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LABOR UNIONS, COLLECTIVE BARGAINING, AND THE ANTITRUST LAWS*

BERNARD D. MELTZER†

THE NATIONAL POLICY in favor of competition, reflected in the anti-trust laws, is designed to promote economic efficiency, consumer welfare, and a system of diffused power.¹ The national labor policy fosters, or at least tolerates, large-scale labor organization despite its capacity to interfere with those economic and noneconomic objectives of the antitrust laws. Accommodation of these conflicting policies, or the subordination of one policy to the other, has, for some time, been a troublesome and unruly issue.

A perennial response to that conflict calls for the application of the antitrust laws to union activities. That proposal has had deep and powerful roots: fear of the anticompetitive consequences and the inefficiencies attributed to unions;² concern that the size and centralization of union structures obstruct the noneconomic objectives of unions and particularly the achievement of union democracy;³ hostility to the union movement and its dynamic drive for an increased role in industrial decision making; and the conviction that the substantial immunity of unions from regulation applicable to their management adversaries reflects a more pervasive one-sidedness in labor-management regulation.

One purpose of this article is to consider the proposal that antitrust

* This article is one of a collection which deals with various aspects of labor relations and which was prepared by members of the University of Chicago and the Harvard Business School faculties. The entire collection of articles is being published in Volume 6 of the *Journal of Law & Economics*. The editors of the *Review* are grateful to that journal for consenting to the publication of this article here.

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¹ See the well-known statement by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945): "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."

² See, e.g., LINDBLOM, *UNIONS AND CAPITALISM* 5 (1949), critically reviewed by Rees, *Labor Unions and the Price System*, 58 J. POL. ECON. 254 (1950). But see Lester, *Reflections on the "Labor Monopoly" Issue*, 55 J. POL. ECON. 513, 519 (1947), emphasizing union-induced efficiencies. See also Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1 (1944), reprinted in SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 121 (1948).

³ See generally Lester, *supra* note 2, at 519; Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 IND. & LAB. REL. REV. 503 (1959).

coverage be extended to unions.⁴ That task is complicated by the obscurity of that suggestion. Its terms do not indicate the activities that it would reach; its proponents do not add such specification or indicate the relevance of that proposal to the general problem of union monopoly;⁵ nor do they expressly take account of the fact that some union activities once condemned under the Sherman Act have been proscribed by labor legislation.

A convenient point of departure for the assessment of that proposal is a review of the role that the Sherman Act once played, and still plays, in the regulation of union activities. Such a review, to be undertaken here, has been made timely by the revival of old issues and the emergence of new ones in recent litigation.⁶ That litigation may justify a reexamination of the problems raised by the clash of national policies despite the pages of scholarship that have been devoted to them.⁷

⁴ Bills introduced since 1945 that incorporate, or are related to, the antitrust proposal may be categorized as follows: (1) those proscribing combinations, etc. in restraint of trade by unions or amending the Clayton Act or the Norris-LaGuardia Act so as to eliminate any antitrust exemption; see, e.g., S. 1656, 79th Cong., 1st Sess. (1945); H.R. 2182, 80th Cong., 1st Sess. (1947); H.R. 389, 87th Cong., 1st Sess. (1961); H.R. 2437, 88th Cong., 1st Sess. (1963); (2) those proscribing collusion between labor unions and employers with respect to wage determination or restricting a union to representing the employees of a single employer or a specified number of employees within a single metropolitan area; see H.R. 7697, 82d Cong., 2d Sess. (1952); H.R. 8449, 82d Cong., 2d Sess. (1952); H.R. 333, 88th Cong., 1st Sess. (1963); cf. H.R. 3020, 80th Cong., 1st Sess. § 9(f)(1) (1947) (prohibiting National Labor Relations Board certification of multi-employer units and certification of the same union as the representative of employees of competing employers unless certain rigorous conditions were met. The Ball amendment would have banned certification of a multiemployer unit unless the employees were in the same metropolitan district or county; it was defeated by one vote. 93 CONG. REC. 4442, 4674, 4676 (1947)); (3) those proscribing particular practices such as "feather-bedding," price fixing and other restraints on sales of products or services by a firm; H.R. 3020, 80th Cong., 1st Sess. (1947); S. 2931, 87th Cong., 2d Sess. (1962); H.R. 333, 88th Cong., 1st Sess. (1963); (4) those aimed at union combinations or restrictive practices in particular industries, such as transportation; see, e.g., S. 2573, 87th Cong., 1st Sess. (1961); (5) those calling for study of the advisability of subjecting unions to the antitrust laws; H.R. CON. RES. 20, 86th Cong., 1st Sess. (1959). A single bill may fall in more than one category.

⁵ "Union monopoly" here is used as a tool of analysis and not as a standard of evaluation; the phrase refers to a union's power by virtue of its control over the labor force of a firm or an industry to increase wage costs over those that would prevail in the absence of collective action. See generally CHAMBERLIN, *ECONOMIC ANALYSIS OF LABOR POWER* (rev. ed. 1963); MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 196-216 (1957). For various meanings of "labor monopoly," see Lester, *supra* note 2, at 520. If a substantial number of firms serving a particular product market is not organized, the power of a union in the organized sector is severely limited by competitive pressures. Hence, the classic objective of unions has been "to take competition out of wages" by organizing all or substantially all firms producing for a common market.

⁶ See text accompanying notes 117-154 *infra*.

⁷ An extensive list of earlier writings is set forth in *Allen Bradley Co. v. Local 3, IBEW*, 145 F.2d 215, 221 n.4 (2d Cir. 1944). See also BERMAN, *LABOR AND THE SHERMAN*

That examination will suggest the unlikelihood that a substantial check on "excessive" union power would be provided either by the revival of the Sherman Act as a curb on union activities or by related proposals designed to insulate product markets against restraints directly imposed by collective bargaining. Accordingly, brief consideration will also be given to more drastic proposals for limiting union power by confining the bargaining jurisdiction of particular unions.

Such a review should ideally be preceded by an examination of the sources of union power, an identification of unions that have accumulated large powers, and an effort to assess the impact of union power on the broad range of interests affected by its exercise. That formidable examination will, however, not be undertaken here.⁸ This paper will assume that union power in some contexts poses substantial obstacles to effective performance of the economic system⁹ and to equitable distribution¹⁰ and will consider the utility of an antitrust approach as a remedy for the difficulties involved.

I

Even before labor unions enjoyed a sweeping exemption from the Sherman Act, that act, as applied by the Supreme Court,¹¹ was not

Act (1930). Among the valuable recent discussions are Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Hildebrand, *Collective Bargaining and the Antitrust Laws*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 152 (Shister ed. 1962); Sovern, *Some Ruminations on Labor—the Antitrust Laws and Allen Bradley*, 13 LAB. L.J. 957 (1962); and Winter, *Collective Bargaining and Competition*, 73 YALE L.J. 14 (1963).

