion of the Clayton Act see 1 T. KHEEL, *supra* note 76, § 4.02[2]-[3], at 40-61.

103. See 1 T. KHEEL, *supra* note 76, § 4.02[2][a], at 40.



## 1. Sections 6 and 20 of the Clayton Act

Section 6 expressly forbade federal courts from construing the Sherman Act so as to prohibit the existence and operation of labor unions.<sup>104</sup> Furthermore, section 6 prohibited federal courts from construing the Sherman Act so as to prevent union members from carrying out legitimate union objectives.<sup>105</sup> Finally, section 6 declared that no union or its members could be construed as illegal combinations or conspiracies in restraint of trade under the Sherman Act.<sup>106</sup>

Section 20 prohibited federal courts from issuing injunctions "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 [labor] dispute."<sup>107</sup> Under section 20, injunctions could only be issued under very limited circumstances.<sup>108</sup>

In addition to limiting the availability of injunctive relief, section 20 of the Clayton Act legitimized strikes, boycotts, and picketing,<sup>109</sup> expressly exempting those legitimate union activities from the Sherman Act.<sup>110</sup> However, section 20 established limitations on a union's right to claim the exemption. Under section 20, a union had to act in a lawful manner.<sup>111</sup> Thus, the Clayton Act appeared to be a victory for labor.<sup>112</sup> The victory, however, was short-lived.

## 2. Judicial interpretation of the Clayton Act

In *Duplex Printing Press Co. v. Deering*,<sup>113</sup> the Supreme Court grappled with the application of sections 6 and 20 of the Clayton Act to labor unions. In *Duplex Printing*, the International Association of Machinists

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104. 15 U.S.C. § 17 (1982).

105. *Id.*

106. *Id.*

107. 29 U.S.C. § 52 (1982). Section 20 of the Clayton Act defines a "labor dispute" as one involving "terms or conditions of employment." *Id.* It has been commonly assumed that the Clayton Act overruled *Loewe v. Laylor*, 208 U.S. 274 (1908). See Handler & Zifchak, *supra* note 88, at 470 n.60.

108. Injunctions could be issued to "prevent irreparable injury to property, or to a property right . . . for which there is no adequate remedy at law." 29 U.S.C. § 52 (1982).

109. *Id.*

110. *Id.* The last clause in section 20 provides, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." *Id.*

111. *Id.*

112. See *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 804 (1945) ("[The Clayton] Act was broadly proclaimed by many as labor's Magna Carta."); see also, A. MASON, *supra* note 74, at 170 (quoting Samuel Gompers as describing section 6 as "Labor's Magna Charta" and section 20 as "Labor's Bill of Rights.").

113. 254 U.S. 443 (1921).

(the Union), composed of employees working for various New York newspaper publishers, organized a boycott.<sup>114</sup> The boycott targeted the shipment, purchase, use, repair, and installation of printing presses manufactured by the Duplex Printing Press Company (the Company), located in Michigan.<sup>115</sup> The purpose of this secondary boycott<sup>116</sup> was to aid unionization efforts by the Company's employees.<sup>117</sup> The Court<sup>118</sup> held that notwithstanding the recent passage of the Clayton Act, the Union violated the Sherman Act.<sup>119</sup>

The Court adopted a rather narrow construction of sections 6<sup>120</sup> and 20<sup>121</sup> of the Clayton Act. First, the Court declared that the Union's secondary boycott, irrespective of the Union's intent,<sup>122</sup> was not a legitimate union objective as contemplated by section 6.<sup>123</sup> Thus, the Union's secondary boycott was not protected by the Clayton Act.<sup>124</sup> Second, and more importantly, the Court concluded that Congress intended section 20 to be narrowly construed, applying only to "labor disputes" involving employers and *their* employees.<sup>125</sup> Thus, because Union members were boycotting a Company that was not their own employer, the Court found that the Clayton Act offered the Union no protection from the Sherman Act.<sup>126</sup>

In his dissent, Justice Brandeis<sup>127</sup> lashed out at the majority for what he believed was an unwarranted, restrictive interpretation of section

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114. *Id.* at 462-64.

115. *Id.*

116. See *supra* note 90 for the definition of secondary boycott.

117. *Duplex Printing*, 254 U.S. at 462-64.

118. Justice Pitney delivered the opinion of the Court. *Id.* at 460.

119. *Id.* at 468-79.

120. See *supra* note 100 for the text of section 6 of the Clayton Act, 15 U.S.C. § 17 (1982).

121. See *supra* note 101 for the text of section 20 of the Clayton Act, 29 U.S.C. § 52 (1982).

122. The Union had attempted to obtain a closed shop agreement as well as an eight hour work day and a union wage scale. *Duplex Printing*, 254 U.S. at 462.

123. *Id.* at 469.

124. *Id.* at 468-69.

125. *Id.* at 471-76. In this respect, the Court stated:

Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the . . . operation of the anti-trust laws, . . . and it would violate rules of statutory construction . . . to enlarge that [restriction] . . . by resorting to a loose construction of the section . . . . [Thus, the section only applies] to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective.

*Id.* at 471-72. This narrow interpretation of section 20 was later rejected by Congress in 1932 in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982). See *infra* notes 132-41 and accompanying text.

126. *Duplex Printing*, 254 U.S. at 478.

127. Justice Brandeis was joined by Justices Holmes and Clarke. *Id.* at 479.

20.<sup>128</sup> Justice Brandeis reasoned that section 20 of the Clayton Act protected legitimate labor union activities arising out of a "labor dispute," irrespective of whether the employees involved were actual employees of the targeted employer.<sup>129</sup> Thus, Justice Brandeis concluded that section 20 applied to the Union's secondary boycott, thereby exempting the Union from the Sherman Act.<sup>130</sup>

In effect, *Duplex Printing* established that the status of union activity under the Sherman Act remained unchanged, despite the passage of the Clayton Act. The Supreme Court and lower federal courts consistently reaffirmed this position throughout the post-Clayton Act period.<sup>131</sup>

### B. *The Norris-LaGuardia Act: A Congressional Response*

Continued judicial application of the Sherman Act to labor unions coupled with a judicial failure to implement the clearly defined labor exemption of the Clayton Act prompted Congress to enact the Norris-LaGuardia Anti-Injunction Act of 1932.<sup>132</sup> The purpose of the Norris-LaGuardia Act was to "protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which act, by reason of its construction and application by the Federal courts [was] ineffectual to accomplish the congressional intent."<sup>133</sup> In other words,

128. *Id.* at 487-88 (Brandeis, J., dissenting).

129. *Id.* (Brandeis, J., dissenting). Justice Brandeis stated:

Congress did not restrict the provision to employers and workmen *in their employ*. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, . . . [i]f the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workmen, since the very acts to which it applies sever the continuity of the legal relationship.

*Id.* (Brandeis, J., dissenting) (emphasis in original). However, this position was not adopted by Congress until 1932 in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982). *See infra* notes 132-41 and accompanying text.

130. *Duplex Printing*, 254 U.S. at 487-88 (Brandeis, J., dissenting).

131. *See, e.g.*, *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927) (union's primary boycott held to violate Sherman Act); *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925) (strike over employer's establishment of non-union facility held to violate Sherman Act); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921) (union picketing held to violate Sherman Act); *see also* 1 T. KHEEL, *supra* note 76, § 4.02[3], at 53 n.73 (court decisions narrowly construing §§ 6 and 20 of the Clayton Act).

132. 29 U.S.C. §§ 101-115 (1982). For a further discussion of the Norris-LaGuardia Act, *see* 1 T. KHEEL, *supra* note 76, § 4.03[1]-[4], at 62-104.

133. H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932). The Supreme Court in *United States v. Hutcheson*, 312 U.S. 219 (1941), stated that the "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 . . . by unduly restrictive judicial construction." *Id.* at 235-36; *see also* *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 100-03 (1940) (discussion of legislative purpose behind Norris-LaGuardia Act).

the Norris-LaGuardia Act sought to restrict federal judicial intervention in "labor disputes."<sup>134</sup>

The Norris-LaGuardia Act established a national policy<sup>135</sup> legitimizing an employee's right to organize, as well as a union's right to pursue its objectives through collective bargaining.<sup>136</sup> Furthermore, the Norris-LaGuardia Act severely curtailed the federal courts' jurisdiction over controversies involving or growing out of a "labor dispute."<sup>137</sup> In this regard, Congress adopted the broad definition of "labor dispute" ad-

134. See THE DEVELOPING LABOR LAW: THE BOARDS, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT 22 (Morris ed. 1971) [hereinafter LABOR LAW].

135. Section 2 of the Norris-LaGuardia Act established the following as the public policy of the United States:

Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . 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 . . . 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 . . .

29 U.S.C. § 102 (1982). Congress reiterated this public policy favoring collective bargaining and union organization when it passed the National Labor Relations (Wagner) Act in 1935, 29 U.S.C. §§ 151-169 (1982); see *infra* notes 173-86 and accompanying text.

136. 29 U.S.C. § 102 (1982). Collective bargaining has been described as "a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours, and other conditions of employment." *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941); see section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1982). The NLRA imposes a duty of good faith bargaining on both the employer and the union. See *id.*

137. Section 4 of the Norris-LaGuardia Act provides:

No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

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

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

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

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

(e) Giving publicity to the existence of, or the facts involved in, any labor dis-

vocated by Justice Brandeis in his dissent in *Duplex Printing*.<sup>138</sup> Section 13(c) of the Norris-LaGuardia Act provides:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*.<sup>139</sup>

Hence, under the Norris-LaGuardia Act a "labor dispute" existed regardless of whether an employer-employee relationship existed.

Congress, in passing the Clayton and Norris-LaGuardia Acts, provided an unambiguous exemption from the Sherman Act for legitimate labor union activities. However, not until *Apex Hosiery Co. v. Leader*<sup>140</sup> did the Court begin to give credence to Congress' desire to exempt from

pute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

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

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

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

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

29 U.S.C. § 104 (1982).

Moreover, § 1 of the Norris-LaGuardia Act provides:

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

29 U.S.C. § 101 (1982).

Finally, § 5 of the Norris-LaGuardia Act provides:

No Court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

29 U.S.C. § 105 (1982).

However, federal courts may issue injunctions involving or growing out of a "labor dispute" in very limited circumstances. *See* § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1982).

138. *See supra* notes 127-30 and accompanying text.

139. 29 U.S.C. § 113(c) (1982) (emphasis added). The Norris-LaGuardia Act's definition of "labor dispute" is similar to that found in § 20 of the Clayton Act. *See supra* note 101; *see also* § 2(9) of the National Labor Relations Act, 29 U.S.C. § 152(9) (1982) (defining "labor dispute" essentially the same as that found in Clayton and Norris-LaGuardia Acts).

140. 310 U.S. 469 (1940).

the Sherman Act legitimate labor union activities.<sup>141</sup>

C. *The Turning Point: Apex Hosiery Co. v. Leader*

Eight years after the passage of the Norris-LaGuardia Act, Justice Stone,<sup>142</sup> writing for the majority in *Apex Hosiery Co. v. Leader*,<sup>143</sup> established the foundation for a new direction in labor-antitrust law.<sup>144</sup>

1. The facts

The Apex Hosiery Company (the Company) manufactured hosiery at its factory in Philadelphia.<sup>145</sup> The Company employed about 2500 workers; eight were union members.<sup>146</sup> In April 1937, the American Federation of Full Fashioned Hosiery Workers (the Union), demanded a closed shop agreement<sup>147</sup> from the Company.<sup>148</sup> The Company refused.<sup>149</sup> On May 4, 1937, the Union ordered a strike at the Company's Philadelphia factory.<sup>150</sup> Two days later, Union members, most of whom were employed at various factories around the area, gathered at the Company's plant.<sup>151</sup> William Leader, President of the Union, again demanded a closed shop agreement from the Company.<sup>152</sup> Again, the Company refused.<sup>153</sup> Subsequently, a sit-down strike began.<sup>154</sup> During the strike, Union members violently destroyed the Company's manufacturing equipment.<sup>155</sup> The Company brought suit against the Union and its officials, claiming that the Union's actions constituted a restraint of

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141. Although *Apex Hosiery* did not specifically involve the question of a labor exemption, see *infra* note 161, the decision is important because it marks a significant turning point. In *Apex Hosiery*, the Court began to reexamine the interplay between labor unions and the Sherman Act. See generally, *Apex Hosiery*, 310 U.S. at 483-513.

142. Justice Stone was appointed Chief Justice by President Roosevelt in 1941. See C. DUCAT & H. CHASE, *CONSTITUTIONAL INTERPRETATION* 1616 (3d ed. 1983).

143. 310 U.S. 469 (1940). For a further discussion of *Apex Hosiery* see Hoffmann, *supra* note 12, at 4-9.

144. In *Apex Hosiery*, the Court reexamined the interplay between labor unions and the Sherman Act. See generally *Apex Hosiery*, 310 U.S. at 483-513. This seemed appropriate in light of numerous congressional actions aimed at promoting unionization and stabilizing working conditions in the labor market. See A. COX, D. BOK & R. GORMAN, *supra* note 90, at 62.

145. *Apex Hosiery*, 310 U.S. at 480.

146. *Id.* at 481.

147. See *supra* note 81 for the definition of closed shop agreement.

148. *Apex Hosiery*, 310 U.S. at 481.

149. *Id.*

150. *Id.*

151. *Id.* at 482.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

trade in violation of section 1 of the Sherman Act.<sup>156</sup>

## 2. The holding

On the surface, Justice Stone's opinion in *Apex Hosiery* held that the Union's violent sit-down strike did not violate the Sherman Act.<sup>157</sup> But in his opinion Justice Stone also defined the scope of the Sherman Act.<sup>158</sup> Justice Stone concluded that the Sherman Act prohibited only conduct that substantially interfered with the *commercial market*.<sup>159</sup> Moreover, Justice Stone made it clear that union conduct aimed at eliminating competition in the *labor market* was not prohibited by the Sherman Act.<sup>160</sup>

Justice Stone did not base his decision on the express labor exemption created by the Clayton and Norris-LaGuardia Acts. Rather, he relied on his understanding of the ultimate purpose and scope of the Sherman Act.<sup>161</sup> For Justice Stone, the Sherman Act reached conduct

156. *Id.* at 480-81. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

157. *Apex Hosiery*, 310 U.S. at 512-13.

158. *Id.* at 492-501.

159. *Id.* at 495. More specifically, the Sherman Act prohibited only conduct that "restrict[ed] production, raise[d] prices, or otherwise control[led] the market to the detriment of . . . consumers . . ." *Id.* at 493.

160. *Id.* at 502-04. Justice Stone stated:

Since the enactment of the declaration in § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands . . . [However,] the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. . . . Furthermore, successful union activity . . . may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. . . . [However, the] 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.

*Id.*

Based on his review of the national labor laws, Justice Stone concluded, "[t]his series of acts clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy." *Id.* at 504 n.24.