⁸ See generally Meltzer, *Symposium on Labor Union Power and the Public Interest—Some Introductory Observations*, 35 NOTRE DAME LAW. 595 (1960), and the references cited therein. The other articles in the *Journal of Law & Economics* collection on various aspects of labor relations, although not intended to be a systematic confrontation of the central issues, will illuminate some of them.

⁹ The annual cost of "featherbedding" has been estimated at \$2,000,000,000; that estimate rests on the Wall Street Journal. See LEITER, FEATHERBEDDING AND JOB SECURITY 67 (1964).

¹⁰ See REES, THE ECONOMICS OF TRADE UNIONS 194 (1962); Rees, *The Effects of Unions on Resource Allocation*, to appear in 6 J. L. & ECONOMICS.

¹¹ In *Loewe v. Lawlor*, 208 U.S. 274 (1908), the first Supreme Court case applying the act to union activities, the Court emphasized the union's resort to secondary pressures and not its objective of securing industry-wide organization. *Id.* at 294-95. See also *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438-39 (1911), where the Court, although condemning boycotts, recognized the legality of "powerful labor unions"; and *Hitchman Coal & Coke v. Mitchell*, 202 Fed. 512 (N.D.W. Va. 1912), *rev'd*, 214 Fed. 685 (4th Cir. 1914), *rev'd*, 245 U.S. 229 (1917), where the Court, although sustaining the trial court's injunction, with modifications, did not accept its view that the United Mine Workers was an unlawful monopoly. The Court passed over that point, presumably because only the government could maintain an injunctive action, prior to the passage of the Clayton Act. For a discussion of the earlier cases, see BERMAN, *op. cit. supra* note 7, at 77-98; Winter, *supra* note 7, at 30-38.

directed at the existence of union monopoly in the labor market or at efforts by a union to achieve such monopoly by organizing substantially all of the workers producing for a given market. The act was essentially a proscription against bad practices, such as union-instigated boycotts enforced either through consumers or through employees of secondary employers.¹² In proscribing boycotts the Court had not explicitly attached any importance to union efforts to extend unionization, together with the closed shop, over an entire industry.¹³ Indeed, the Court appeared to have recognized the legality of industry-wide unions¹⁴ even before they had apparently been legitimized by section 6 of the Clayton Act.¹⁵ Nor did the Court explicitly concern itself with the quantitative impact of particular boycotts on supply and price in interstate markets. Like the boycott of a firm by employer-combinations, the union-sponsored boycott was unlawful so long as it was aimed at interstate trade.

The Court's treatment of strikes that obstructed the production of goods for interstate shipment contrasted sharply with its condemnation of boycotts which interfered with the sale of goods at their destination rather than at their point of origin. Such strikes, even though accompanied by extensive and serious breaches of peace, generally did not fall within the Sherman Act. That result obtained even though the union knew that the obstructed output would have gone into interstate commerce and understood that reduction of nonunion supply was critical for the preservation of union gains. So long as the union's primary objective was found to have been the resolution of a local labor controversy, strikes that interfered with the production of goods destined for interstate commerce were held not to be a "direct," *i.e.*, an unlawful, restraint on such commerce.¹⁶

¹² In addition to the cases cited in note 11 *supra*, see *Bedford Cut Stone Co. v. Stone Cutters Ass'n*, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). The Supreme Court invoked those cases, among others, in condemning a boycott of out-of-state goods designed to provide work for the employees involved rather than to affect the labor relations of the boycotted manufacturers. See *Painters Dist. Council v. United States*, 284 U.S. 582 (1931), *affirming*, 44 F.2d 58 (N.D. Ill. 1930).

¹³ The dissent in *Duplex*, *supra* note 12, emphasized the extent of organization in the industry involved and the threat posed to the unionized sector by unorganized firms. In *Bedford*, *supra* note 12, the dissent also pointed to the extent of past organization and the need for unionization as a counterpoise to an association of employers accounting for 70% of the output. The Court's apparent indifference to such factors was highlighted by the attention accorded to them in dissenting opinions. See *Duplex*, *supra* note 12, at 479-83, and *Bedford*, *supra* note 12, at 59.

¹⁴ See cases cited note 11 *supra*.

¹⁵ 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

¹⁶ See *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922). The opinions in those cases emphasized the narrow concept of interstate commerce that prevailed prior to 1937 and linked the constitutional question with the existence of a specific intent to restrain trade, as dis-

In *Coronado Coal Co. v. UMW (Coronado II)*¹⁷ a unanimous Court subjected the foregoing approach to an uncertain qualification ominous for the development of national unions. Evidence in the second trial had indicated that the capacity of the plaintiff-company had been substantially understated in the first trial and, more important, that the union's strike and destruction of mining facilities had been prompted by concern that nonunion competition, and particularly the plaintiff's, would reduce the market for unionized coal and thereby undermine the union's scale.¹⁸ That evidence was the basis for finding that the union's paramount purpose had been to reduce the nonunion output competing with union products in interstate commerce. The union's overriding concern with interstate competition, as distinguished from a "local" labor controversy, became the basis for the Court's characterization of the restraint on commerce as "direct" and for its condemnation of the union's activities as a violation of the Sherman Act.

The Court's approach in *Coronado II* rested on a distinction between local labor purposes and the purpose of sheltering union goods against nonunion competition that was obviously unmanageable. Those purposes were not nicely separable, but coalesced, since local labor purposes could be achieved only by protecting the local unionized sector against the pressure of nonunion goods originating elsewhere. The Court implied, moreover, that a violation would be made out only by showing that a union had expressed its concern that union goods might be displaced from interstate markets by nonunion goods. Sophisticated unions could, thereafter, be expected to avoid such fatal explicitness; the Court's doctrine was, accordingly, likely to reach only the unwary.

The consideration deemed decisive in *Coronado II* also suffered from another basic flaw, its irrelevance to the general objectives of both the Sherman Act and the union movement. Plainly, where unions by strikes and related weapons reduced output destined for interstate markets, the consequences for supply, price, and the union involved were in no way affected by determinations as to whether the union's dominant purpose was to protect a local unionized sector or to reduce nonunion output destined for interstate commerce. Furthermore, whatever the union's dominant purpose, preservation of benefits from organization in the unionized sector was dependent on spreading unionization or on choking off the flow of nonunion goods by the use of economic pressure.

tinguished from an intent to settle a local labor controversy. See 265 U.S. at 465 and 259 U.S. at 407-09.

17 *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925). Justice Brandeis, who had dissented in the boycott cases, somewhat surprisingly joined in the Court's opinion.

18 See 268 U.S. at 295, 302; Gregory, *The Sherman Act v. Labor*, 8 U. CHI. L. REV. 222, 231 (1941).

The proscription, in *Coronado II*, of such pressure on the ground that the union had manifested that its purpose had been to avoid the erosion of union standards through product competition plainly made legality turn on elusive issues of intent and motive. A distinction so obviously unmanageable and irrelevant to the preservation of a competitive order¹⁹ could hardly be expected to survive. The uncertain shield for union activities provided by that distinction might have been wholly withdrawn by imputing to union leaders knowledge that competition in the product market threatened union gains and that such competition could be moderated only by the extension of organization and of the union scale. Such an approach, coupled with *Coronado II*, would have converted the Sherman Act into a barrier against the development of national unions, at least by the use of pressures that excluded nonunion goods from interstate markets, and conceivably by requests for "voluntary" recognition directed at the same purpose. Later decisions, as we will see in a moment, did not take that turn.

The Court's distinction between legal strikes and illegal boycotts was as irrelevant to the preservation of competition as the approach in *Coronado II*. That distinction depended on whether interstate commerce was pinched at its origin or at its destination. That distinction clearly could not be justified on the basis of any differential impact on the flow of goods in interstate commerce. The effect on trade obviously was a function of the effectiveness of the union pressure rather than the point at which it was exerted.²⁰ Furthermore, strikes and boycotts were frequently alternative methods for achieving the same union objectives. A boycott against a manufacturer was needed to advance a given objective only when a strike did not succeed in stopping production. Where a union had achieved sufficient control of an employer's work force, actual and prospective, to mount an effective strike, there was no need for the union to organize a boycott. Since such control of the work force is the primary source of union power, the resort to boycotts to break a bargaining impasse was typically a sign of weakness rather than of strength. As a consequence, the unfavorable treatment of boycotts, compared to strikes, seemed perverse in relation to any general objective of limiting private economic power.

To be sure, the boycott, then as now, appeared to have the vice of expanding the area of conflict so as to involve third parties or "neutrals" who could not directly resolve the underlying labor dispute. But such neutrals could generally extricate themselves by exercising their option to cut off their relations with the primary employer; that is, neutrals

¹⁹ See GREGORY, *LABOR AND THE LAW* 216 (2d rev. ed. 1958).

²⁰ *Id.* at 212-13.

could choose to bring about the situation that the union would have achieved if it had possessed enough power to close down the primary employer by an effective strike. Such a strike would, of course, have deprived the primary employer of goods to sell and the possibility of profitable use of goods that he bought. Furthermore, an employer, prior to the Wagner Act, could legally resort to a broad range of measures to avert or to counter a strike. It was, therefore, not easy to see why boycotts by relatively weak unions should have triggered the severe sanctions of the Sherman Act while strikes and comprehensive lawlessness directed at identical objectives and producing similar consequences on interstate commerce were generally untouched by that act.

In developing the approach described above, the Court had emptied the vague labor clauses of the Clayton Act of any significance. By ruling that section 6 of that act did not exempt union departures from "normal and legitimate objects,"²¹ the Court had preserved controversial and uncertain judicial regulation of "union purposes." It had restricted the application of section 20 to the parties to a dispute concerning their own employment, present, past or prospective,²² thereby rendering that section inapplicable to secondary activities initiated by immediate parties but implemented by affiliated or sympathetic unions. Thus, notwithstanding the Clayton Act, classic weapons of organization²³ and collective bargaining remained subject to the Sherman Act.

The legislation of the thirties was, however, designed to promote the use of those weapons and to curtail the role of the courts in the formulation of labor policy. The Norris-LaGuardia Act,²⁴ enacted in 1932, had drastically limited the issuance of injunctions in the federal courts. In 1935 the Wagner Act²⁵ had given moral approval and legal protection to organizational campaigns and to a broad range of concerted activities by employees. But that legislation had not integrated the new freedoms with the old restrictions; indeed, the new statutes had not

²¹ Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 (1921).

²² *Id.* at 472.

²³ The boycott was, of course, an important organizing weapon, and the organizing boycott gave rise to celebrated antitrust cases. See cases cited notes 11 & 12, *supra*. Unions using boycotts for organizing purposes, rather than for resolving a bargaining deadlock, are not necessarily "weak" in the areas they have already organized. Thus, for example, the boycott has been an important lever for the Teamsters' organization not only of truckers but also of warehousing and other nontrucking enterprises. See James & James, *Hoffa's Acquisition of Industrial Power*, 2 Ind. Rel., May 1963, p. 67, at 76. Organizational boycotts and hot cargo provisions are now regulated by amendments to the National Labor Relations Act.

²⁴ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1958).

²⁵ National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (amended by 73 Stat. 542 (1959), as amended, 29 U.S.C. §§ 151-68 (1964)).

even mentioned the Sherman Act and, hence, had not eliminated the threat of criminal and treble-damage actions based on the characterization of boycotts or organizational efforts as "direct" attacks on interstate commerce.

Apex Hosiery Co. v. Leader,²⁶ decided in 1940, was the first step towards reducing the risks of such liability and of harmonizing the anti-trust laws with the freedom granted unions by labor legislation. *Apex* did not, however, purport to grant unions any special exemption from the antitrust laws; it presumably would be the point of departure if proposals to subject unions to the Sherman Act were adopted. *Apex* remains, moreover, relevant in the ill-defined area of union activities still subject to the Sherman Act under the *Allen Bradley* doctrine.²⁷ Hence, *Apex* merits special attention.

After organizing a handful of employees from the 2,500 employed by a Philadelphia manufacturer, the American Federation of Hosiery Workers demanded, but was denied, a closed shop. Thereupon, the union stopped production and occupied the plant; the stoppage continued for about three months. In addition, the union refused to permit the shipment of existing goods to out-of-state customers. The company received a treble-damage award, based on the finding that the union had violated the Sherman Act.

The Supreme Court reversed that finding. The Court, dismissing the union's violence as irrelevant, announced that the act did not apply to strikes or other obstructions to interstate commerce unless they had an effect, or were intended to have an effect, on prices.²⁸ Since the union's only purpose had been organization and since no effect on prices had been shown, the Court held the Sherman Act inapplicable.

The opinion emphasized that the elimination of nonunion competition was indispensable for effective union action, was wholly compatible with the Sherman Act and, in any event, was privileged by section 6 of the Clayton Act.²⁹ It followed that industry-wide or market-wide unionization, whatever its effect on product competition or prices, was privileged. Furthermore, since strikes were the traditional means for achieving benefits from organization, the *Apex* opinion implied that strikes, at least for conventional objectives, such as higher wages, were lawful without regard to their impact on price and competition in the product market.

That implication was, however, muddled because the Court, in

²⁶ 310 U.S. 469, *affirming*, 108 F.2d 71 (3d Cir. 1940).

²⁷ See Part II herein.

²⁸ 310 U.S. at 501.