161. *Id.* at 495, 500; see also Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1341 (1982). Some courts and commentators have suggested that Justice Stone's opinion carved out a nonstatutory exemption from the Sherman Act for labor unions. See, e.g., *Altemose Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653, 659 (3d Cir. 1985), *cert. denied*, 475 U.S. 1107 (1976); *Mid-America Regional Bargaining Ass'n v. Will County*

aimed only at eliminating competition in the commercial market.<sup>162</sup> This conclusion was consistent with Congress' intent in enacting the Sherman Act.<sup>163</sup> Congress, in passing the Sherman Act, had sought to restrain only anticompetitive abuses in the commercial market.<sup>164</sup> By limiting the scope of the Sherman Act to conduct aimed at eliminating competition in the commercial market, Justice Stone recognized the true underlying purpose for which the Sherman Act was meant to apply.<sup>165</sup>

Under Justice Stone's reasoning, union liability under the Sherman Act turned on whether the union pursued its objectives through the elimination of competition in the commercial market or through the elimination of competition in the labor market. The former conduct was prohibited under the Sherman Act, while the latter conduct was beyond the scope of the Sherman Act.

Applying this standard to the facts of the *Apex Hosiery* case, Justice

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Carpenters Dist. Council, 675 F.2d 881, 890 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982); Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *see also* Note, *From Norris-La Guardia to Connell-Consistency Yields Comprehensive Labor Antitrust Protection*, 17 NEW ENG. L. REV. 845, 860 (1982) ("What set the decision in *Apex* apart from all prior labor antitrust decisions was the Court's recognition that the goals and activities of organized labor may qualify for a nonstatutory exemption.").

The language in Justice Stone's opinion really does not suggest the creation of an exemption. Rather, Justice Stone held that the Sherman Act prohibited only conduct aimed at eliminating competition in the commercial market. Conduct aimed at eliminating competition in the labor market was beyond the scope of the Sherman Act, not merely exempt from the Act. Thus, the Union's conduct in *Apex Hosiery* was entirely beyond the scope of the Sherman Act. *See* St. Antoine, *supra* note 75, at 606; Handler, *supra*, at 1340 n.332 ("Some courts and commentators have cited *Apex* as the seminal opinion in the development of . . . the 'nonstatutory' exemption . . . . This is unfortunate, in that *Apex* had portrayed conduct affecting labor market competition as not merely exempt but *entirely beyond* the substantive scope of the Sherman Act.") (emphasis in original); *see also* California Dump Truck Owners Ass'n v. Associated Gen. Contractors, 562 F.2d 607, 611 (9th Cir. 1977) (properly tracing origins of nonstatutory exemption to Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965)).

162. Justice Stone cited three reasons in support of his conclusion. First, Congress' commerce power under the Sherman Act was at its greatest only when Congress prevented restraints in the commercial market. *Apex Hosiery*, 310 U.S. at 495. Second, Justice Stone observed that the Court had never applied the Sherman Act unless there was some restraint on the commercial market. *Id.* Finally, the Court had never applied the Sherman Act unless the restraint on the commercial market was substantial. *Id.* at 495-97.

163. *See supra* notes 12-74 and accompanying text.

164. *See supra* notes 44-74 and accompanying text. Justice Stone did, however, recognize that a union's pursuit of legitimate goals might create restraints on the commercial market. *Apex Hosiery*, 310 U.S. at 503. He nevertheless concluded that such restraints were not the type the Sherman Act intended to proscribe. *Id.*

165. *See supra* notes 12-74 and accompanying text.



Stone concluded that the Union's strike, regardless of its illegality,<sup>166</sup> did not violate the Sherman Act.<sup>167</sup> There was no evidence that the Union intended to affect prices in the commercial market.<sup>168</sup> Justice Stone stated:

Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market . . . .<sup>169</sup>

Thus, under *Apex Hosiery*, a union could pursue traditional objectives, such as better wages, hours and working conditions, so long as the union did not attempt to directly interfere or restrain the commercial market.<sup>170</sup> However, a union that sought to suppress competition in the commercial market would violate the Sherman Act.<sup>171</sup>

#### IV. THE RISE OF THE NATIONAL LABOR LAWS

To fully understand the development of labor's exemptions from the Sherman Act,<sup>172</sup> a brief review of the major labor law legislation is essential. This section focuses on the National Labor Relations Act, and its subsequent amendments, the Labor Management Relations (Taft-Hartley) Act and the Labor-Management Reporting and Disclosure (Landrum-Griffing) Act.

##### A. *The National Labor Relations Act*

The purpose behind the Clayton<sup>173</sup> and Norris-LaGuardia<sup>174</sup> Acts

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166. Justice Stone noted, "[i]t is not denied . . . [that the union] violated the civil and penal laws of Pennsylvania . . . ." *Apex Hosiery*, 310 U.S. at 483.

167. *Id.* at 501.

168. *Id.*

169. *Id.*

170. Some commentators have suggested that further refinement of the *Apex Hosiery* doctrine would have been the soundest course for the Court to take in dealing with labor unions under the Sherman Act. See St. Antoine, *supra* note 75, at 607.

171. Labor unions that combine with non-labor groups in an effort to eliminate competition in the commercial market are subject to the Sherman Act. See *supra* note 48 and accompanying text.

172. 15 U.S.C. §§ 1-7 (1982). See *infra* notes 216-391 and accompanying text for a discussion on labor's statutory and nonstatutory exemptions.

173. 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982). See *supra* notes 99-131 and accompanying text.

was to restrict federal courts' ability to issue injunctions in controversies growing or arising out of a "labor dispute."<sup>175</sup> This restriction would allow unions to pursue legitimate objectives without undue judicial interference. The National Labor Relations (Wagner) Act (NLRA),<sup>176</sup> was passed in an effort to further promote the growth of organized labor and the development of collective bargaining.<sup>177</sup> Section 7,<sup>178</sup> at the heart of the NLRA, gave employees affirmative rights to organize, to bargain collectively and to engage in concerted activities in support of these rights.<sup>179</sup>

Moreover, the NLRA established a scheme to protect employees' section 7 rights.<sup>180</sup> Section 8 of the NLRA prohibited certain employer practices aimed at obstructing section 7 rights.<sup>181</sup> For instance, section 8 prohibited employers from interfering, restraining or coercing employees' exercise of their section 7 rights.<sup>182</sup> Section 8 also prohibited employers from giving assistance to or dominating a favored union,<sup>183</sup> from discriminating against employees on the basis of union affiliation<sup>184</sup> and from refusing to bargain with employees' representatives.<sup>185</sup> Finally, Congress created a new agency empowered to implement and enforce the provi-

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174. 29 U.S.C. §§ 101-115 (1982). *See supra* notes 132-41 and accompanying text.

175. *See supra* notes 99-112, 132-41 and accompanying text.

176. 29 U.S.C. §§ 151-169 (1982). For a further discussion of the National Labor Relations Act see LABOR LAW, *supra* note 134, at 1-34. *See also* A. COX, LAW AND THE NATIONAL LABOR POLICY (1960); 1 T. KHEEL, *supra* note 76, § 5.01[1]-[4], at 5-89. The constitutionality of the NLRA was upheld by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

177. While it is true that the Norris-LaGuardia Act attempted to promote the growth of organized labor, *see supra* notes 135-36 and accompanying text, it made very little progress in this respect. *See* LABOR LAW, *supra* note 134, at 25.

178. Section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*

29 U.S.C. § 157 (1982) (italicized text added pursuant to Taft-Hartley Act of 1947, 29 U.S.C. §§ 141-197 (1982)).

179. *Id.* The right to strike was also affirmatively acknowledged. *See* § 13 of the NLRA, 29 U.S.C. § 163 (1982).

180. *See* § 8 of the NLRA, 29 U.S.C. § 158 (1982).

181. A violation of § 8 constitutes an unfair labor practice. The National Labor Relations Board has the power to remedy unfair labor practices. *See infra* note 186 and accompanying text.

182. 29 U.S.C. § 158(a)(1) (1982).

183. *Id.* § 158(a)(2).

184. *Id.* § 158(a)(3).

185. *Id.* § 158(a)(5).

sions of the NLRA—the National Labor Relations Board (NLRB).<sup>186</sup>

### 1. Labor Management Relations (Taft-Hartley) Act

By 1947, the balance of power had shifted dramatically from employers to labor unions.<sup>187</sup> One commentator described the labor movement of the late 1940s as the “largest, the most powerful, and the most aggressive that the world has ever seen; and the strongest unions . . . are the most powerful private economic organizations in the country.”<sup>188</sup> This unprecedented shift in power prompted Congress to amend the NLRA by passing the Labor Management Relations (Taft-Hartley) Act in 1947.<sup>189</sup>

Under the Taft-Hartley Act, unions were subject to similar prohibitions imposed against employers under the original NLRA. Among other things, Taft-Hartley imposed on unions a duty to bargain,<sup>190</sup> prohibited unions from coercing or intimidating employees with respect to employees’ organizational rights<sup>191</sup> and prohibited unions from pressing management into discriminating against employees with respect to their organizational rights.<sup>192</sup> The Taft-Hartley Act also outlawed closed shops.<sup>193</sup>

Moreover, the Taft-Hartley Act prohibited certain secondary activities in which unions regularly engaged to put pressure on employers.<sup>194</sup>

186. *Id.* §§ 153, 160.

187. *See* A. COX, D. BOK & R. GORMAN, *supra* note 90, at 89-93.

Between 1935 and 1947, unions, in the wake of the Norris-LaGuardia Act and the National Labor Relations Act, flourished. *See* LABOR LAW, *supra* note 134, at 35. During this time period union membership increased from three to fifty million. *Id.* Along with this growth in numbers came increasing power for labor leaders. During World War II, for example, union leaders were given important and prestigious positions in the federal government. *Id.* These leaders were frequently consulted by the Roosevelt Administration in an attempt to maintain internal industrial peace. *Id.* In accord with this new found power, labor leaders constantly caused unions to engage in crippling strikes in important industries. *Id.* Against this backdrop, Congress sought to even the balance of power between employers and unions.

188. S. SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 154 (1947).

189. 29 U.S.C. §§ 141-197 (1982). For a further discussion on the Taft-Hartley Act see LABOR LAW, *supra* note 134, at 35-48. *See also* Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pts. 1 & 2), 61 HARV. L. REV. 1, 274 (1947); 1 T. KHEEL, *supra* note 76, § 5.02[1]-[3], at 90-154. The Taft-Hartley Act was bitterly opposed by labor unions, and passed over President Truman’s veto. *See* A. COX, D. BOK & R. GORMAN, *supra* note 90, at 89; LABOR LAW, *supra* note 134, at 39 (contents of President Truman’s message on veto of Taft-Hartley).

190. 29 U.S.C. § 158(b)(3) (1982).

191. *Id.* § 158(b)(1).

192. *Id.* § 158(b)(2).

193. *Id.* §§ 158(a)(3), (b)(2); *see also supra* note 81.

194. 29 U.S.C. § 158(b)(4)(A)-(D) (1982).

For example, under section 8(b)(4), unions, that pursued certain unlawful objectives were prohibited from inducing or encouraging employees of secondary employers to strike or refuse to handle goods or perform services.<sup>195</sup> However, the Taft-Hartley Act permitted unions and secondary employers to voluntarily enter into agreements,<sup>196</sup> allowing the secondary employers to boycott primary employers with whom the unions had disputes.<sup>197</sup>

## 2. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act

The major impetus behind the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959<sup>198</sup> was to protect union members from improper union conduct.<sup>199</sup> Senate investigations in the late 1950s<sup>200</sup> revealed substantial corruption in the internal operations of some of the largest unions in the country.<sup>201</sup> Congress sought to control this corruption by passing the Landrum-Griffin Act, another amendment to the NLRA.

The Landrum-Griffin Act was composed of several introductory sections<sup>202</sup> and seven titles.<sup>203</sup> Most of the Landrum-Griffin Act dealt with the internal regulation of labor unions.<sup>204</sup> However, the Landrum-Griffin Act also closed certain loopholes left open by Taft-Hartley's secondary boycott provisions.<sup>205</sup> Further, the Landrum-Griffin Act prohib-

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195. *Id.*

196. These agreements are known as hot cargo agreements. *See infra* note 358. Congress outlawed hot cargo agreements in 1959, with the passage of the Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). *See* 29 U.S.C. § 158(e) (1982). However, certain hot cargo agreements are allowed in the construction and garment industries. *See infra* note 378.

197. *See* Handler & Zifchak, *supra* note 88, at 473.

198. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.). For a further discussion on the Landrum-Griffin Act see LABOR LAW, *supra* note 134, at 49-59. *See also* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); 1 T. KHEEL, *supra* note 76, § 5.03[1]-[3], at 155-80.

199. *See* 1 T. KHEEL, *supra* note 76, § 5.03[1], at 155.

200. Senate investigation committees, such as the McClellan Committee, began investigating union corruption in 1957. *Id.* at 155 n.2, 159-60.

201. *Id.* at 155.

202. *See* §§ 2-3 of the Landrum-Griffin Act, 29 U.S.C. §§ 401-402 (1982).

203. Title I consists of §§ 101-105, 29 U.S.C. §§ 411-415 (1982); Title II consists of §§ 201-211, 29 U.S.C. §§ 431-441 (1982); Title III consists of §§ 301-306, 29 U.S.C. 461-466 (1982); Title IV consists of §§ 401-404, 29 U.S.C. §§ 481-484 (1982); Title V consists of §§ 501-505, 29 U.S.C. §§ 501-504, 186(a)-(c) (1982); Title VI consists of §§ 601-611, 29 U.S.C. §§ 521-531 (1982); Title VII, which contains the Taft-Hartley amendments, is codified at 29 U.S.C. §§ 141-144, 151-168, 185-188 (1982).

204. *Id.* *See also* 1 T. KHEEL, *supra* note 76, § 5.03[3], at 170-75.

205. *See* National Woodwork Mfgs. Ass'n v. NLRB, 386 U.S. 612, 633-43 (1967).

ited hot cargo agreements,<sup>206</sup> except in the construction industry and garment industry.<sup>207</sup>

### B. Summary of Labor Laws

The National Labor Relations Act created and firmly established specific organizational rights for employees.<sup>208</sup> Moreover, the NLRA expressly prohibited certain employer activities aimed at obstructing the newly established rights.<sup>209</sup> The subsequent amendments to the NLRA placed affirmative duties on unions not to engage in conduct obstructing employees' organizational rights and outlawed various union secondary activities.<sup>210</sup> Under the NLRA, union or employer conduct constituted an unfair labor practice when such conduct obstructed employees' organizational rights.<sup>211</sup> The NLRA encompassed a comprehensive scheme implemented and regulated by the National Labor Relations Board, to remedy unfair labor practices.

Thus, with the passage of the national labor laws, the right to unionize and to bargain collectively had become codified as part of the nation's public policy.<sup>212</sup> To uphold the commands of this newly created national labor policy, it was necessary to protect the rights afforded labor from undue restriction under the antitrust laws. The problem, however, is that the antitrust laws are inherently incompatible with the goals of organized labor.<sup>213</sup> Antitrust laws seek to preserve compet-

206. 29 U.S.C. § 158(e) (1982). See *infra* note 378 for the text of section 158(e).

207. 29 U.S.C. § 158(e) (1982) (construction industry and garment industry proviso). See *infra* note 378 for the text of the construction industry proviso.

208. 29 U.S.C. § 157 (1982).

209. *Id.* § 158.

210. See generally Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1982); Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

211. 29 U.S.C. § 158 (1982).

212. Section 1 of the NLRA states in pertinent part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982); see also *supra* note 135 (similar public policy announcement contained in section 2 of Norris-LaGuardia Act).