²⁹ *Id.* at 503-04.

disposing of the specific controversy before it, emphasized that the union's obstructions to interstate commerce had not affected price and had not been so intended.³⁰ The threat of this reservation was underscored by the Court's continued reliance on *Coronado II*,³¹ despite the tension between that case and earlier passages of the opinion. Also left open was the possibility that a strike, or other obstructions to commerce, which eliminated enough output to affect price, fell within the statutory ban. But to apply the Sherman Act to such strikes would have been contrary to both the basic premises behind labor legislation and the dominant thrust of the *Apex* opinion. Such an application would have converted the Sherman Act into an antistrike weapon protecting only larger enterprises, since the elimination of their output, or indeed their unionization under strike pressure, might have affected the price of goods. But one of the declared objectives of the labor statutes was the protection of labor organization in order to balance the power of large business combinations. Plainly, strike protection confined to large enterprises would have been a perverse response to that objective. Furthermore, industry-wide unionization sanctioned by the Court could scarcely have achieved labor's purposes in the labor market without strikes that might have affected price by withdrawing a substantial volume of output for substantial periods. Those considerations suggested that the Court's emphasis, in *Apex*, on the absence of price effects, was a convenient *ad hoc* expedient rather than a formulation of a general principle condemning union activity producing such effects. That conclusion was, moreover, reinforced by language throughout the opinion implying that the statute was directed solely at business combinations and trusts.³²

Although *Apex* thus seemed to foreshadow substantial union emancipation from the Sherman Act, it did not, as already noted, articulate an exemption for unions. The Court declared that the act would continue to apply to union activities that affected or restrained "commercial competition."³³ But the illustrations of restraints on such competition, drawn as they were from cases involving business combinations,³⁴ provided scant guidance as to whether and how the act should be ap-

³⁰ *Id.* at 501-02. But if *Apex* had produced, e.g., 40% of the output in the industry involved, that conclusion would have been vulnerable. Hence, *Apex* raised a question about the legality of an organizational strike when it counted most. See Cavers, *Labor v. The Sherman Act*, 8 U. CHI. L. REV. 246, 249 (1941).

³¹ See 310 U.S. at 511, 512, where the Court assimilated *Coronado II* to the secondary boycott cases. But those cases had not emphasized the impact on prices or markets, and it was difficult to see a basis for distinguishing the boycott cases from the obstruction to interstate shipment in *Apex*. See Gregory, *supra* note 18, at 222, 226, 228, 232.

³² See 310 U.S. at 492, 493 n.15, 494, 497.

³³ *Id.* at 495.

³⁴ *Id.* at 497-98.

plied to a variety of controversial union activities, such as secondary boycotts, restraints on the use of new technology or of new products,³⁵ the exclusion of certain enterprises, whether or not unionized, from particular markets, or the restriction of supply through control of hours of work. Even if *Apex* is read as immunizing union restraints on the labor market but not the product market, the line between those two markets is, as the foregoing list suggests, not easily drawn. That difficulty aside, the impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act, consumer protection and the dispersion of private economic power, can be frustrated by monopoly power exerted solely in the labor market. It is the risk of such frustration that may have accounted for the confusing ambivalence of *Apex* and that today still poses a formidable issue of national policy.

In 1941 the Court, in the celebrated case of *United States v. Hutcheson*,³⁶ changed its course and substantially, although not completely, resolved that ambivalence. Interlacing section 20 of the Clayton Act with section 13 of the Norris-LaGuardia Act, the Court ruled that those two statutes made the Sherman Act inapplicable to the "practices specifically enumerated" in section 20,³⁷ at least if they occurred in the course of a labor dispute.³⁸ As a consequence, peaceful strikes and boycotts, which had been covered by section 20, were generally excluded from the Sherman Act. The Court indicated both the breadth of that exclusion and its possible qualification in the future by declaring:

So long as a union acts in its self-interest and does not combine with non-labor groups,³⁹ the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.⁴⁰

Despite the Court's controversial method in *Hutcheson*, its result seemed sound. The Court, as we have seen, had not applied the Sherman

³⁵ Compare *Cavers*, *supra* note 30, at 255 with *Cox*, *supra* note 7, at 273-75.

³⁶ *United States v. Hutcheson*, 312 U.S. 219 (1941); for an extensive list of commentaries on this case, see *Allen Bradley Co. v. Local 3, IBEW*, 145 F.2d 215, 221 n.4 (2d. Cir. 1944).

³⁷ 312 U.S. at 230; see also *Frankfurter, J.*, dissenting in *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 413-14 (1947).

³⁸ See *Nathanson & Wirtz, The Hutcheson Case: Another View*, 36 ILL. L. REV. 41, 47-51 (1941).

³⁹ 312 U.S. at 232 n.3. Here the Court inserted the following footnote: "Cf. *United States v. Brims*, 272 U.S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters."

⁴⁰ *Id.* at 232.

Act to preserve competition in labor markets. Nor had it developed a principle for distinguishing between permissible and proscribed union activities. The act, moreover, did not supply any criteria for policing the objectives or methods of unions seeking to expand their jurisdiction or to get better bargains for employees. Nor did it suggest how restrictions on unions, drawn from the act or elsewhere, were to be integrated with the protections and freedoms, including the freedom to secure market-wide organization, apparently accorded by the labor statutes. *Hutcheson* virtually swept such problems aside by rendering the act generally inapplicable to union efforts to achieve, to maintain, or to exploit monopoly in the labor market. What remained for the Court was further elucidation of the problem adumbrated in *Hutcheson*—the treatment of union-employer combinations that achieved price restraints, production allocation or other market-control schemes, proscribed for employers acting without labor unions.

Hutcheson ended the controversial effort of the Antitrust Division, under Thurman Arnold, to use the Sherman Act as a weapon against union "bad practices." Subsequently, Congress, by amendments to the National Labor Relations Act (NLRA), regulated such practices and proscribed conduct such as secondary boycotts and jurisdictional disputes⁴¹ that prior to *Hutcheson* had been condemned or attacked under the Sherman Act.

The proposal for eliminating labor's exemption may well reflect dissatisfaction with the coverage or administration of those amendments. But the proposal does not identify the defects in the existing law that it would remedy. Its adoption could involve either an essentially redundant overlap with some of the existing prohibitions or an uncharted reconstruction of existing regulation. Such a reconstruction might, for example, seek to apply the doctrine of *United States v. Aluminum Co. of America*⁴² so as to fragment unions on the ground that their absolute size, coupled with predatory or unlawful practices, required corrective action. So opaque a proposal in a complex and controversial field plainly does not provide a basis for responsible legislative judgment.⁴³ On the

⁴¹ See National Labor Relations Act § 8, amended by, 61 Stat. 140 (1947), as amended, 29 U.S.C. §§ 158(a)(3)-(f) (1964).

⁴² See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The absence of criteria for judicial regulation of union activities, on the basis of *Aluminum*, is aggravated by the recognition that unions are designed to take "wages out of competition" throughout an entire market.

⁴³ Cf. the remarks of the late Senator Taft: "You would practically have to write an antitrust law for labor, because I do not think the Sherman Act is really aimed at it, or that the wording is particularly suitable. It seems to me that if you do that you are going to have to write an antitrust law saying that labor unions can only combine and consult with each other and agree under certain limited conditions—those in the same

contrary, it involves a legislative abdication scarcely compatible with the respective responsibilities of the Congress and the courts for fundamental policy making.

II

In *Allen Bradley v. Local 3, IBEW*,⁴⁴ the Court was faced with the issue reserved in *Hutcheson*—the status under the Sherman Act of market arrangements arising from collaboration of unions and employer groups. A somewhat detailed statement of the origin and evolution of the arrangements in question is necessary for an understanding of the dilemma they posed and the Court's unsatisfying response.⁴⁵

By 1934 Local 3, by conventional organizing pressures, had obtained closed shop agreements from most of the electrical contractors in New York City. The local, whose membership had declined during the depression, then turned to the organization of the New York manufacturers of electrical equipment. Sweetening conventional pressures by promising to provide a sheltered market for those manufacturers, the local secured closed shop agreements from them as well as agreements that they would confine their New York sales to contractors under contract with the local. The protected market was provided through agreements with the electrical contractors requiring them to buy certain components only from New York manufacturers under contract with the local. By 1936 outside manufacturers, who had previously supplied most of the electrical equipment to the New York contractors, had been ousted from that market insofar as local products were available.

Insulated against outside competition, the local manufacturers raised their prices. The higher prices were presumably made more palatable to the contractors by union-induced restrictions on their competitive bidding. Although the union had been the "actuating party"⁴⁶ for the arrangements for market and price control, their implementation in time involved the active participation of the employers,

area or those in the same company, dealing with the same company, or perhaps some other exceptions, but that beyond that it is a violation of the antitrust law and can be directly enjoined. It seems to me you have got to get to that." Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess., Part IV, at 1793 (1947).

⁴⁴ 325 U.S. 797 (1945).

⁴⁵ Although the Court did not disturb the findings below, *id.* at 798, its treatment of the facts glossed over the initiative and the power exerted by the local in order to develop market controls. For that reason, the statement in the text draws on the trial court's reports. *Allen Bradley Co. v. Local 3, IBEW*, 41 F. Supp. 727 (S.D.N.Y. 1941) (Master's Report), 51 F. Supp. 36 (S.D.N.Y. 1943), *rev'd*, 145 F.2d 215 (2d Cir.), *rev'd*, 325 U.S. 797 (1944).

⁴⁶ 41 F. Supp. at 750.

acting through their associations. All three groups benefited: the union and its members, through higher wages and lower hours; and the local firms, through higher prices and profits. The obvious victims of the restrictive arrangements were, as the courts observed, first, the excluded outside manufacturers (and their employees),⁴⁷ and second, the public, taxed by monopoly prices. Another group of victims consisted, presumably, of those workers who might have been employed in New York electrical contracting had output not been lowered by monopoly prices.

The excluded manufacturers, in an action to enjoin the local's activities as a violation of the Sherman Act, named only Local 3 (and its officers) as defendants.⁴⁸ The Supreme Court, although it upheld the trial court's findings of such a violation, acknowledged that the local had been acting in the interests of its members.⁴⁹ The Court also indicated that the union might have lawfully achieved the same market consequences by using conventional economic pressures to secure parallel agreements with individual contractors and manufacturers restricting their purchases and sales.⁵⁰ Indeed, the Court at one stage properly read the record as showing an initial resort to such weapons by the union.⁵¹ Nevertheless, the Court found a violation by the local for two interdependent reasons: (1) the union had not been "acting alone" but "in combination with business groups"; (2) the industry-wide understandings had looked to and had achieved price and market control.⁵² Consequently, the businessmen had engaged in activities condemned by the Sherman Act. The union's participation did not immunize the businessmen and was itself a violation of the act.

The Court's distinction between parallel agreements and multiemployer agreements, directed at the exclusion of the outside manufac-

⁴⁷ Some of those employees were covered by collective bargaining agreements negotiated by other unions, including other locals of the IBEW. Local 3's jurisdiction extended only to the New York metropolitan area. See 325 U.S. at 799. The trial court explicitly found that the local's activities had not been designed to affect wages or employment relations among the excluded manufacturers. See Finding #368 of Final Decree and Declaratory Judgment incorporated in transcript filed in the Supreme Court. Record, p. 285, *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1944).

⁴⁸ The nonjoinder of the New York firms may have resulted from the filing of the action prior to the Supreme Court's decision in *Hutcheson*. In addition, the plaintiffs may have considered the union to have been the "actuating party" and may also have sought to avoid alienating potential purchasers.

⁴⁹ 325 U.S. at 798, 799.

⁵⁰ *Id.* at 799, 807, 810. The opinion of the court of appeals, after remand, explicitly directed that the injunction should be inapplicable if the union did not act in combination with nonlabor groups. See *Allen Bradley Co. v. Local Union No. 3, IBEW*, 164 F.2d 71, 75 (2d Cir. 1947).

⁵¹ 325 U.S. at 799.

⁵² *Id.* at 799, 800.

turers, was vulnerable on several grounds. Obviously, that distinction was of no practical significance to the interests at stake. Furthermore, the Court's condemnation of market control because it was associated with multiemployer bargaining ignored that such bargaining had been placed on the same footing as individual bargaining by the Norris-LaGuardia Act⁵³—an important factor in the *Hutcheson* immunity. On the other hand, the Court's dictum on the legality of parallel agreements ran counter to the approach to concerted activity that had been applied to firms charged with antitrust violations. That approach would have permitted a finding of implied conspiracy by the business firms if they had entered into individual agreements with knowledge that parallel action by others was contemplated and was necessary for the success of the restrictive program.⁵⁴ Surely, as suggested by Mr. Justice Roberts' concurring opinion in *Allen Bradley*,⁵⁵ the hypothetical parallel agreements could have served as a basis for finding an unlawful conspiracy by the firms. And once such a finding had been made, the union's participation, under the Court's rationale in *Allen Bradley*, would not have saved either the firms or the union from the Sherman Act.

The Court, it should be noted, had emphasized that the business groups in *Allen Bradley* had gone beyond the boycotting of "nonunion" suppliers and customers and had engaged in direct price fixing.⁵⁶ Unlike boycotts, such price fixing could not have been defended as classic make-work and organizing devices. But if price fixing had been the source of illegality, the ultimate remedy should have been confined, as it was not, to eliminating that evil. Furthermore, the Court's opinion intimated that even price fixing might have been tolerated provided that it had been achieved by parallel, rather than multiemployer, agreements;⁵⁷ it could, after all, have been rationalized as a means of protecting individual employees from the instability of employment asso-

⁵³ See §§ 4 and 13, 47 Stat. 70, 73 (1932), 29 U.S.C. §§ 104, 113 (1958). Section 20 of the Clayton Act also implied that employers were to enjoy rights to concerted action parallel to those of employees. Although § 6 of the Clayton Act did not expressly mention employer associations, the pertinent legislative history reinforces the foregoing implication. See 51 CONG. REC. 14333-34, 14336 (1914). In *Allen Bradley* the Court, conceding that the means used by the union fell within § 20 and that a "labor dispute" had been involved, rested the inapplicability of the *Hutcheson* immunity on the presence of the union-contractor-manufacturer combination. See 325 U.S. at 807. That result plainly was incompatible with the statutory exegesis in *Hutcheson*.