213. Dean St. Antoine has stated:

From the outset, the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it. According to classical trade union theory, the objective is the

ition,<sup>214</sup> whereas labor unions seek to limit competition.<sup>215</sup> To resolve this conflict, courts have recognized labor's exemptions from the Sherman Act. Without such recognition, the public policies enunciated under the national labor laws would be frustrated.

#### V. THE MODERN ANALYSIS FOR THE LABOR-ANTITRUST PROBLEM: THE STATUTORY AND NONSTATUTORY LABOR EXEMPTIONS

To determine whether the Sherman Act<sup>216</sup> is applicable to union conduct, courts apply a bifurcated analysis: the statutory and nonstatutory exemptions.<sup>217</sup> The statutory exemption applies to those unilateral union activities expressly exempt from injunction under the Clayton<sup>218</sup> and Norris-LaGuardia<sup>219</sup> Acts.<sup>220</sup> However, the statutory exemption does not apply to controversies arising from the terms or the enforcement of union-employer agreements.<sup>221</sup> Rather, courts have created a more limited nonstatutory exemption applicable to union-employer agreements.<sup>222</sup> Applying the nonstatutory exemption involves a judicial balance between the competing policies underlying the national labor laws and those underlying the antitrust laws.<sup>223</sup> This section reviews the major Supreme Court cases that recognized, defined and applied the statutory and nonstatutory exemptions.

##### A. *The Statutory Exemption: Labor's Immunization from the Sherman Act*

Shortly after *Apex Hosiery Co. v. Leader*,<sup>224</sup> the Supreme Court de-

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elimination of wage competition among all employees doing the same job in the same industry. Logically extended, the policy against restraint of trade must condemn the very existence of labor organizations, since their minimum aim has always been the suppression of any inclination on the part of working people to offer their services to employers at different prices.

St. Antoine, *supra* note 75, at 604 (footnotes omitted).

214. *Id.*

215. *Id.*

216. 15 U.S.C. §§ 1-7 (1982).

217. *See* *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 621-22 (1975); *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council*, 793 F.2d 1110, 1115 (9th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1299 (1987); *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1109 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

218. 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982).

219. 29 U.S.C. §§ 101-115 (1982).

220. *See* ANTITRUST LAW DEVELOPMENTS (SECOND) 620-23 (1984).

221. *Id.* at 623.

222. *Id.*

223. *Id.*

224. 310 U.S. 469 (1940); *see supra* notes 140-71 and accompanying text.

cided *United States v. Hutcheson*.<sup>225</sup> The *Hutcheson* Court finally recognized what Congress had attempted since the passage of the Sherman Act—that legitimate labor union activities were exempt from the Sherman Act's prohibitions.<sup>226</sup> This exemption is known as labor's statutory exemption. The statutory exemption protects those unilateral union activities that are immune from injunction under the Clayton and Norris-LaGuardia Acts.

### 1. *United States v. Hutcheson*

#### a. *the facts*

In *Hutcheson*,<sup>227</sup> a dispute arose at the Anheuser-Busch Brewing Company plant in St. Louis.<sup>228</sup> The United Brotherhood of Carpenters and Joiners of America (the Carpenters) and the International Association of Machinists (the Machinists) were among those unions representing employees at the plant.<sup>229</sup> Trouble began when the employer gave the Machinists the responsibility for erecting and dismantling certain equipment.<sup>230</sup> Believing that the work should have been assigned to their union, officials for the Carpenters organized a strike at the employer's plant.<sup>231</sup> In addition, the Carpenters called a strike against certain construction companies that were hired by the employer to expand its facilities.<sup>232</sup> The Carpenters also organized a boycott of Anheuser-Busch beer among union members and friends.<sup>233</sup> The federal government filed criminal antitrust charges<sup>234</sup> against the Carpenters alleging that the Carpenters' actions constituted a combination and conspiracy in restraint of trade in violation of section 1<sup>235</sup> of the Sherman Act.<sup>236</sup>

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225. 312 U.S. 219 (1941); see *infra* notes 227-56 and accompanying text; see also C. GREGORY, *LABOR AND THE LAW* 269-79 (2d rev. ed. 1958) for a discussion of the case.

226. See *supra* notes 25-74 and accompanying text.

227. 312 U.S. 219 (1941).

228. *Id.* at 227-28.

229. *Id.* at 228.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 227-28.

234. The antitrust laws may be enforced through government initiated proceedings for criminal sanctions or equitable relief, or private suits for injunctive relief or treble damages. See 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* 26 (1978). The antitrust division of the United States Justice Department is responsible for bringing federal criminal prosecutions under sections 1 and 2 of the Sherman Act. *Id.* at 27. There is no criminal liability for violations of the Clayton Act. *Id.* For a more detailed discussion of antitrust enforcement see *id.* at 26-44.

235. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

236. *Hutcheson*, 312 U.S. at 228.

b. *the holding*

Writing for the majority, Justice Frankfurter recognized the existence of labor's statutory exemption from the Sherman Act.<sup>237</sup> Justice Frankfurter, after acknowledging Congress' efforts to exempt legitimate labor union activities from the Sherman Act,<sup>238</sup> determined that the Sherman, Clayton and Norris-LaGuardia Acts must be read together as "interlacing statutes" before a court could determine whether union conduct violated the Sherman Act.<sup>239</sup> In this regard, Justice Frankfurter concluded that union conduct that could not be enjoined under the Clayton and Norris-LaGuardia Acts (conduct involving or growing out of a "labor dispute"),<sup>240</sup> could not be reached by the Sherman Act.<sup>241</sup>

Justice Frankfurter defined labor's statutory exemption broadly, stating:

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 [of the Clayton Act] 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.<sup>242</sup>

In effect, Justice Frankfurter created a two-pronged analysis for determining whether labor's statutory exemption was applicable. First, the

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237. *Id.* at 229-32.

238. *Id.* at 229-31.

239. *Id.* at 231-32. Specifically, Justice Frankfurter stated: "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." *Id.* at 231. The Court made clear that conduct which cannot be enjoined under the Norris-LaGuardia Act cannot be prosecuted under the Sherman Act. *Id.* at 236.

240. *See supra* notes 107, 137-39 and accompanying text.

241. *Hutcheson*, 312 U.S. at 236. Justice Frankfurter stated:

The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

*Id.* In concurrence, Justice Stone, who authored the *Apex Hosiery* opinion, 310 U.S. 469 (1940), thought that the Court went too far by interpreting the Clayton and Norris-LaGuardia Acts. *Id.* at 237 (Stone, J., concurring). For Justice Stone, it was enough to say that the Union's activities were outside the scope of the Sherman Act. *Id.* (Stone, J., concurring).

242. *Id.* at 232 (footnote omitted). Justice Frankfurter recognized that, in the wake of the Norris-LaGuardia Act, it made little sense to rely on the earlier labor-antitrust cases. *Id.* at 236. Commentators have suggested that the Court's opinion in *Hutcheson* overruled *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). *See Handler, supra* note 161, at 1340; *see also supra* notes 113-31 and accompanying text.



union's conduct must fall within the statutory definition of "labor dispute."<sup>243</sup> Second, the union must "act alone" and not in combination with "non-labor groups."<sup>244</sup> According to Justice Frankfurter, satisfaction of both prongs triggered the statutory exemption.

This result was in full accord with Congress' intent. First, Congress, in passing the Sherman Act, never intended to punish a union's pursuit of legitimate objectives.<sup>245</sup> It was only a union's combination with non-labor groups to restrict competition in the commercial market that triggered application of the Sherman Act.<sup>246</sup> Second, and perhaps more importantly, Congress, in passing the Clayton and Norris-LaGuardia Acts, sought to limit courts from interfering in "labor disputes."<sup>247</sup> However, these judicial limitations would be meaningless if they could be circumvented indirectly by way of the Sherman Act. By holding that the existence of a "labor dispute" could preclude the application of the Sherman Act, Justice Frankfurter foreclosed any such possibility.<sup>248</sup>

Applying this rationale to the case, Justice Frankfurter concluded that the Carpenters' conduct involved a "labor dispute," and was thus immune from injunction.<sup>249</sup> Since the Carpenters' conduct was statutorily protected from injunction under the Clayton and Norris-LaGuardia Acts, their conduct was exempt from prosecution under the Sherman Act.<sup>250</sup>

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243. *Hutcheson*, 312 U.S. at 230-37. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 133 & n.117.

244. *Hutcheson*, 312 U.S. at 230-37. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 133 & n.118. The second prong ("act alone") was treated much more extensively by the Court in *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945), see *infra* notes 257-81 and accompanying text. In *Hutcheson*, however, Justice Frankfurter's opinion implied that unions would be stripped of antitrust immunity if they combined with nonlabor groups. In *Hutcheson*, Justice Frankfurter referred to *United States v. Brims*, 272 U.S. 549 (1926), as an example of the type of union-employer combination needed for a union to forfeit statutory protection. *Hutcheson*, 312 U.S. at 232 n.3. *Brimms* involved manufacturers, building contractors and union carpenters who conspired to eliminate competition by nonunion mills. *Brimms*, 272 U.S. at 551-52. Such a combination was obviously not present in the *Hutcheson* case; thus, Justice Frankfurter did not directly address the issue. However, Justice Frankfurter's opinion is significant, in that it suggests that unions will be stripped of statutory immunity only when they engage in concerted action in the antitrust sense; that is, when they adopt an employers' antitrust animus.

245. Although Congress' intent may have been unclear when it passed the Sherman Act, see *supra* note 47, any ambiguities were quickly resolved when Congress subsequently passed the Clayton and Norris-LaGuardia Acts. See *supra* notes 99-141 and accompanying text.

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

247. See *supra* notes 99-112, 132-39 and accompanying text.

248. *Hutcheson*, 312 U.S. at 234-37.

249. *Id.* at 234.

250. The United States argued that despite the fact federal courts lacked jurisdiction to issue an injunction under the Clayton and Norris-LaGuardia Acts, the Carpenters were still

c. *union status under Hutcheson*

Under *Hutcheson*, the application of the statutory exemption turns on whether the union conduct in question comes within the scope of a "labor dispute," as defined by the Clayton and Norris-LaGuardia Acts.<sup>251</sup> If a labor dispute exists, the Clayton and Norris-LaGuardia Acts will prevent the federal courts from issuing an injunction.<sup>252</sup> If no injunction could issue under the Clayton and Norris-LaGuardia Acts, the conduct is statutorily exempt from the Sherman Act.<sup>253</sup> The *Hutcheson* Court, however, only dealt with the statutory exemption in the context of unilateral union conduct.<sup>254</sup> The Court did not address whether the statutory exemption applied to controversies arising from the terms or the enforcement of union-employer agreements.<sup>255</sup> This issue, however, arose four years after *Hutcheson*, in *Allen Bradley Co. v. Local No.*

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subject to criminal prosecution under the Sherman Act. *Hutcheson*, 312 U.S. at 234. Justice Frankfurter rejected this argument:

It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. *Such legislation must not be read in a spirit of mutilating narrowness.* On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking.

*Id.* at 235 (emphasis added).

Shortly after *Hutcheson*, the Court, in a *per curiam* decision, upheld the district court's application of the statutory exemption to a musician's union. *See United States v. American Fed'n of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd per curiam*, 318 U.S. 741 (1943); *see also United States v. Carozzo*, 37 F. Supp. 191 (N.D. Ill.), *aff'd sub nom. United States v. International Hod Carriers Council*, 313 U.S. 539 (1941).

251. *See supra* notes 237-50 and accompanying text. A section 1 Sherman Act violation requires a showing of two elements: a "contract, combination, or conspiracy," and, a "restraint of trade." 15 U.S.C. § 1 (1982). The *Hutcheson* Court dealt with the first element by holding that a union that acts in its own self-interest and has not combined with nonlabor groups is protected from the Sherman Act. The *Apex Hosiery* Court dealt with the second element by holding that a party must prove that union conduct was aimed at eliminating competition in the commercial market, and that this was not just an ancillary effect of the elimination of competition in the labor market. The two cases must be read as together establishing the basis for labor-antitrust analysis. *See* 1 T. KHEEL, *supra* note 76, § 4.04[2], at 116.

252. *See supra* notes 107-08, 134, 137-39 and accompanying text.

253. Any other result would make little sense. It would be strange indeed if union conduct protected under the national labor laws was prohibited under the antitrust laws.

254. Unilateral union conduct as used in this Comment refers to conduct not arising in the context of a union-employer agreement.

255. The references to "union-employer agreements" throughout this Comment are meant to include, unless otherwise indicated, those agreements dealing with wages, hours, and other terms and conditions of employment.

3, *IBEW*.<sup>256</sup>2. Defining the parameters of the statutory exemption: *Allen Bradley Co. v. Local No. 3, IBEW*

Shortly after the *Hutcheson* Court recognized labor's statutory exemption from the Sherman Act, the Court was asked to define the outer parameters of this exemption in the context of both unilateral union conduct and union-employer agreements.

*a. the facts*

In *Allen Bradley*, Local No. 3, affiliated with the International Brotherhood of Electrical Workers (IBEW), had jurisdiction over electrical workers in New York City.<sup>257</sup> Local No. 3 represented employees who manufactured or installed electrical equipment.<sup>258</sup> In an effort to obtain more work and better working conditions for its members, Local No. 3 waged a fierce campaign to obtain closed shop agreements<sup>259</sup> with New York City manufacturers and contractors in the electrical equipment industry.<sup>260</sup> Local No. 3 used such tactics as strikes and boycotts.<sup>261</sup> These tactics proved highly successful, resulting in agreements being reached between Local No. 3 and a variety of employers in the electrical equipment industry.<sup>262</sup> Under the agreements, contractors agreed to purchase electrical equipment only from manufacturers that had agreements with Local No. 3.<sup>263</sup> Furthermore, manufacturers agreed to sell electrical equipment only to contractors that employed members of Local No. 3.<sup>264</sup> Over time these agreements became industry wide, concerning not only terms and conditions of employment, but also price and market control.<sup>265</sup> All parties to the agreements profited greatly.<sup>266</sup>

A group of electrical equipment manufacturers, located outside of New York City, brought suit against Local No. 3.<sup>267</sup> The suit alleged that Local No. 3 had conspired with electrical contractors and manufac-

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256. 325 U.S. 797 (1945).

257. *Id.* at 799.

258. *Id.*

259. See *supra* note 81 for the definition of closed shop agreement.

260. *Allen Bradley*, 325 U.S. at 799.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 799-800.

266. *Id.* at 800.

267. *Id.* at 798-800.

turers in an effort to exclude outside manufacturers from competing in New York City.<sup>268</sup>

*b. the holding*

Justice Black, writing for the majority, began by recognizing the inherent conflict between the policies embodied in the national labor laws and the antitrust laws.<sup>269</sup> In an attempt to reconcile these two conflicting policies, Justice Black concluded that a union must "act alone" and in its "self-interest" to benefit from the statutory exemption.<sup>270</sup> Justice Black found that Local No. 3 violated the Sherman Act because it combined with electrical manufacturers and contractors to monopolize the electrical equipment industry in New York City.<sup>271</sup> However, Justice Black suggested that had Local No. 3 not participated in a conspiracy to monopolize the industry, its conduct would have been protected by the

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268. *Id.* at 798.