⁵⁴ See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Cf. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). For a discussion of the uncertainties of "conscious parallelism" in cases involving business monopoly, see Handler, *Recent Antitrust Developments, 1964*, 63 MICH. L. REV. 59, 85-88 (1964).

⁵⁵ 325 U.S. at 818-19.

⁵⁶ *Id.* at 799-800.

⁵⁷ *Id.* at 807-08.

ciated with competition. Price fixing could also have been rationalized as one of the interrelated inducements and pressures by which the union first extended its jurisdiction to the manufacturing employees and then promoted stable employment for both groups of employees. Accordingly, from the union's point of view, there was no basis for distinguishing between the exclusion of outside manufacturers from the market and price fixing by the contractors.⁵⁸

Nor were the *Allen Bradley* arrangements essentially different from the exercise of the union's power over the labor market in their impact on the interest of the special wards of the Sherman Act, those buying goods and services from the electrical contractors. In this connection it should be noted that the union's leverage was based on its control over the contractors' labor force and on its capacity to prevent substantial nonunion competition. The local's power, found by the trial court to have been overwhelming,⁵⁹ could have resulted in the same degree of exploitation of consumers even if it had been exercised solely in the labor market. Indeed, it seems likely that to the extent that the union by market control schemes permitted the firms to share in the monopoly gains, it did so at the expense of its own constituents employed by the electrical contractors. Those employees presumably would have received more had the union exercised its power to maximize their wages while leaving the firms subject to price competition. The union may have rejected that course on the questionable assumption that a monopolistic seller is better off if he, first, provides monopoly profits for those to whom he sells and then gets part of such profits back.⁶⁰ The union may also have considered that a division of the spoils from its monopoly position was a justifiable price to pay for achieving other ends, such as extending its jurisdiction to the manufacturing sector, maintaining peaceful relations with both sets of firms, or stabilizing employment opportunities provided by the contractors. In speculating as to what Local 3 was trying to maximize, it is worth noting that the findings of the trial court im-

⁵⁸ See MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 199 (1957): "If the labor market embraces that group of economic activities which a union may seek to influence in its attempt to increase its power to improve wages, hours, and working conditions, there is really no tenable distinction between labor markets and product markets. There is literally no entrepreneurial activity in the production and sale of goods that cannot conceivably be influenced by union activities to the advantage of union members."

⁵⁹ See 41 F. Supp. at 730-31, 740-43, 749.

⁶⁰ The assumption that a union that has achieved control over the labor market will do better if it restricts competition in the product market is related to the view that unions do better in bargaining with monopolistic or oligopolistic, as distinguished from competitive, firms. For a discussion questioning that view, see REES, *THE ECONOMICS OF TRADE UNIONS* 82-87 (1962).

pliedly negated any payoffs to the union officials for their enforcement of market restrictions.⁶¹

As for the New York firms, the benefits accruing to them from the market control arrangements seemed on the surface quite different from the typical impact of union activities. The firms' profits, after all, increased because of, not in spite of, the arrangements sponsored by Local 3. Such a result plainly runs counter to the conventional view of collective bargaining as a war between labor and management. But antagonism between labor and management within a firm is replaced by a common interest in the face of pressures from nonunion competition. Since elimination of such competition tends to avoid the erosion of union gains and to preserve the markets and profitability of the unionized firm, there are, from the firms' standpoint, similarities between a union's control of the labor market of competitors and the anticompetitive effects of the market controls imposed in *Allen Bradley*.

Even the plaintiff-manufacturers in *Allen Bradley* were not in any essentially different position from other firms that had been blocked from markets by labor's pressures, without being accorded a remedy under the Sherman Act. For example, prior to *Allen Bradley* the Court had held that the act did not bar unions from seeking to preserve jobs by barring the use of new technology.⁶² Plainly, producers of such technology, to the extent that they had been denied markets by such pressures, were in a position similar to that of the outside manufacturers in *Allen Bradley*.

The difficulties that dominated the *Allen Bradley* opinion were the result, as the Court suggested, of a basic collision between the policy of preserving competition in product markets and the policy of fostering or tolerating labor monopolies.⁶³ Under *Hutcheson* and the legislation of the thirties the classic objectives of a competitive order—consumer protection, access to markets, and efficient use of resources—had been subordinated to labor's pursuit of its self-interest. It was not easy to see why that freedom should have been judicially limited merely because labor's impact on the product market was direct rather than indirect,

⁶¹ See 145 F.2d at 220. See also *id.* at 224-25 n.10, referring to the suggestions in Boudin, *Organized Labor and the Clayton Act* (pts. 1-2), 29 VA. L. REV. 272, 395 (1942-1943), that when union power is used for the benefit of monopolistic nonlabor groups, the union officers, and not the union, should be liable, a result that is supported by § 6 of the Norris-LaGuardia Act, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1958).

⁶² See *United States v. American Fed'n of Musicians*, 318 U.S. 741 (1943), *affirming*, 47 F. Supp. 304 (N.D. Ill. 1942); *United States v. Building & Constr. Trades Council (Hod Carrier's Case)*, 313 U.S. 539, *affirming*, *United States v. Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941). *But cf. Painters' Dist. Council v. United States*, 284 U.S. 582 (1931), *affirming*, 44 F.2d 58 (N.D. Ill. 1930).

⁶³ 325 U.S. at 803, 806.

or because restraints on product competition were viewed as the cause rather than the result of higher wages, or because labor's activities directly rather than indirectly provided a sheltered market to a group of employers.⁶⁴ Nevertheless, such freedom to unions to impose direct restraints on product markets raised the threat of union-induced monopolization powered by the idea that unions by price fixing and other restraints on the product market could increase profits and thereby enable employers to raise wages. Such cooperative monopoly was wholly incompatible with the purposes of the Sherman Act and scarcely could be rationalized under the prevailing ideology of unionism.

That ideology emphasized the worker's inequality in relation to capital, his need for a voice in the fixing of the terms and conditions of his employment, and the role of the union as an offset to combination and monopoly power on the enterprise side. Such considerations scarcely could legitimize the use of union power to create monopoly profits for industry by market rigging even though such profits were to be split with labor.

In *Allen Bradley* the Court, pulled by conflicting national policies and confronted with a sobering demonstration of union power, pretended to find guidance in the "congressional purpose" of outlawing business monopolies.⁶⁵ But that "guide" was fashioned by the Court rather than Congress, for Congress had failed to indicate how the prohibition of commercial restraints and the purposes underlying that prohibition were to be integrated with the purpose of fostering unionization and collective bargaining. It was presumably the lack of such guidance, coupled with the distasteful character of the *Allen Bradley* restraints, that moved the Court to minimize the union's dynamic role in the development of those restraints. Thus, the Court emphasized the employers' market restrictions,⁶⁶ passed over the findings below that Local 3 had been the actuating party, and transformed the employers into principals and the local into their accessory⁶⁷—a transformation that was given an ironic twist by the failure of the plaintiffs to join the New York employers as defendants.

The Court's reshaping of the facts has contributed to uncertainties over the reach of the *Allen Bradley* doctrine. One view is that the doctrine is directed only at sham arrangements, *i.e.*, those diverting union power from legitimate union ends to the enforcement of em-

⁶⁴ See 145 F.2d at 224-26.

⁶⁵ 325 U.S. at 811.

⁶⁶ *Id.* at 810.

⁶⁷ *Id.* at 807, 809, 811. The Court's approach drew fire from both Roberts, J., concurring, and Murphy, J., dissenting, on the ground that the union had been the "dynamic force which has driven the employer group . . . into agreements." *Id.* at 820.

ployer restrictions on competitive markets.⁶⁸ But that view ignores both the Court's explicit recognition that Local 3 had been seeking to benefit its members and the undisturbed finding that corruption had not been involved. Employee benefit will always be the paramount objective of union leaders honestly serving their constituents. Union officials seeking to benefit employers as an end in itself are obviously defaulting on their fiduciary obligations and, presumably, are being paid off to do so. Surely the extended exposition undertaken in *Allen Bradley* was not necessary to exclude such sham and venal arrangements from the *Hutcheson* immunity.⁶⁹

A second and more expansive view of *Allen Bradley* is warranted both by the Court's language and the facts before it: the Sherman Act applies to union-employer combinations that institute market restrictions essentially similar to those devised by businessmen even when they are free from union pressure. Accordingly, such restrictions are not exempted from the act on the ground that they were thrust on resistant employers by a union pursuing its own interests by conferring monopoly benefits on an employer combination.

The second interpretation would obviate some slippery questions and disingenuous tactics spawned by such questions as the following: Were employers active architects of market restrictions or unwilling beneficiaries capitulating to union pressure? Have union officers been paid off to impose such restraints for the purpose of benefiting employers? What was the relative magnitude of employer and union benefits? Did the benefits to employers exceed those necessary for the achievement of conventional union objectives? Such elusive questions are plainly made irrelevant by a test which inquires only whether the restraints on the marketing of goods and services were of a kind that could have produced monopoly benefits for groups of employers⁷⁰ collaborating with a union.

That test would, however, not reach a broad pattern of restraints on the marketing of goods and services, such as union restrictions on purchases from firms outside of the union's jurisdiction or proscription of labor-saving equipment, that are imposed in order to preserve jobs or wage standards within the unionized sector. Such restrictions, even when they involve the collaboration of employer-groups, plainly do not provide the participating employers with sheltered markets or monopoly bene-

⁶⁸ See Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094, 1099 (1962).

⁶⁹ See *Albrecht v. Kinsella*, 119 F.2d 1003, 1004, 1005 (7th Cir. 1941), approved in *Allen Bradley Co. v. Local 3, IBEW*, 145 F.2d 215, 224 (2d Cir. 1944).

⁷⁰ The question of what kind of conduct is necessary to constitute "an employer group" is briefly considered, at text accompanying note 170 *infra*.

fits. On the contrary, the putative purchasers are presumably harmed by the disruption of advantageous relations with respect to the goods that they buy. But such boycotts do provide a sheltered market for the sellers favored by the union and, correspondingly, exclude the boycotted sellers from that market. The latter group of sellers would, as already suggested, be in substantially the same position as the outside electrical manufacturers in *Allen Bradley*. It is not, however, clear whether *Allen Bradley* was to apply to such boycotts. Such an application gains some support from the Court's recognition that many union activities restrain trade and from its suggestion that the legality of such restraints depends on "whether the union acts alone or in combination with business groups."⁷¹ But the Court's larger concern was with the power of business groups "to shift our society from a competitive to a monopolistic economy,"⁷² and the Court expressed that concern in a context where the participating firms had shared in the spoils of monopoly. Where, however, employers accede to union demands to limit competition, not among themselves, but among their suppliers, the participating employers enjoy none of the benefits of monopoly and have every incentive to resist the union demands. Accordingly, the restriction on competitive markets imposed by such boycotts arises not from the appeal of monopoly gains to the participating employers but solely from the power behind the union demands. The absence of such gains means at least that employer self-interest will serve as a check on such union-sponsored restraints on product competition.

It should, however, be noted that the dissent by four Justices in *Hunt v. Crumboch*,⁷³ decided the same day as *Allen Bradley*, was incompatible with an approach giving decisive effect to employer benefit and that the majority opinion in *Crumboch* was not clear-cut on that point.⁷⁴ The decision in that case underscored the uncertainties of the Court's

⁷¹ See 325 U.S. at 810.

⁷² *Ibid.*

⁷³ 325 U.S. 821 (1945). In that case, after a strike, the union secured an agreement restricting the A & P to contract haulers with union shop agreements. The union rejected the offer by the plaintiff, a contract hauler, to enter into such an agreement and induced first A & P and, later, another firm to cancel contracts with the plaintiff, thereby excluding the plaintiff from business. That exclusion had apparently been prompted by the plaintiff's operations during the strike, which had been attended by violence and the death of a union member; a partner in plaintiff's firm had been acquitted of the homicide.

⁷⁴ Although the majority might have relied on the absence of benefit to the boycotting employers, it urged that there had not been any combination of the plaintiff's competitors but only of workers refusing to sell their labor. 325 U.S. at 824. It is not clear from that argument whether the decisive factor was the absence of anything more than parallel agreements by the boycotting firms or the absence of monopoly benefits to them since they were not in competition with the plaintiff.

approach—uncertainties that fundamentally arise from the absence of a principle for harmonizing the conflict between the policy of commercial competition and of collective bargaining.

The uncertainties of *Allen Bradley* have not been markedly clarified by subsequent developments. The Supreme Court has not reconsidered the issues involved, and the decisions of lower courts often have not articulated a general rationale.⁷⁵ In examining those decisions, it is useful to distinguish among three types of restraints: (1) limitations on competition in the sales of final products of employer groups of a kind that could provide monopolistic benefits to some or all of the employers collaborating with unions; (2) restrictions on the choice of firms from which the participating employers may purchase goods or services or to whom they may sell;⁷⁶ (3) activities relating to wages, hours, or job-control, *i.e.*, "labor market" activities, challenged on the ground that their specific purpose or dominant effect was to eliminate certain competitors of the participating employers or otherwise to restrict competition in the sales of the final product of such employers.