269. *Id.* at 806. Justice Black stated:

[There are] two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

*Id.* Later in the opinion, Justice Black determined how far Congress had sought to proscribe union activities under the Sherman Act. Justice Black stated:

There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

*Id.* at 811.

270. *Id.* at 807-11. Justice Black stated that, "[o]ur holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Id.* at 810.

271. *Id.* at 809-11. *Allen Bradley* involved union-employer agreements which exceeded the traditional terms and conditions of employment (the labor market), by substantially affecting price and market control (the commercial market). *Id.* In this respect Justice Black noted that, although the agreements encompassed strikes and boycotts—legitimate union activities:

[This] was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. 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. . . . 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.

statutory exemption.<sup>272</sup> This observation was significant because it suggested that the Court was willing to protect union-employer agreements under the statutory exemption.<sup>273</sup> However, because Local No. 3 participated in a conspiracy to monopolize the commercial market, it lost all statutory protection.<sup>274</sup>

Justice Black defined the scope of the statutory exemption to exclude unions that conspired with employers to fix prices or to monopolize the commercial market,<sup>275</sup> regardless of the union's intent.<sup>276</sup> Thus, while in *Allen Bradley* the Court reiterated its support for labor's statutory exemption,<sup>277</sup> the Court made it clear that the statutory exemption

272. *Id.* at 807. Specifically Justice Black stated, "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." *Id.*

273. The *Allen Bradley* case involved both union-employer agreements—a series of interlocking closed shop/hot cargo agreements—and unilateral union conduct—strikes and boycotts. Justice Black clearly believed that the union-employer agreements by themselves could have been protected under the statutory exemption: "[e]mployers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ members of Local No. 3. . . . [S]uch an agreement standing alone would not have violated the Sherman Act." *Id.* at 809 (emphasis added).

However, these union-employer agreements did not stand alone. The agreements constituted "but one element in a far larger program . . . to monopolize all the business in New York City . . . and to charge the public prices above a competitive level." *Id.* Thus, the dispositive factor that led Justice Black to conclude that Local No. 3 was not statutorily protected was not that Local No. 3 entered into the closed shop/hot cargo agreements (Justice Black would find those exempt), but the fact that Local No. 3 aided and abetted the employers in a price fixing conspiracy to monopolize the commercial market.

This conclusion is in accord with the holding in *Hutcheson*. See *supra* note 244. Although *Hutcheson* did not involve union-employer agreements, Justice Frankfurter implied that the statutory exemption could reach *all* union conduct so long as the union did not combine with non-labor groups, that is, combine in the antitrust sense. See *supra* note 244 and accompanying text.

274. *Allen Bradley*, 325 U.S. at 809-11.

275. *Id.* at 808-11. Justice Black, writing for the majority, said, "we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808; see also *supra* note 48.

276. In this case, Local No. 3 was initially motivated by legitimate intentions to secure closed shop agreements. *Allen Bradley*, 325 U.S. at 798-801.

277. Justice Black stated:

[The statutory exemption] it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. . . . It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. . . . Congress evidently concluded, however, that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition.

would not protect an otherwise lawful union-employer agreement when a union combined with an employer to fix prices and monopolize the commercial market.<sup>278</sup>

*c. union status under Hutcheson and Allen Bradley*

Under the rationale of *Hutcheson* and *Allen Bradley*, whether the court should apply the statutory exemption turns on whether the following two-pronged analysis has been satisfied. First, the union's conduct must constitute a "labor dispute" as defined by the Clayton and Norris-LaGuardia Acts.<sup>279</sup> Second, the union must "act alone" and in its "self-interest."<sup>280</sup> A union that combines with non-labor groups in an effort to suppress competition in the commercial market will lose statutory immunity.<sup>281</sup>

3. The trilogy: *Apex Hosiery-Hutcheson-Allen Bradley*

The *Apex Hosiery-Hutcheson-Allen Bradley* trilogy established the foundation for a very sensible approach to the labor-antitrust problem. The *Apex Hosiery* Court defined the scope of the Sherman Act by concluding that the Act only prohibited activities aimed at eliminating commercial competition.<sup>282</sup> Thus, union activities pursued in furtherance of traditional union objectives were free from Sherman Act scrutiny.<sup>283</sup> In *Hutcheson*, the Court gave full recognition to labor's statutory exemption.<sup>284</sup> Accordingly, conduct that could not be enjoined under the Clayton and Norris-LaGuardia Acts was exempt from the Sherman Act.<sup>285</sup> Finally, in *Allen Bradley*, the Court excluded from labor's statutory exemption unions that combined with employers in an effort to monopolize the commercial market.<sup>286</sup>

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*Id.* at 810-11.

278. This holding is consistent with *Apex Hosiery*, in which the Court held that the Sherman Act only applied to conduct which substantially affected the commercial market. See *supra* notes 142-71 and accompanying text.

279. *Hutcheson*, 312 U.S. at 233-37.

280. *Allen Bradley*, 325 U.S. at 810.

281. *Id.* at 808. See *supra* note 48.

282. *Apex Hosiery*, 310 U.S. at 493 & n.15.

283. *Id.* at 503-04 (Union not merely accorded an exemption—Sherman Act did not apply).

284. *Hutcheson*, 312 U.S. at 229-37.

285. Reading the Sherman, Clayton and Norris-LaGuardia Acts as "interlacing statutes," the Court concluded that union activity that was protected under the latter two Acts could not be reached by the Sherman Act. *Id.* at 236. See *supra* notes 225-55 and accompanying text.

286. *Allen Bradley*, 325 U.S. at 808-11. The Court held that when a union combines with an employer in an effort to fix prices and monopolize the commercial market, it loses its statutory exemption from the Sherman Act. See *supra* notes 256-78 and accompanying text.

Under the rationale of *Hutcheson* and *Allen Bradley* application of the statutory exemption depends on two factors: (1) the existence of a "labor dispute"; and (2) a finding that the union "acted alone" and in its "self-interest."<sup>287</sup> Under this test, a union that combines with non-labor groups in an effort to control the commercial market loses its statutory exemption from the Sherman Act.

However, even if a union is unable to claim the statutory exemption under *Hutcheson* and *Allen Bradley*, it still might not be subject to the Sherman Act under the rationale of *Apex Hosiery*. The dispositive factor according to the *Apex Hosiery* Court, was whether the union conduct was aimed at eliminating competition in the commercial market or aimed at eliminating competition in the labor market.<sup>288</sup> The former conduct is prohibited under the Sherman Act, while the latter is beyond the scope of the Sherman Act.<sup>289</sup>

### B. The Nonstatutory Exemption

Despite the fact that the *Hutcheson* Court<sup>290</sup> and the *Allen Bradley* Court<sup>291</sup> were willing to apply the statutory exemption in the context of union-employer agreements,<sup>292</sup> the Supreme Court has subsequently refused to apply the statutory exemption to such agreements.<sup>293</sup> Instead, the Court has created a much narrower, nonstatutory exemption applicable to union-employer agreements.<sup>294</sup> In essence, the nonstatutory ex-

287. See *supra* notes 227-81 and accompanying text.

288. *Apex Hosiery*, 310 U.S. at 494-513.

289. *Id.* This position was adopted by the First Circuit in *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981), *cert. denied*, 458 U.S. 1120 (1982). In *Allied International*, the court first determined that the statutory exemption was inapplicable because there was no "labor dispute." *Id.* at 1380. The court next considered whether the complained of union conduct (politically motivated boycott) was intended to be proscribed by the Sherman Act. The court concluded that it was not. The court stated:

While we have rejected appellees' claim that the boycott falls within the statutory exemption from the [Sherman Act], we nevertheless think that it would be a rare case when, absent a specific anticompetitive object or collaboration with non-labor groups, a mere refusal to work by members of a labor union . . . would be held to violate the Sherman Act.

*Id.* at 1381; see also *Eastern Coal Corp. v. Disabled Mine Workers Ass'n*, 449 F.2d 616, 618-20 (6th Cir. 1971) (court used similar analysis in concluding Sherman Act did not proscribe picketing by disabled miners).

290. 312 U.S. 219 (1941).

291. 325 U.S. 797 (1945).

292. See *supra* notes 244, 273 and accompanying text. This position was consistent with the Court's approach until 1965. See *Handler & Zifchak*, *supra* note 88, at 478, 478 n.119.

293. See *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

294. See *Handler & Zifchak*, *supra* note 88, at 483.

emption involves a judicial attempt to balance the policies underlying the antitrust laws with the competing policies underlying the national labor laws.<sup>295</sup> This judicial balancing has led to confusion surrounding the application of the nonstatutory exemption.<sup>296</sup>

1. *United Mine Workers v. Pennington*

a. *the facts*

In *United Mine Workers v. Pennington*,<sup>297</sup> Phillips Brothers Coal Company (Phillips), a small coal operator, filed a claim<sup>298</sup> alleging that the United Mine Workers (UMW) had conspired with certain large coal operators to restrain and monopolize trade in violation of sections 1<sup>299</sup> and 2<sup>300</sup> of the Sherman Act.<sup>301</sup> Phillips alleged that UMW, in agreement with the large coal operators, sought to impose a uniform industry wide wage scale on small coal operators who were not parties to any collective bargaining agreement with UMW.<sup>302</sup> Phillips further alleged that the effects of the wage scale made it difficult for smaller coal operators to compete with the larger ones.<sup>303</sup> In response, UMW claimed that the wage scale was exempt from the Sherman Act since it concerned only wage standards.<sup>304</sup>

b. *the holding*

The question before the Court was whether the union-employer agreement imposing the wage scale was exempt from the Sherman

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295. See *Connell*, 421 U.S. at 622.

296. See 6 J. VON KALINOWSKI, *supra* note 2, § 48.01, at 3; 1 T. KHEEL, *supra* note 76, § 4.04[3]-[4], at 137-38 & n.137, 152-66.

297. 381 U.S. 657 (1965).

298. The original suit was filed by the trustees of the United Mine Workers of America Welfare and Retirement Fund against Phillips Brothers Coal Company to recover \$55,000 in royalty payments allegedly due under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, an agreement into which both parties had entered. Upon filing its answer, Phillips also filed a cross-claim alleging that United Mine Workers had violated sections 1 and 2 of the Sherman Act by conspiring with large coal companies to restrain trade and monopolize interstate commerce. *Pennington*, 381 U.S. at 659.

299. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

300. Section 2 of the Sherman Act provides in pertinent part: "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 felony . . ." 15 U.S.C. § 2 (1982).

301. 15 U.S.C. §§ 1-7 (1982). *Pennington*, 381 U.S. at 659.

302. *Pennington*, 381 U.S. at 659-61, 664.

303. *Id.* at 660.

304. *Id.* at 664.



Act.<sup>305</sup> Writing for a plurality, Justice White<sup>306</sup> concluded that the statutory exemption offered no protection from the Sherman Act to union-employer agreements.<sup>307</sup> Justice White offered two reasons for his conclusion. First, Justice White implied that the statutory exemption only applied when a union "acts alone."<sup>308</sup> By definition, a union could not be acting alone when it entered into a union-employer agreement. Thus, such an agreement could not be protected under the statutory exemption. Second, Justice White reasoned that the statutory exemption only protected union activities expressly contained in section 20<sup>309</sup> of the Clayton Act and section 4<sup>310</sup> of the Norris-LaGuardia Act.<sup>311</sup> Since a union-employer wage agreement was not expressly contained in either section, there was no statutory protection from the Sherman Act.<sup>312</sup>

Justice White, however, acknowledged the importance of union-employer wage agreements under the national labor laws.<sup>313</sup> Justice White stated that union-employer agreements dealing with mandatory subjects of collective bargaining,<sup>314</sup> such as wages, should be heavily sheltered from the Sherman Act.<sup>315</sup> In this regard, Justice White established the foundation for what has become known as labor's nonstatutory exemp-

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305. *Id.* at 661.

306. Justice White's opinion was joined by Chief Justice Warren and Justice Brennan. *Id.* at 659. Justices Douglas, Black and Clark joined in a separate concurring opinion. *Id.* at 672. Justices Goldberg, Harlan and Stewart concurred in the reversal but dissented from the plurality's reasoning. *Id.* at 672, 697.

307. *Id.* at 662.

308. *Id.*

309. See *supra* note 101 for the text of section 20 of the Clayton Act, 29 U.S.C. § 52 (1982).

310. See *supra* note 137 for the text of section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982).

311. *Pennington*, 381 U.S. at 662.

312. *Id.*

313. *Id.* at 664. Justice White acknowledged that such agreements "lie at the very heart of those subjects about which employers and unions must bargain." *Id.*

314. Section 8(d) of the National Labor Relations Act mandates bargaining in "good faith with respect to *wages, hours, and other terms and conditions of employment . . .*" 29 U.S.C. § 158(d) (1982) (emphasis added); see also Handler & Zifchak, *supra* note 88, at 503-04 n.255-60 and accompanying text for cases dealing with topics considered as mandatory subjects of collective bargaining.

315. *Pennington*, 381 U.S. at 664. Justice White recognized that although union wage agreements which result in eliminating competition based on wages create anticompetitive restraints on the product market, they are not the kinds of restraints that Congress intended the Sherman Act to prohibit. *Id.* Justice White stated, "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior." *Id.* at 665 (footnote omitted). Moreover, Justice White noted that a union could, consistent with the Sherman Act, attempt unilaterally to implement a wage agreement, even if some employers could not effectively compete if required to pay the union wage scale. *Id.* at 665 n.2.

tion.<sup>316</sup> The nonstatutory exemption was an attempt by Justice White to balance the policies embodied in the Sherman Act with those policies embodied in the National Labor Relations Act.<sup>317</sup>

Justice White, however, cautioned that not every union-employer agreement involving a mandatory subject of collective bargaining would be shielded by the nonstatutory exemption.<sup>318</sup> Specifically, Justice White concluded that a union-employer wage agreement would not be protected from the Sherman Act if the union agreed with the employer to impose the wage scale on parties not in a collective bargaining relationship with the union.<sup>319</sup>

Justice White made an important distinction between a union-employer agreement that affected only the parties to the agreement and a union-employer agreement intended to force parties outside the collective bargaining relationship to comply with the terms of the agreement:<sup>320</sup> the latter agreement would not be exempt from the Sherman Act.<sup>321</sup> Thus, if UMW agreed with the large coal operators to impose the terms of the wage scale on small coal operators who were not in a collective bargaining relationship with UMW, the nonstatutory exemption would

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316. The term nonstatutory exemption was coined by the Court in *Connell*, 421 U.S. at 622. In *Connell*, Justice Powell stated that “[t]he Court has recognized . . . 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 . . . nonstatutory exemption from antitrust sanctions.” *Id.*

317. *Pennington*, 381 U.S. at 665. Justice White thought that the nonstatutory exemption was an attempt to “harmoniz[e] the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting ‘the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.’ ” *Id.* (quoting *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 211 (1964)).

318. *Id.* at 664-66.

319. *Id.* at 665-66. Justice White stated:

[A] union forfeits its [nonstatutory] exemption . . . 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.

*Id.* Moreover, a union will be liable under the antitrust laws even though the union’s role in the scheme was limited to merely securing “wages, hours or other [working] conditions” from other employers in the industry. *Id.* at 666.

320. *Id.* at 663.

321. Justice White noted that the latter agreement, which was intended to force parties outside a collective bargaining relationship to comply with its terms, did not further any legitimate labor interests. According to Justice White, such agreements tend to restrict a union’s freedom in future contract negotiations, *id.* at 666, and are open to antitrust liability. *Id.* at 669.

As to the former agreement, Justice White concluded that it was “beyond question” that such an agreement could be entered into without violating the Sherman Act. *Id.* at 664.

not apply.<sup>322</sup> Consequently, the Court remanded the case to the district court to determine whether UMW had agreed with large coal operators to institute an industry wide wage agreement.<sup>323</sup>

2. *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*

In *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*,<sup>324</sup> a case decided the same day as *Pennington*, the Court again faced the issue of whether a union-employer agreement violated the Sherman Act. In *Jewel Tea*, the union-employer agreement restricted the daily hours during which Chicago-area retail meat markets could sell fresh meat.<sup>325</sup> The Court found that the union-employer agreement was protected from the Sherman Act under the nonstatutory exemption.<sup>326</sup>

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322. *Id.* at 669. Justice White concluded that this result did not conflict with the goals of the national labor laws. Although one of labor's legitimate goals was unifying labor standards to eliminate labor competition, Justice White refused to interpret the labor laws as allowing a union and an employer, as parties to a collective bargaining agreement, to force their agreements on the whole industry. *Id.* at 666. Justice White concluded that:

[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

*Id.*

It seems clear, however, that if UMW had attempted to implement its wage agreements only among employers with whom it bargained, there would have been no potential Sherman Act problems. In *Pennington*, that UMW allegedly attempted to force its wage scale on employers not in a collective bargaining relationship with UMW was dispositive. According to the Court, allowing UMW to impose its wage scale on non-party employers would exceed both national labor and antitrust policies. *Id.* at 666-68. The Court believed that such agreements would be tantamount to the union surrendering its freedom of action with respect to future collective bargaining agreements. *Id.*

323. *Id.* at 672. On remand, the district court held for UMW on the ground that Phillips could not show predatory intent, an element that the district court believed was required by the Supreme Court's decision. *Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968).

*Pennington* has been read to stand for three principles: (1) a union's agreed-upon restraint on its freedom of action exposes the union to antitrust liability; (2) the agreement must have been motivated by predatory intent in order to give rise to antitrust liability; and, most importantly, (3) mandatory subjects of collective bargaining are not automatically exempt from antitrust scrutiny. See Zifchak, *Labor-Antitrust Principles Applicable to Joint Labor-Management Conduct*, 21 DUQ. L. REV. 365, 368 (1983).

324. 381 U.S. 676 (1965).

325. *Id.* at 680.

326. *Id.* at 697.

a. *the facts*

*Jewel Tea* involved contract negotiations between representatives of 9,000 Chicago retailers of fresh meat (the Retailers) and seven local unions (the Unions).<sup>327</sup> The Unions, which were all affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, represented nearly all Chicago-area butchers.<sup>328</sup> During the heated negotiations, the Retailers, among them Jewel Tea, demanded a relaxation of the existing contract restrictions on marketing hours for retail meat departments.<sup>329</sup> The Unions rejected those demands.<sup>330</sup> When the Unions threatened to strike, the Retailers, including Jewel Tea, capitulated and signed the agreement.<sup>331</sup> The agreement contained a marketing hours provision restricting the sale of fresh meat before 9:00 a.m. and after 6:00 p.m.<sup>332</sup> Subsequently, Jewel Tea brought suit against the Unions claiming violations of sections 1<sup>333</sup> and 2<sup>334</sup> of the Sherman Act.<sup>335</sup>

b. *the holding*

Justice White, again writing for a plurality,<sup>336</sup> reaffirmed the non-statutory exemption he had articulated the same day in *Pennington*. Justice White explained:

[As we] pointed out in *Pennington*, [the nonstatutory] exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects.<sup>337</sup>

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327. *Id.* at 680.

328. *Id.*

329. *Id.* The current agreement provided that "[m]arket operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above." *Id.* at 679-80.

330. *Id.* at 680.

331. *Id.* at 681.

332. *Id.*

333. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

334. See *supra* note 300 for the text of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982).

335. *Jewel Tea*, 381 U.S. at 681. Jewel Tea complained about the marketing hours restriction, which disallowed the sale of meat before 9:00 a.m. and after 6:00 p.m. *Id.*

336. The Court again split three ways. Justice White, joined by Chief Justice Warren and Justice Brennan, wrote for the Court. *Id.* at 679. Justices Douglas, Black and Clark dissented. *Id.* at 735-38. Justices Goldberg, Harlan and Stewart concurred in the opinion, but on substantially different grounds. *Id.* at 697-735.

337. *Id.* at 689.

The issue in *Jewel Tea*, according to Justice White, was whether the marketing hours provision was "intimately related to wages, hours and working conditions."<sup>338</sup> If so, the Court would have to determine whether the provision, obtained through arm's length bargaining and in pursuit of legitimate union objectives, was protected under the national labor laws and was exempt from the Sherman Act.<sup>339</sup>

First, Justice White found that the marketing hours provision was within the realm of wages, hours and working conditions.<sup>340</sup> Next, to determine whether the national labor laws protected the Unions, Justice White balanced the anticompetitive effects the marketing hours provision had on the commercial market against the Unions' interest in obtaining the marketing hours provision.<sup>341</sup> On the one hand, Justice White found that there were significant restraints on competition caused by the marketing hours provision.<sup>342</sup> However, on the other hand, the Unions had an "immediate and direct" interest in the marketing hours provision.<sup>343</sup> Placing greater emphasis on the Unions' "immediate and direct" interest in the marketing hours provision, Justice White concluded that the national labor policy favoring such provisions outweighed any anticompetitive effects caused by the marketing hours provision.<sup>344</sup> Consequently, Justice White concluded that the provision, obtained through arm's length bargaining, was nonstatutorily exempt from the Sherman Act.<sup>345</sup>

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338. *Id.* at 689-90.

339. *Id.* Justice White stated:

The issue . . . 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.

*Id.*

340. *Id.* at 691-97. Justice White also noted that no evidence of a union-employer conspiracy existed. *Id.* at 688.

341. *Id.* at 691.

342. *Id.* Justice White noted, "the effect on competition [in *Jewel Tea*] is apparent and real, perhaps more so than in [*Pennington*] . . ." *Id.*

343. *Id.*

344. *Id.* Justice White stated:

Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

*Id.*

345. *Id.*

*c. lack of majority support*

The problem with the *Jewel Tea* decision, however, was that no single opinion represented a majority of the Court. Justice White, who argued that the nonstatutory exemption protected the marketing hours provision, was joined only by Chief Justice Warren and Justice Brennan.<sup>346</sup> Justices Goldberg, Harlan and Stewart concurred in the judgment, believing that the Sherman Act did not apply in this case, but disagreeing with Justice White's rationale.<sup>347</sup> The concurrence reasoned that all union-employer agreements dealing with mandatory subjects of collective bargaining were outside the scope of the Sherman Act.<sup>348</sup> At the same time, Justices Douglas, Black and Clark dissented, concluding that the marketing hours provision tended to restrain the product market and thus violated the Sherman Act.<sup>349</sup> According to the dissenters, the provision itself showed an illegal union-employer conspiracy under the Sherman Act.<sup>350</sup>

### 3. The adoption of a bifurcated analysis

Subsequent to *Pennington* and *Jewel Tea*, courts have followed Justice White's bifurcated analysis in labor-antitrust cases.<sup>351</sup> As a result,

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346. *Id.* at 679. Likewise, in *Pennington*, no single opinion represented a majority of the Court. See *supra* note 306.

347. Justice Goldberg, wrote one opinion applicable to both *Pennington* and *Jewel Tea*. *Jewel Tea*, 381 U.S. at 697. In *Pennington*, Justice Goldberg dissented from the opinion but concurred in the reversal. *Pennington*, 381 U.S. at 672. In *Jewel Tea*, Justice Goldberg concurred in the judgment but on substantially different grounds. *Jewel Tea*, 381 U.S. at 697. He believed that mandatory subjects of collective bargaining were automatically exempt from the Sherman Act. The Justice stated, "[t]o hold that mandatory collective bargaining is completely protected [from the Sherman Act] would effectuate the congressional policies of encouraging free collective bargaining . . ." *Id.* at 710. See generally *Jewel Tea*, 381 U.S. at 697-735 (Goldberg, J., dissenting in part and concurring in part).

348. *Id.* at 711-13, 731-35 (Goldberg, J., dissenting in part and concurring in part).

349. *Id.* at 735-36 (Douglas, J., dissenting).

350. *Id.* (Douglas, J., dissenting).

351. See, e.g., *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713-16, 716 n.19 (1981); *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 621-23 (1975); *Continental Maritime v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987); *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council*, 793 F.2d 1110, 1115-18 (9th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1299 (1987); *Altamose Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653, 658-62 (3d Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986); *Feather v. UMW*, 711 F.2d 530, 541-43 (3d Cir. 1983); *Telecom Plus, Inc. v. Local No. 3, IBEW*, 719 F.2d 613, 615 (2d Cir. 1983); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *James R. Snyder Co. v. Associated Gen. Contractors*, 677 F.2d 1111, 1118 n.10 (6th Cir.), *cert. denied*, 459 U.S. 1015 (1982); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 884-93 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982); *Berman Enters., Inc. v. Local No. 333, United Marine Div.*, 644 F.2d 930, 934-37 (2d Cir.),

unilateral union conduct is analyzed under the statutory exemption, while union conduct arising in the context of a union-employer agreement is analyzed under the nonstatutory exemption. Under the Court's approach in *Pennington* and *Jewel Tea*, the nonstatutory exemption turns on the following factors: (1) whether the union-employer agreement was negotiated at the employer's behest, (2) whether the subject of the union-employer agreement was intimately related to mandatory subjects of collective bargaining, and (3) whether the agreement affected labor relations with third parties.<sup>352</sup>

By creating a more limited nonstatutory exemption, the Court has misconstrued both Congress' intent and the Court's earlier decisions defining and applying labor's statutory exemption. Congress, in passing the Clayton and Norris-LaGuardia Acts, sought to exempt all legitimate union activities from the Sherman Act.<sup>353</sup> This was true irrespective of whether the dispute arose in the context of a union-employer agreement or in the context of unilateral union conduct. This result was clearly recognized by the Court in *Hutcheson* and *Allen Bradley*.<sup>354</sup> Thus, the Court's subsequent decisions applying a more limited nonstatutory exemption to union-employer agreements have betrayed Congress' intent and the Court's earlier decisions. The height of this judicial abuse of power came in the Court's 1975 decision, *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*.<sup>355</sup>

#### 4. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*

##### a. *the facts*

In *Connell*, Local No. 100 (the Union) represented workers in the plumbing and mechanical trades in the Dallas area.<sup>356</sup> In November of 1970, the Union asked Connell Construction (Connell),<sup>357</sup> a general contractor, to agree to employ only subcontracting firms that had collective bargaining agreements with the Union.<sup>358</sup> The Union, however, had no

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*cert. denied*, 454 U.S. 965 (1981); *Amalgamated Meat Cutters & Butcher Workmen v. Weterau Foods, Inc.*, 597 F.2d 133, 135-36 (8th Cir. 1979); *Pacific Maritime Ass'n v. Federal Maritime Comm'n*, 543 F.2d 395, 401-04 (D.C. Cir. 1976), *rev'd on other grounds*, 435 U.S. 40 (1978).

352. *Pennington*, 381 U.S. at 661-69; *Jewel Tea*, 381 U.S. at 688-97. See also 1 T. KHEEL, *supra* note 76, § 4.04[2], at 125.

353. See *supra* notes 99-112, 132-41 and accompanying text.

354. See *supra* notes 227-78 and accompanying text.

355. 421 U.S. 616 (1975).

356. *Id.* at 619.

357. *Id.* Connell was a general building contractor that subcontracted out construction projects to both union and nonunion companies. *Id.*

358. *Id.* at 618-19. This is known as a hot cargo agreement. A hot cargo agreement applies

desire to represent Connell's employees.<sup>359</sup> The Union's sole purpose in requesting the agreement was to organize as many subcontractors as possible.<sup>360</sup> Connell refused to sign any such agreement with the Union.<sup>361</sup> Upon Connell's refusal, the Union staged a strike at one of Connell's major construction sites, halting construction.<sup>362</sup> Under pressure, Connell signed the agreement.<sup>363</sup> Subsequently, Connell brought suit against the Union, alleging, among other things, that the agreement violated sections 1<sup>364</sup> and 2<sup>365</sup> of the Sherman Act.<sup>366</sup>

*b. the holding*

Justice Powell, writing for a 5-4 majority, noted at the outset that the Union could not claim the statutory exemption if the conduct complained of involved "concerted action or agreements between unions and nonunion parties."<sup>367</sup> Since the conduct complained of involved a union-employer agreement, the Union could not rely on the statutory exemption. Thus, the only exemption from the Sherman Act available to the Union was the nonstatutory exemption.<sup>368</sup> In this regard Justice Powell

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direct and indirect pressure on an employer to refrain from doing business with a third party in order to persuade the third party to meet union demands. See Annotation, *NLRA—Hot Cargo Provisions*, 39 A.L.R. FED. 16 (1978). Such agreements constitute an unfair labor practice under section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1982) (exemptions for the construction and garment industry). See *infra* note 378 for the text of construction industry proviso to section 8(e).

In the instant case, the Union wanted Connell to sign an agreement which included the following:

[T]he contractor and the union mutually agree with respect to work falling within the scope of the agreement that is to be done at the site of the construction, alteration, painting, or repairs of any building, structure or other works, that [if] the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

*Connell*, 421 U.S. at 619-20.

359. *Connell*, 421 U.S. at 619.

360. *Id.* at 625.

361. *Id.* at 620.

362. *Id.* Approximately 150 of Connell's employees walked off the job. *Id.*

363. *Id.*

364. See *supra* note 79 for the text of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

365. See *supra* note 300 for the text of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982).

366. *Connell*, 421 U.S. at 620-21. Connell also alleged violations of state antitrust laws. *Id.* at 619-20.

367. *Id.* at 622.

368. *Id.* at 622-23. Justice Powell, citing *Pennington* and *Jewel Tea*, traced the origins of the nonstatutory exemption to the national labor policy favoring a union's eliminating competition over wages and working conditions in the labor market. *Id.* at 622 (citing *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Local No. 189, Amalgamated Meat Cutters*



defined the scope of the nonstatutory exemption narrowly, stating that "while the statutory exemption allows unions to accomplish some [direct] restraints [on competition] . . . the nonstatutory exemption affords no similar protection . . ." <sup>369</sup> Thus, if the agreement produced direct effects on the market, the nonstatutory exemption would be inapplicable. With this in mind, Justice Powell set out to determine what effects the agreement had on the commercial market.

The Court conceded that the Union had attempted to achieve entirely legitimate goals. <sup>370</sup> Moreover, Justice Powell noted that no evidence of a conspiracy existed. <sup>371</sup> Nevertheless, the Court ultimately concluded that the agreement may have violated the Sherman Act. <sup>372</sup> Justice Powell cited two reasons for the Court's conclusion. First, a provision of the agreement rendered nonunion subcontractors ineligible to compete for actual jobs. <sup>373</sup> This created a direct impact on the commercial market. <sup>374</sup> Justice Powell stated:

This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policy to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the

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& Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965)). Thus, under the nonstatutory exemption, courts must balance the national labor policy favoring collective bargaining against the antitrust policy promoting free competition.

369. *Id.* at 622.

Justice Powell in effect created two separate categories of agreements with respect to the nonstatutory exemption: (1) agreements that create direct effects on the commercial market are not afforded protection under the nonstatutory exemption; and (2) agreements that do not create direct effects on the market can benefit from the nonstatutory exemption. *Id.* at 621-26. This result directly conflicts with the Court's decision in *Jewel Tea*. In *Jewel Tea*, Justice White, although acknowledging the agreement created direct effects on the commercial market, nevertheless applied the nonstatutory exemption. *Jewel Tea*, 381 U.S. at 691-97. See *supra* notes 342-44 and accompanying text.

370. *Connell*, 421 U.S. at 625. Justice Powell observed, "[t]his record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms." *Id.*

371. *Id.* at 625 n.2. Justice Powell went on to say, "in fact, *Connell* has not argued the case on a theory of conspiracy between the union and unionized subcontractors. It has simply relied on the multiemployer agreement as a factor enhancing the restraint of trade implicit in the subcontracting agreement it signed." *Id.*

372. *Id.* at 635. This case was remanded for a determination of whether the agreement violated the Sherman Act. *Id.* at 637.

373. *Id.* at 625.

374. *Id.*

antitrust laws.<sup>375</sup>

Hence, finding that the agreement impacted the commercial market, weighed heavily in the Court's decision not to apply the nonstatutory exemption. Second, the agreement was not protected by federal labor policies favoring collective bargaining since the Union made no attempt to represent Connell's employees.<sup>376</sup> Thus, despite the Court's finding that the Union was pursuing wholly legitimate objectives, the nonstatutory exemption was inapplicable.<sup>377</sup>

The Union defended the agreement on two grounds. First, the Union argued that the agreement fell within the construction industry proviso to section 8(e) of the National Labor Relations Act.<sup>378</sup> Second, the Union contended that, even if the agreement violated section 8(e), Connell's exclusive remedy was contained in the national labor laws.<sup>379</sup> In support of its first argument the Union asserted a literal interpretation of the construction industry proviso,<sup>380</sup> arguing that since Connell was an employer in the construction industry, the Union was a labor organization, and the agreement covered only work to be done at the construction site, the construction industry proviso to section 8(e) applied.<sup>381</sup>

375. *Id.* at 626.

376. *Id.* at 625.

377. This rationale is at odds with the Court's decision in *Jewel Tea*, 381 U.S. at 688-97. See *infra* notes 392-403 and accompanying text.

378. *Connell*, 421 U.S. at 626. Section 8(e) of the NLRA (passed as part of the Landrum Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, codified as amended in scattered sections of 29 U.S.C.), which prohibits hot cargo agreements, provides in part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be . . . void . . . .

29 U.S.C. § 158(e) (1982). Section 8(e) contains a construction industry proviso which states: Provided, That nothing in [section 8(e)] 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, alteration, painting, or repair of a building, structure, or other work . . . .

*Id.* (construction industry proviso).

Both lower courts held that the agreement came within the construction industry proviso and was thus exempt from the Sherman Act. *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 78 L.R.R.M. 3012 (N.D. Tex. 1971), *aff'd*, 483 F.2d 1154 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (1975).

At least one court has held that an agreement protected under the construction industry proviso automatically excludes that agreement from Sherman Act scrutiny. See *Suburban Tile Center, Inc. v. Rockford Bldg. & Constr. Trades Council*, 354 F.2d 1 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966).

379. *Connell*, 421 U.S. at 633-34.

380. *Id.* at 626-27.

381. *Id.*

Connell responded that the construction industry proviso was only intended to protect agreements arising out of a collective bargaining relationship.<sup>382</sup> Since this agreement did not arise out of a collective bargaining relationship, the construction industry proviso offered the Union no protection.<sup>383</sup>

The Court agreed with Connell. The Court noted that although the construction industry proviso suggested no limitations, it must be construed in light of congressional intent.<sup>384</sup> Reviewing the legislative history surrounding the passage of section 8(e), Justice Powell concluded that only agreements arising in the context of a collective bargaining relationship, and that were restricted to a particular job site, were protected by the construction industry proviso.<sup>385</sup> Thus, because the Union's agreement was aimed at employers not parties to a collective bargaining agreement, and was not limited to any particular job site,<sup>386</sup> the *Connell* Court found that the agreement violated section 8(e).<sup>387</sup>

The Union further argued that even if the agreement violated section 8(e), Connell's exclusive remedy was contained in the national labor laws.<sup>388</sup> Rejecting the Union's contention, Justice Powell concluded that "[t]here is no legislative history in the 1959 Congress suggesting that labor-law remedies for [section] 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."<sup>389</sup> Thus, the Court held that Connell could maintain an anti-

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382. *Id.* at 627.

383. *Id.* at 627-28.

384. *Id.*

385. *Id.* at 626-35.

386. Subsequent to *Connell*, the Court in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), held that a lawful hot cargo agreement arising out of a collective bargaining relationship need not be limited in application to a particular job site. *Id.* at 666.

387. *Connell*, 421 U.S. at 626-35.

388. *Id.* at 633-34.

389. *Id.* at 634. Justice Powell found it significant that Congress did not provide for any express remedies for parties injured by agreements violating section 8(e) of the NLRA, 29 U.S.C. § 158(e) (1982). Many commentators believe Justice Powell misread the legislative intent behind the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). See, e.g., Handler, *supra* note 161, at 1343-44. Professor Handler has stated:

The notion that the NLRA was not the exclusive remedy for an unfair labor practice had no foundation in prior law [before *Connell*]. . . . In ruling that dual remedies were appropriate, Justice Powell looked to the legislative history of the Landrum-Griffin Amendments. While Congress had made it clear that the remedies accorded union unfair labor practices under the Taft-Hartley Act were to be exclusive, in 1959 Congress was largely silent on the exclusivity of the labor remedies under Landrum-Griffin. Justice Powell construed this silence to allow for antitrust liability. But Justice Powell's premise must have been that the hot cargo boycott agreement was not

trust action against the Union.<sup>390</sup>

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immune from antitrust prior to the Landrum-Griffin Amendments, whose purpose was to render such agreements unlawful under the labor law, thereby filling the gap left open by the Taft-Hartley Act. This premise was faulty. In fact, *Hutcheson* had immunized the secondary labor boycott, and, from an antitrust point of view, there is no difference in market impact between a boycott brought about by union pressure tactics and a collective bargaining agreement requiring a boycott of nonunion contractors; in each instance a party is foreclosed from access to the commercial market. Furthermore, a series of Supreme Court decisions subsequent to *Hutcheson* taught that all secondary boycotts, including hot cargo agreements, were immune from antitrust. Thus, Congress wrote the Landrum-Griffin Amendments at a time when it was clear that a boycott agreement was no longer subject to antitrust. In this context, congressional silence as to the exclusivity of the labor remedy could not reasonably be construed as reversing the well-established antitrust immunity.

*Id.* (footnotes omitted); see also Handler & Zifchak, *supra* note 88, at 486-87.

390. *Connell*, 421 U.S. at 616. Justice Stewart dissented. He believed the majority improperly characterized the legislative history surrounding the passage of section 8(e). *Id.* at 639 (Stewart, J., dissenting). The Justice noted that Congress did not provide dual remedies, that is, antitrust and labor remedies for union agreements that violated section 8(e):

The relevant legislative history unmistakably demonstrates that in regulating secondary activity and 'hot cargo' agreements in 1947 and 1959, Congress selected with great care the sanctions to be imposed if proscribed union activity should occur. In so doing, Congress rejected efforts to give private parties injured by union activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws.

*Id.* (Stewart, J., dissenting).

Justice Stewart greatly emphasized that Congress rejected numerous proposals aimed at applying the Sherman Act to conduct prohibited under the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). *Id.* at 646-55 (Stewart, J., dissenting). Justice Stewart warned that the majority's "imposition of 'independent federal remedies' not intended by Congress . . . threatens 'to upset the balance of power between labor and management expressed in our national labor policy.'" *Id.* at 655 (quoting *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964)) (Stewart, J., dissenting).

Justice Stewart's argument is particularly compelling in light of the remedial scheme contained in the NLRA. Section 303 of the NLRA, 29 U.S.C. § 187 (1982) (passed pursuant to Taft-Hartley Act of 1947, 29 U.S.C. §§ 141-197 (1982)), provides an adequate remedy against a union's secondary pressures necessary to secure a hot cargo agreement. See Handler & Zifchak, *supra* note 88, at 488. Moreover, the legislative history surrounding the passage of the Taft-Hartley Act clearly established that section 303 was intended to be an exclusive remedy. See Handler & Zifchak, *supra* note 88, at 486. Thus, despite the lack of an express remedy for hot cargo agreements themselves, under Landrum-Griffin Congress contemplated that a party injured by such an agreement would be fully compensated under section 303. Since section 303 is intended to be an exclusive remedy which provides the necessary compensatory relief, there is no need to seek relief under the Sherman Act.

Justice Powell, on the other hand, argued that the absence of an express congressional remedy for the hot cargo agreement itself meant that such an agreement could be remedied under the Sherman Act. Justice Powell stated, "whatever significance this legislative choice [i.e. the exclusive remedy under Taft-Hartley for section 303] 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 the 'hot cargo' agreements it outlawed in 1959." *Connell*, 421 U.S. 634. Thus, Justice Powell's opinion created a paradox: despite the fact that the Court had consistently held that punitive damages are inconsistent with the policies underlying the national labor laws, the Court relied on Congress' failure to include com-

The *Connell* decision was important because it unequivocally removed union-employer agreements from the broad protection of the statutory exemption.<sup>391</sup> Union-employer agreements are now protected only by the more narrow, nonstatutory exemption.

5. Application of the nonstatutory exemption: conflicting approaches under *Jewel Tea* and *Connell*

In *Jewel Tea*, the issue was whether a marketing hours provision incorporated into a collective bargaining agreement violated the Sherman Act.<sup>392</sup> The Court held that the provision was exempt from the Sherman Act.<sup>393</sup> In *Connell*, the issue was whether a union-employer agreement not arising out of a collective bargaining relationship violated the Sherman Act.<sup>394</sup> The Court held that the agreement could be the basis of an antitrust attack.<sup>395</sup> Although the Court in both cases applied the nonstatutory exemption framework, the Court's approach in the two cases was radically inconsistent.

In both *Jewel Tea* and *Connell*, the Court acknowledged the existence of two opposing factors: the Unions' self-interest in the agreements<sup>396</sup> and that the agreements created direct restraints on the commercial market.<sup>397</sup> However, the Court's balancing of these two factors varied greatly. On the one hand, the *Jewel Tea* Court placed considerable emphasis on the fact that the Union's interest was "immediate and direct."<sup>398</sup> This "immediate and direct" interest justified any anticompetitive effects the agreement had on the commercial market. In contrast, the *Connell* Court emphasized the fact that the agreement restrained the commercial market.<sup>399</sup> Consequently, the *Connell* Court found that the agreement was not exempt from the Sherman Act. These two cases represent fundamentally different outcomes under the nonstatutory exemp-

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pensatory damage remedies against parties violating section 8(e) to justify imposing treble damages under the Sherman Act. See Handler & Zifchak, *supra* note 88, at 489 n.173 and accompanying text.

A full discussion of the exclusivity issue is beyond the scope of this Comment. However, for an excellent overview of the problem see St. Antoine, *supra* note 75, at 616-31; Handler & Zifchak, *supra* note 88, at 486-92; Handler, *supra* note 161, at 1343-48; 1 T. KHEEL, *supra* note 76, § 4.04[4], at 372-74.

391. *Connell*, 421 U.S. at 622.

392. *Jewel Tea*, 381 U.S. at 679. See *supra* notes 325-50 and accompanying text.

393. *Jewel Tea*, 381 U.S. at 697.

394. *Connell*, 421 U.S. at 619-37. See *supra* notes 355-91 and accompanying text.

395. *Connell*, 421 U.S. at 637.

396. See *supra* notes 343, 370 and accompanying text.

397. See *supra* notes 342, 373-75 and accompanying text.

398. *Jewel Tea*, 381 U.S. at 691.

399. *Connell*, 421 U.S. at 623-25.

tion,<sup>400</sup> and suggest that liability for union-employer agreements under the Sherman Act depends solely on what factors courts choose to give greater emphasis. This wide-open analysis makes the nonstatutory exemption both unpredictable and highly manipulable.

Several conclusions regarding the nonstatutory exemption can be drawn. First, as demonstrated by the differing outcomes under *Jewel Tea* and *Connell*, application of the nonstatutory exemption is unpredictable.<sup>401</sup> Second, the nonstatutory exemption is much more limited in scope than the statutory exemption.<sup>402</sup> Thus, the protection afforded union-employer agreements from the Sherman Act is much less expansive than the protection afforded unilateral union activities under the statutory exemption.<sup>403</sup> These conclusions necessitate a reexamination of labor's nonstatutory exemption.

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400. Of course, the major distinguishing factor between *Jewel Tea* and *Connell* is the fact that the agreement in *Jewel Tea* arose out of a collective bargaining relationship, whereas in *Connell* there was no such relationship. However, whatever importance this might have had has been somewhat diminished by the fact that some lower courts have applied the *Connell* approach to union-employer agreements arising out of a collective bargaining relationship. See, e.g., *Altomose Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653 (3d Cir. 1985), cert. denied, 475 U.S. 1107 (1986); *Feather v. UMW*, 711 F.2d 530 (3d Cir. 1983); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), vacated on other grounds, 488 U.S. 902 (1980); *Commerce Tankers v. National Maritime Union*, 553 F.2d 793 (2d Cir.), cert. denied, 434 U.S. 923 (1977).

In contrast, some courts have held that the *Jewel Tea* approach prevails in the context of collective bargaining agreements. See, e.g., *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council*, 793 F.2d 1110 (9th Cir. 1986) (en banc), cert. denied, 107 S. Ct. 1299 (1987); *Home Box Office v. Director's Guild*, 708 F.2d 95 (2d Cir. 1983); *James R. Snyder Co. v. Associated Gen. Contractors*, 677 F.2d 1111 (6th Cir.), cert. denied, 459 U.S. 1015 (1982); *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), cert. denied, 449 U.S. 1076 (1981).

401. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 138 n.137, § 4.04 [a]-[5], at 152-66; see also, 6 J. VON KALINOWSKI, *supra* note 2, § 48.01, at 3.

402. This conclusion necessarily follows from the logic in *Connell*. In *Connell*, Justice Powell made it clear that union-employer agreements that have direct effects on the market will not be protected by the nonstatutory exemption. *Connell*, 421 U.S. at 622-23. See *supra* note 369 and accompanying text. Justice Powell made it equally clear, however, that unilateral activities that create direct effects on the market may still be protected by labor's statutory exemption. *Connell*, 421 U.S. at 622-23.

403. This result is somewhat of an anomaly. On the one hand, a union may implement the weapons of industrial warfare—strikes, boycotts and pickets—virtually free from Sherman Act liability. Yet on the other hand the "peace treaty"—union-employer agreements—which results from the industrial warfare are subject to almost unlimited Sherman Act review. This is so despite the fact that these "peace treaties" are often the result of a statutorily imposed duty under the national labor laws. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 134; see also *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 712 (1965) (Goldberg, J., dissenting in part and concurring in part).

## VI. THE NONSTATUTORY EXEMPTION: A STEP BACKWARDS IN LABOR-ANTITRUST ANALYSIS

The nonstatutory exemption<sup>404</sup> applicable to union-employer agreements has been marked by confusion and controversy. The split Court at the genesis of the exemption in *United Mine Workers v. Pennington*<sup>405</sup> and *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*<sup>406</sup> exemplifies this confusion and controversy. In fact, even later cases such as *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*<sup>407</sup> have done little to clarify this problem. The problem is two-fold. First, the Court, by creating the nonstatutory exemption, has not been true to Congress' underlying purpose in passing the antitrust and labor laws. Second, the Court, in creating the nonstatutory exemption, has strayed from its own decisions defining the scope of the statutory exemption. As a result, labor-antitrust analysis veered off-course long ago and has continued to drift away.

This section examines the interplay between union-employer agreements and the principles espoused by the Court in *United States v. Hutcheson*<sup>408</sup> and *Allen Bradley Co. v. Local No. 3, IBEW*.<sup>409</sup> It concludes that application of the statutory exemption to controversies arising from the terms or the enforcement of union-employer agreements is not only the soundest course for courts to take, but is also supported by congressional intent and past Court precedent.

### A. *Union-Employer Agreements and the Statutory Exemption: Never the Twain Shall Meet?*

#### 1. Statutory exemption: two-pronged analysis

In *Hutcheson*, the Court, recognizing labor's statutory exemption, reasoned that the Sherman,<sup>410</sup> Clayton<sup>411</sup> and Norris-LaGuardia<sup>412</sup> Acts

404. See *supra* notes 290-403 and accompanying text for discussion of the nonstatutory exemption.

405. 381 U.S. 657 (1965). See *supra* notes 297-323, 351-52 and accompanying text.

406. 381 U.S. 676 (1965). See *supra* notes 324-52, 392-403 and accompanying text.

407. 421 U.S. 616 (1975). See *supra* notes 355-403 and accompanying text.

408. 312 U.S. 219 (1941). See *supra* notes 225-55, 284-85, 287 and accompanying text.

409. 325 U.S. 797 (1945). See *supra* notes 256-78, 286-87 and accompanying text.

410. 15 U.S.C. §§ 1-7 (1982). See *supra* notes 12-98 and accompanying text for discussion of the Sherman Act.

411. 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982). See *supra* notes 99-131 and accompanying text for discussion of the Clayton Act.

412. 29 U.S.C. §§ 101-115 (1982). See *supra* notes 132-41 and accompanying text for discussion of the Norris-LaGuardia Act.

must be read together "as a harmonizing text of outlawry of labor conduct."<sup>413</sup> In this light, the Court concluded that so long as the union's conduct falls within the bounds of a "labor dispute" as redefined by the Norris-LaGuardia Act,<sup>414</sup> the conduct was exempt from the Sherman Act.<sup>415</sup>

Subsequent to *Hutcheson*, the Court in *Allen Bradley* held that the existence of a "labor dispute" was not, by itself, dispositive of the Sherman Act question.<sup>416</sup> Instead, the Court determined that once a "labor dispute" existed, the next question to ask was whether the union "acted alone" or in "combination" with non-labor groups in an effort to monopolize the commercial market.<sup>417</sup> A union that combines with non-labor groups in an effort to suppress competition in the commercial market falls outside statutory protection.<sup>418</sup> The *Hutcheson* and *Allen Bradley* cases delineate a two-pronged test for determining whether the statutory exemption applies. First, does the union conduct fall within the statutory definition of "labor dispute?"<sup>419</sup> Second, assuming the first prong is satisfied, has the union "acted alone" and in its "self-interest," and not in "combination" with non-labor groups?<sup>420</sup>

#### a. "labor dispute" requirement

Central to concluding that the statutory exemption applies is the finding of a "labor dispute" as that term is defined by the Clayton and

413. *United States v. Hutcheson*, 312 U.S. 219, 231 (1941). See *supra* notes 237-42 and accompanying text.

414. See *supra* note 101 for the text of section 20 of the Clayton Act, 29 U.S.C. § 52 (1982) (defining "labor dispute"). See also *supra* note 139 and accompanying text for the text of section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1982) (defining "labor dispute").

415. *Hutcheson*, 312 U.S. at 227-37. See *supra* notes 237-50 and accompanying text.

416. *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 808-11 (1945).

417. *Id.* See *supra* notes 279-81, 286-87 and accompanying text. This is similar to the *Hutcheson* language. In *Hutcheson*, the Court implied that the statutory exemption would apply so long as the union acted in its "self-interest" and did not combine with non-labor groups. *Hutcheson*, 312 U.S. at 232. In *Allen Bradley*, the Court held that so long as the union "acts alone" and not in combination with non-labor groups, the statutory exemption will apply. *Allen Bradley*, 325 U.S. at 810. Whether the "self-interest" requirement and the "act alone" requirement are meant to mean the same thing is unclear. What is clear, however, is that both opinions imply that an antitrust combination must be present in order for the union to lose statutory protection. See *supra* note 244 for a discussion on how the *Hutcheson* Court defined combination.

418. *Allen Bradley*, 325 U.S. at 408-11. See *supra* notes 48, 417.

419. *Hutcheson*, 312 U.S. at 231-37. See *supra* notes 227-81, 286-87 and accompanying text.

420. *Allen Bradley*, 325 U.S. at 408-11. See *supra* notes 227-81, 286-87 and accompanying text.



Norris-LaGuardia Acts.<sup>421</sup> In determining whether a "labor dispute" exists, the logical first question is whether the union conduct meets the statutory requirements for a "labor dispute."

i. statutory definition

Section 13(c)<sup>422</sup> of the Norris-LaGuardia Act broadly defines "labor dispute."<sup>423</sup> Congress used sweeping language to "obviate the results of the judicial construction" given the Clayton Act.<sup>424</sup> Despite this language, the Court has chosen to narrowly construe the term "labor dispute" for purposes of labor-antitrust analysis. For instance, in the *Pennington-Jewel Tea-Connell* line of cases,<sup>425</sup> the Court implicitly suggested that controversies arising from the terms or the enforcement of union-employer agreements do not constitute "labor disputes."<sup>426</sup> The immediate consequence of such a holding is that such controversies will never be protected from the Sherman Act under the statutory exemption.

There are several problems with the Court's restrictive interpretation of the term "labor dispute" in the context of union-employer agreements. First, such an interpretation conflicts with the Court's own holdings that section 13(c) of the Norris-LaGuardia Act, which defines "labor dispute," must be broadly construed. For instance, in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*,<sup>427</sup> the Court considered whether a politically-motivated work stoppage fell within the meaning of "labor dispute" as defined by section 13(c)<sup>428</sup> of the Norris-LaGuardia Act.<sup>429</sup> In concluding that the union conduct con-

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421. See *supra* note 139 and accompanying text for the text of section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1982) (defining "labor dispute"). See also *supra* note 101 for the text of section 20 of the Clayton Act, 29 U.S.C. § 52 (1982) (defining "labor dispute").

422. See *supra* note 139 and accompanying text for text of section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1982).

423. See *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982).

424. *Hutcheson*, 312 U.S. at 234.

425. *Pennington*, 381 U.S. at 662; *Jewel Tea*, 381 U.S. at 689; *Connell*, 421 U.S. at 621-23. See *supra* notes 297-391 and accompanying text.

426. *Id.* Although the Court in these three cases did not expressly hold that controversies arising from the terms or the enforcement of union-employer agreements do not constitute "labor disputes" for labor-antitrust analysis, this is the effect of the holdings. By expressly excluding union-employer agreements from the ambit of the statutory exemption, these three cases constructively remove such agreements from the scope of "labor disputes"—the essential component of the statutory exemption.

427. 457 U.S. 702 (1982).

428. See *supra* note 139 and accompanying text for the text of section 13(c) of the Norris-LaGuardia Act.

429. *Jacksonville*, 457 U.S. at 704.

stituted a "labor dispute,"<sup>430</sup> Justice Marshall, writing for the Court, stated:

Our decisions have recognized that the term "labor dispute" must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws.<sup>431</sup>

Thus, the Court has clearly articulated a broad framework from which to analyze the term "labor dispute."<sup>432</sup>

Applying this broad analytical framework to the context of union-employer agreements suggests only one conclusion: plainly within any common-sense reading of section 13(c), the term "labor dispute" necessarily encompasses controversies arising from the terms or the enforcement of union-employer agreements.<sup>433</sup> The language of section 13(c) is unmistakably clear—a "labor dispute" includes controversies arising from "representations of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."<sup>434</sup> Thus, the Court is wrong to suggest, as it did in the *Pennington-Jewel Tea-Connell* line of cases, that controversies arising out of union-employer agreements can never form the basis of a "labor dispute."

The Court's restrictive interpretation of "labor dispute" is also inconsistent with its earlier labor-antitrust decisions. For example, in *Allen Bradley*, the disputed union conduct involved both unilateral conduct (strikes and boycotts) and union-employer agreements (series of interlocking closed shop/hot cargo agreements).<sup>435</sup> Nevertheless, the Court recognized that a "labor dispute" existed. The Court stated, "[i]t has been argued that no labor disputes existed. *The argument is untenable. . . .* Local No. 3 is a labor union and its spur to action related to wages and working conditions."<sup>436</sup> The logical extension of this argument is that the finding of a "labor dispute" presumably would have trig-

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430. *Id.* at 719.

431. *Id.* at 711-12.

432. See also *Marine Cooks & Stewards v. Panama S.S.*, 362 U.S. 365, 369-70 (1960); *International Ass'n of Machinist and Aerospace Workers v. Eastern Air Lines, Inc.*, 826 F.2d 1141, 1145 (1st Cir. 1987) (term "labor dispute" should be "broadly and liberally construed"); *Brotherhood of Maintenance of Way Employees v. Guilford Transp. Industries, Inc.*, 803 F.2d 1228, 1232-33 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 1972 (1987).

433. See *Adams, Ray & Rosenberg v. William Morris Agency, Inc.*, 411 F. Supp. 403, 406-11 (C.D. Cal. 1976) (applying term to union-employer agreement).

434. 29 U.S.C. § 113(c) (1982).

435. *Allen Bradley*, 325 U.S. at 799-800. See *supra* notes 256-78 and accompanying text.

436. *Allen Bradley*, 325 U.S. at 807 n.12 (emphasis added). See *Carpenters Local No. 1846*

gered the statutory exemption, protecting from the Sherman Act both the unilateral union conduct and the union-employer agreements.<sup>437</sup> However, the Court's finding that Local No. 3 combined with employers to eliminate competition in the commercial market, effectively stripped Local No. 3 of any statutory protection.<sup>438</sup> The significance of the Court's opinion, however, lies in the fact that the Court seemed willing to find a "labor dispute" in the context of controversies arising from the terms or the enforcement of union-employer agreements.<sup>439</sup> Thus, in the absence of a union-employer combination<sup>440</sup> aimed at fixing prices, the Court was willing to apply the statutory exemption in the context of union-employer agreements.<sup>441</sup>

The Court's underlying rationale in the *Pennington-Jewel Tea-Connell* line of cases, that the term "labor dispute" does not apply to union-employer agreements in the labor antitrust context has no foundation for support. To the contrary, Congress' broad statutory language coupled with the Court's holding in *Hutcheson* and *Allen Bradley* suggests that controversies arising from the terms or the enforcement of union-employer agreements may fall within the definition of "labor dispute," and thus be protected by labor's statutory exemption.

Assuming that a "labor dispute" is found to exist, the Clayton<sup>442</sup> and Norris-LaGuardia<sup>443</sup> Acts prohibit federal courts from issuing injunctions.<sup>444</sup> Section 1<sup>445</sup> of the Norris-LaGuardia Act expressly prohibits the issuance of injunctions in "a case involving or growing out of a labor dispute."<sup>446</sup> Thus, in the absence of any type of union-employer

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v. Pratt-Farnsworth, Inc., 690 F.2d 489, 531 n.22 (5th Cir. 1982) (conduct involved in *Allen Bradley* constituted "labor dispute"), *cert. denied*, 464 U.S. 932 (1983).

437. See *supra* notes 269-73 and accompanying text.

438. *Allen Bradley*, 325 U.S. at 807-13.

439. *Id.* at 807 n.12; see also *supra* notes 272-73 and accompanying text.

440. The term "combination" throughout this Comment is used in the antitrust sense. That is, a union that adopts an employer's antitrust animus in an effort to eliminate competition in the commercial market has combined with that employer.

441. *Allen Bradley*, 325 U.S. at 809. This conclusion is consistent with the Court's decision in *Hutcheson*. In *Hutcheson*, although dealing solely with unilateral union conduct, the Court made it clear that the union would lose its antitrust immunity *only* if combined with non-labor groups. *Hutcheson*, 312 U.S. at 232. The Court defined the term "combination" in the antitrust sense. *Id.* at 232 n.3. See *supra* note 244. Thus, union-employer agreements free from antitrust taint would be protected by the statutory exemption.

442. 15 U.S.C. §§ 12-27 (1982), 29 U.S.C. §§ 52-53 (1982).

443. 29 U.S.C. §§ 101-115 (1982).

444. This assumes that the exceptions contained in section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1982), do not apply.

445. See *supra* note 137 for the text of section 1 of the Norris-LaGuardia Act, 15 U.S.C. § 1 (1982).

446. *Id.* 29 U.S.C. § 101 (1982).

combination to eliminate competition in the commercial market, no injunction can be issued and thus the disputed conduct is exempt from the Sherman Act.<sup>447</sup>

ii. public policy

Presuming courts are unwilling to give the broad construction to the term "labor dispute" that Congress intended, there is an alternative approach that would equally satisfy the first prong of the statutory exemption. Section 2 of the Norris-LaGuardia Act incorporates, as part of the public policy of the United States, union-employer agreements involving "terms and conditions of employment."<sup>448</sup> In addition, section 1 of the Norris-LaGuardia Act prohibits courts from issuing injunctions "contrary to the public policy declared in this [Act]."<sup>449</sup> Thus, section 1 expressly prohibits courts from issuing injunctions in controversies arising from the terms or the enforcement of such union-employer agreements.

Although under this approach it is not necessary to label the dispute a "labor dispute," the logic of *Hutcheson* still controls. The underlying premise of *Hutcheson* is that activities protected by the Clayton and Norris-LaGuardia Acts are to be exempted from the Sherman Act.<sup>450</sup> The vehicle used by the *Hutcheson* Court to achieve this result was the finding of a "labor dispute." An equally plausible vehicle is the finding of a protected public policy. Since the Norris-LaGuardia Act expressly protects union-employer agreements from injunctions as a matter of public policy, the *Hutcheson* logic dictates that the protection should also be extended to bar courts from issuing injunctions pursuant to the Sherman Act. Thus, under either the "labor dispute" approach or the "public policy" approach, union-employer agreements may be protected from injunctive relief and therefore may also be protected from the Sherman Act.<sup>451</sup>

b. "acting alone" and "self-interest" requirements

Assuming that a "labor dispute" exists, it does not necessarily follow that the statutory exemption applies. The union must also "act

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447. This argument assumes, of course, that the union has "acted alone" and in its "self-interest," and not in combination with non-labor groups.

448. 29 U.S.C. § 102 (1982). See *supra* note 135 for the text of section 2 of the Norris-LaGuardia Act.

449. 29 U.S.C. § 101 (1982). See *supra* note 137 for the text of section 1 of the Norris-LaGuardia Act.

450. *Hutcheson*, 312 U.S. at 227-37.

451. See *supra* note 447.

alone” and in its “self-interest.”<sup>452</sup>

i. “act alone”

The requirement that a union must “act alone” can be traced to the Court’s holding in *Allen Bradley*.<sup>453</sup> In *Allen Bradley*, the Court explained, “[o]ur holding means that the same labor union activities may or may not be in violation of the Sherman Act, *dependent upon whether the union acts alone or in combination with business groups.*”<sup>454</sup> Thus, unions should only be liable under the Sherman Act when they combine with non-labor groups.<sup>455</sup>

The use of the term “combination” by the *Allen Bradley* Court was not meant to encompass all union-employer agreements.<sup>456</sup> To the contrary, the Court’s usage of the term “combination” meant concerted action in the antitrust sense, where a union adopts a non-labor group’s antitrust animus in an effort to suppress competition in the commercial market.<sup>457</sup> This interpretation of “combination” is further supported by the *Allen Bradley* Court’s recognition that the term “act alone” could apply to certain union-employer agreements which standing alone would not violate the Sherman Act.<sup>458</sup> In other words, the Court was not defining “act alone” literally to exclude all union-employer agreements. Rather, the Court merely held that a union *could not* have been “acting alone” if it “combined” with non-labor groups.<sup>459</sup> Thus, under the Court’s earlier decisions, controversies arising from the terms or the enforcement of union-employer agreements satisfied the “act alone” requirement of the statutory exemption.

Unfortunately, this has not been the prevailing view. The Court in *Pennington* implicitly held that the statutory exemption was unavailable

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452. *Allen Bradley*, 325 U.S. at 810 (“act alone” requirement); *Hutcheson*, 312 U.S. at 232 (“self-interest” requirement). See *supra* notes 227-78, 280, 287 and accompanying text.

453. *Allen Bradley*, 325 U.S. at 810. In *Hutcheson*, however, the Court hinted at this requirement when it stated, “[s]o long as a union acts in its self-interest and does not combine with non-labor groups [the statutory exemption will apply] . . . .” *Hutcheson*, 312 U.S. at 232. The *Hutcheson* Court thus implied that if a union does not combine with non-labor groups, it will be protected from the Sherman Act by the statutory exemption.

454. *Allen Bradley*, 325 U.S. at 810 (emphasis added).

455. This position is consistent with *Hutcheson* and *Allen Bradley*. See *supra* notes 244, 273, 441 and accompanying text.

456. To the contrary, the term “combination” was used by both the *Hutcheson* and *Allen Bradley* Courts to mean only concerted activity in the antitrust sense—agreeing to eliminate competition in the commercial market. *Hutcheson*, 312 U.S. at 232 n.3; *Allen Bradley*, 325 U.S. at 807-13. See *supra* notes 244, 273.

457. *Hutcheson*, 312 U.S. at 232 n.3; *Allen Bradley*, 325 U.S. at 807-13.

458. *Allen Bradley*, 325 U.S. at 809. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 141, 148.

459. *Allen Bradley*, 325 U.S. at 809-10.

to controversies arising from the terms or the enforcement of union-employer agreements because the union had not literally "acted alone."<sup>460</sup> This rationale was reaffirmed by the Court in *Connell*.<sup>461</sup> The two cases, however, misconstrued the concept of "acting alone." Neither the *Pennington* nor *Connell* Courts considered the possibility that within the context of a union-employer agreement a union could "act alone" in the sense of acting independently of an employer's antitrust animus.<sup>462</sup> Clearly, however, the *Allen Bradley* Court contemplated that "acting alone" meant acting independently of such employer animus.<sup>463</sup>

The *Allen Bradley* Court required that unions "act alone" to ensure that unions would not combine with non-labor groups to suppress competition in the commercial market.<sup>464</sup> This reasoning is consistent with Congress' intent behind the Sherman Act.<sup>465</sup> Thus, it would be wrong to suggest that the "act alone" requirement was meant to exclude all union-employer agreements from the ambit of the statutory exemption. This fundamental misunderstanding by the Court over the interpretation of the "act alone" requirement in *Pennington* and *Connell* resulted in creating and perpetuating a limited, highly manipulable and unnecessary non-statutory exemption.

Furthermore, the Court's misconception of what constitutes the "act alone" requirement infringes upon the policies enumerated in the national labor laws. The labor laws view union-employer agreements as a desirable end result of direct union pressure tactics (e.g., strikes and boycotts). However, the Court's approach in *Pennington* and *Connell* relegates such agreements to a lower status. As one commentator stated, "the *Pennington-Connell* approach appears to see union/employer agreements as, if not aberrant, then as somehow unanticipated consequences beyond the ken of the statutory scheme."<sup>466</sup>

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460. *Pennington*, 381 U.S. at 661-63. Furthermore, in *Pennington*, Justice White suggested that the statutory exemption protects only union activities expressly contained in section 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act. See *supra* notes 309-11 and accompanying text. However, neither *Hutcheson* nor *Allen Bradley* can be read as so limiting the statutory exemption. Under the rationale of *Hutcheson* and *Allen Bradley*, satisfaction of the two-pronged test triggers the statutory exemption irrespective of whether the union conduct involved was expressly contained in sections 4 or 20.

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

462. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 141.

463. *Allen Bradley*, 325 U.S. at 810.

464. *Id.* at 807-13.

465. See *supra* note 48.

466. See 1 T. KHEEL, *supra* note 76, § 4.04[3], at 137.

## ii. "self-interest"

Just as a union must "act alone" to claim the statutory exemption, it must also act in its "self-interest" to claim the exemption's benefit.<sup>467</sup> Courts have held that a union acts in its "self-interest" when its activities "bear a reasonable relationship to a legitimate union interest."<sup>468</sup> In other words, when the union acts to protect wages, hours and other working conditions—objectives at the heart of the national labor policy—the union acts in its "self-interest."<sup>469</sup> Clearly, then, a union that is enforcing or negotiating an agreement with an employer concerning wages, hours or other terms and working conditions is acting in its "self-interest." Thus, controversies arising from the terms or the enforcement of such union-employer agreements satisfy the "self-interest" requirement.

## 2. Summary

As this analysis indicates, controversies arising from the terms or the enforcement of union-employer agreements<sup>470</sup> satisfy the two-pronged test articulated in *Hutcheson* and *Allen Bradley*. Therefore, courts should analyze such agreements in the context of labor's statutory exemption. However, the Supreme Court's manipulation of the *Hutcheson-Allen Bradley* test has resulted in a bifurcated labor exemption.

The creation of the nonstatutory exemption is clearly antithetical to the national labor laws. After all, the national labor laws compel unions and employers to agree on certain terms. At the same time, however, the existence of an agreement strips the union of its statutory protection from the Sherman Act. Thus, unions are shielded from the Sherman Act only by a limited and highly manipulable nonstatutory exemption.

The creation of the nonstatutory exemption also conflicts with Congress' broad definition of "labor dispute" and public policy statements found in the Norris-LaGuardia Act.<sup>471</sup> The Court has narrowly construed the term "labor dispute" and has failed to consider the public policy argument. Finally, the Court's creation of a nonstatutory exemption is incompatible with the Court's own prior precedent. In *Hutcheson* and *Allen Bradley*, the Court clearly envisioned statutory protection

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467. *Hutcheson*, 312 U.S. at 232.

468. See *Adams, Ray & Rosenberg v. William Morris Agency, Inc.*, 411 F. Supp. 403, 410 (C.D. Cal. 1976); see also *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981), cert. denied, 458 U.S. 1120 (1982).

469. See *Allied International*, 640 F.2d at 1380.

470. See *supra* note 255.

471. 29 U.S.C. §§ 101-115 (1982).

from the Sherman Act for those union-employer agreements dealing with lawful union objectives.<sup>472</sup> Following the *Pennington* case, however, the Court has rejected this view.<sup>473</sup>

The time has come for the courts, and even Congress, to clearly articulate the rules regarding labor's exemption from the Sherman Act. Such clarification necessarily entails abolishing the nonstatutory exemption. The present bifurcated framework of analysis will not do. Union-employer agreements, which for the most part are creatures of statutory obligation, should receive greater protection from the Sherman Act than the current analytical framework provides. The following section proposes a workable framework to analyze all controversies arising from the terms or the enforcement of union-employer agreements.

## VII. PROPOSAL

Courts must abandon the nonstatutory exemption. In its place, courts should adopt the underlying principles from the *Apex Hosiery-Hutcheson-Allen Bradley* line of cases<sup>474</sup> to analyze controversies arising from the terms or the enforcement of union-employer agreements. This approach would require courts to look beyond the mere fact that a union-employer agreement exists.<sup>475</sup> Instead, courts should focus on whether the union-employer agreement satisfies the underlying principles of the above three cases. This analysis imports a two-part approach.

### A. Act Alone/Self-Interest

First, a court should analyze the disputed union-employer agreement to determine whether the union "acted alone" and in its "self-interest."<sup>476</sup> Such a conclusion could be determined by finding that the dispute arising from the union-employer agreement concerned wages,

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472. *Hutcheson*, 312 U.S. at 227-37; *Allen Bradley*, 325 U.S. at 809.

473. See *Connell*, 421 U.S. at 621-23.

474. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945). See *supra* notes 140-71, 224-89 and accompanying text.

475. The fundamental flaw in the Court's approach in the *Pennington-Jewel Tea-Connell* line of cases was that the Court viewed the mere existence of a union-employer agreement as enough to disallow the statutory exemption. However, under the *Hutcheson-Allen Bradley* approach it was not the mere existence of a union-employer agreement that caused a union to lose its statutory protection. Rather, it was the existence of a union-employer combination. Thus, under the approach outlined in this Comment, the mere existence of a union-employer agreement should be a neutral factor.

476. See *supra* notes 451-67 and accompanying text. The elements to satisfy the "self-interest" test are almost identical to those needed to find a "labor dispute."



hours or other terms and conditions of employment.<sup>477</sup> If a court determined that the union "acted alone" and in its "self-interest," a "labor dispute" exists, as that term is defined in section 13(c) of the Norris-LaGuardia Act.<sup>478</sup>

Once a court determines that a "labor dispute" exists, it should then ask whether the union has combined with the employer by adopting the employer's antitrust animus.<sup>479</sup> Under this approach the focal point is on whether the union sought to achieve its goal by eliminating competition in the labor market or whether the union adopted an antitrust means to achieve its goal.<sup>480</sup> If no antitrust combination is found, then any controversy arising from the terms or the enforcement of a union-employer agreement should be statutorily exempt from the Sherman Act. Although the union conduct in such a situation may violate the national labor laws,<sup>481</sup> the conduct should not be proscribed by the Sherman Act.

### B. *Non-Labor Disputes*

Controversies arising from the terms or the enforcement of union-employer agreements that might not constitute a "labor dispute" should not be protected by the statutory exemption. However, that is not to say that such agreements are automatically exposed to Sherman Act scrutiny. Rather, to determine whether such agreements violate the Sherman Act, a court must look to the principles outlined by Justice Stone in *Apex Hosiery Co. v. Leader*.<sup>482</sup> In *Apex Hosiery*, the Court explored the scope of the Sherman Act. The Court concluded that the Sherman Act only

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477. See *supra* notes 467-69 and accompanying text.

478. 29 U.S.C. § 113(c) (1982). See *supra* note 139 and accompanying text for the text of section 13(c) of the Norris-LaGuardia Act. This argument assumes that section 13(a) of the Norris-LaGuardia Act, 29 U.S.C. § 113(a) (1982), has also been satisfied. Further, a finding that the union acted in its "self-interest" would not only satisfy the "labor dispute" prong, but will also satisfy the public policy approach outlined in this Comment. See *supra* notes 448-51 and accompanying text.

479. This position is consistent with Congress' intent in passing the Sherman, Clayton and Norris-LaGuardia Acts: it ensures that only union-employer agreements that have adopted antitrust purposes will be held to violate the Sherman Act. All other union-employer agreements, although they may violate the national labor laws, will be free from Sherman Act scrutiny.

480. This position helps promote the national labor laws. Under the national labor laws, union-employer agreements are favored to help bring about industrial peace. However, under the Court's current labor-antitrust scheme, these agreements are not being adequately protected from the Sherman Act. The nonstatutory exemption is too manipulable and unpredictable. Consequently, the policies underlying the national labor laws are being hampered. Under the approach advocated by this Comment, however, these agreements would enjoy the necessary protection, promoting the goals underlying the national labor laws.

481. See *supra* notes 172-215 and accompanying text.

482. 310 U.S. 469 (1940); see *supra* notes 140-71 and accompanying text.

prohibited conduct aimed at eliminating competition in the commercial market.<sup>483</sup> The Court further recognized that restraints in the labor market were permissible and did not come within the Sherman Act's proscriptions.<sup>484</sup>

Therefore, in a situation where a controversy arising from the terms or the enforcement of a union-employer agreement does not constitute a "labor dispute," and thus is not entitled to statutory protection, the court must explore the union's intent in entering into the agreement. If the union intended to eliminate commercial competition, the Sherman Act should apply. Likewise, if the court finds that the union did not intend to restrain the commercial market, the Sherman Act should not apply.

There are several benefits to this analytical approach. First, it provides courts with a single analytical framework with which to analyze all labor-antitrust problems. Second, this analytical approach would provide unions with certainty in this very confused area of the law. Courts would no longer have the discretion to pick and choose which factors will be given more weight in determining union liability under the Sherman Act.<sup>485</sup> Third, this approach would govern all union-employer agreements, regardless of whether a "labor dispute" exists. This approach also is in line with Congress' intent and would alleviate much of the confusion surrounding labor-antitrust analysis. Finally, statutes passed by Congress would be given their due effect.

### VIII. CONCLUSION

By creating a nonstatutory exemption to deal with controversies arising from the terms or the enforcement of union-employer agreements, the Court has betrayed both Congress' intent and the Court's own precedent. Consequently, labor-antitrust analysis has been turned on its head. The time has come for courts, or Congress, to inject both certainty and clarity into the labor-antitrust arena. This will necessarily require courts to discard the nonstatutory exemption. Also, the Supreme Court must reexamine the way it has chosen to define the statutory exemption. Congress, as well as the Court in its early decisions, clearly envisioned broad statutory protection from the Sherman Act for both unilateral union conduct and union-employer agreements. The time has come for the Court to again recognize this broad statutory protection. Until this is done, unions will continue to be unsure as to how far they can go without

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483. *Apex Hosiery*, 310 U.S. at 492-93, 493 n.15.

484. *Id.* at 502-04.

485. As applied today, the nonstatutory exemption is both highly manipulable and very uncertain in application. *See supra* notes 392-403 and accompanying text.

incurring Sherman Act liability when entering into agreements with employers. Such uncertainty should not exist in the labor-antitrust arena.

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