Restraints on Final Product Competition

Where unions in collaboration with employer groups have fixed prices, allocated markets, or limited competition of the final product of the participating employers, they have often been held liable under the Sherman Act. Thus, liability has been imposed in the building trades for bid pooling and contractor-designation schemes enforced by the union's withholding of labor from recalcitrant or nonparticipating employers.⁷⁷ Similarly, union efforts to fix prices to be received by participating employers⁷⁸ or otherwise to restrict price competition have been

⁷⁵ See Bernhardt, *supra* note 68, at 1101.

⁷⁶ See text accompanying notes 113-116 *infra*. Although restrictions on sales impinge on the final product of the participating employers, they do not necessarily involve price fixing, territorial allocation, or similar benefits accruing from monopolistic practices that might be devised by employers, union pressure aside.

⁷⁷ See Local 175, IBEW v. United States, 219 F.2d 431 (6th Cir.), *cert. denied*, 349 U.S. 917 (1955) (no discussion of who initiated scheme or of how monopoly spoils were divided); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

⁷⁸ See *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's Union*, 72 F. Supp. 562 (D.C. Hawaii 1947); *cf. Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). See also *McHugh v. United States*, 230 F.2d 252 (1st Cir. 1956). Fishermen's unions have been condemned for a variety of price-fixing arrangements. See Brickner, *Labor and Antitrust Action*, 13 IND. & LAB. REL. REV. 245, 246-47 (1960). Their activities have given rise to difficult problems because employee wages are sometimes a percentage of the price received for the catch (see *McHugh*) or because some of the "employers" are union members who work along with the crew and whose relationships with the purchaser raise questions as to whether the "employer"-fishermen should be characterized as independent contractors (*cf. Hawaiian Tuna Packers*). Los Angeles Meat &

condemned.⁷⁹ A violation has also been made out by allegations that an agreement between a union and an association of construction subcontractors provided for union approval of would-be subcontractors, the assignment of subcontractors to designated contractors, and the denial of union workers to disapproved subcontractors.⁸⁰

Restraints on competition imposed by union-employer combinations on sales of the final product of participating employers have, however, sometimes escaped condemnation on a variety of grounds. The decision by the Federal Trade Commission in *California Sportswear & Dress Ass'n*⁸¹ illustrates this extension of immunity and merits attention because its elaborate exposition served only to underscore the uncertainties of the *Allen Bradley* doctrine.

California Sportswear involved two sets of restraints. First, competition among contractors was limited by the following means: (a) requiring manufacturers and jobbers to use only contractors in contractual relations with the union; (b) a contractor-designation procedure administered by the union; and (c) requiring prices paid to contractors to be sufficient to meet their wage costs plus a reasonable amount for

Provisions Drivers Union v. United States, 371 U.S. 94 (1962), discussed in text accompanying note 91 *infra*, will increase the uncertainties in this area.

⁷⁹ See *United States v. Milk Drivers & Dairy Employees Union*, 153 F. Supp. 803, 808 (D. Minn. 1957), where the union, in order to protect drivers' commissions, sought to prevent store sales of milk at "unfair prices," in combination with a group of dairies and stores. The participation of the stores resulted in price effects on their final product; the court's opinion implies, however, that a violation would have resulted even though the price impact had resulted solely from union instigation of the dairies to boycott the price-cutting stores. See also *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n of Philadelphia*, 155 F.2d 799 (3d Cir. 1946). The plaintiff, in order to service newspapers, employed photoengravers at night who, during the slack periods, did commercial photoengraving. Plaintiff had a collective bargaining agreement that covered daytime photoengraving for newspapers but did not extend to nighttime commercial photoengraving. Defendant-association of commercial photoengravers, concerned about insufficient business and plaintiff's low prices, objected to the union's supplying nighttime workers to the plaintiff. The association's agreement with the union prohibited future night work without the consent of both parties. On the basis of that agreement and the association's objection, the union ordered its members to abstain from further nighttime commercial work for the plaintiff. The employees, who had previously voted against a strike, complied. At the same time, a firm owned by the association's president, which did photoengraving for another newspaper, was permitted to do commercial work at night. The complaint was upheld on the ground that the association had used the union to exclude the plaintiff from the commercial engraving field in order to restrict price competition and eliminate a competitor. It should be noted that the union's pressure was not designed to prevent night work as such, but only a particular kind of night work that had been opposed by plaintiff's competitors because it had diverted business from them.

⁸⁰ *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954), *reversing*, 118 F. Supp. 387 (N.D. Ill. 1953).

⁸¹ 54 F.T.C. 835 (1957).

overhead. The three employer groups involved, after first opposing those clauses, had accepted them in substantially identical terms after being pressed to do so by the union.⁸² The second set of restrictions applied to all three employer groups and concerned their acquisition of new ownership interests in women's sportswear firms. All members of those groups were required to give the union advance notification of acquisitions and were also restricted to acquisitions in the Los Angeles area and among firms already in contractual relations with the union.

The first set of restrictions on the use of contractors was plainly vulnerable on two grounds: it sheltered the contractors against any competition from nonunion firms, and the price provisions limited competition among unionized contractors. Those restrictions thus seemed to have involved the possibility of benefit to one group of participating employers essentially similar to that associated with market control by any group of competitors. Indeed, those restrictions were markedly similar to those developed, apparently without union assistance, by an association of contractors and condemned by the Supreme Court in *United States v. Women's Sportswear Mfrs. Ass'n*.⁸³ In that case, the Court, invoking *Allen Bradley*, had declared: "And if it [the union] did [participate], benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires."⁸⁴

Nevertheless, the Commission in *California Sportswear* held *Allen Bradley* inapplicable. It emphasized that the agreements had resulted from union coercion, but then backtracked by adding that otherwise impermissible arrangements embodied in collective bargaining agreements would not be validated by union instigation and initial employer resistance.⁸⁵ The controlling considerations appeared to be whether union participation had been "intended" solely for the union members' benefit and whether competition had in fact been stifled.⁸⁶ The Commission found no "substantial evidence in the record" that the contractor designation procedure had markedly affected competition. It emphasized that there had been no prospect of direct gain to the jobbers and manufacturers from such a procedure. It dismissed any gains to the unionized contractors from the elimination of nonunion competition and the regulation of their own competition as incidental to the union's efforts to protect employment opportunities for its members. It also dismissed the pricing provisions on the ground that there was no

⁸² *Id.* at 844.

⁸³ 336 U.S. 460 (1949).

⁸⁴ *Id.* at 464.

⁸⁵ 54 F.T.C. at 891.

⁸⁶ *Id.* at 893.

evidence that they had been designed to produce or had produced price uniformity on the part of the contractors.

The Commission, in short, upheld restraints on competition that appeared to run afoul of *Allen Bradley* on the ground that there had been no showing that the participating employers had in fact realized monopoly gains. Such a showing is, however, not required with respect to similar restraints imposed by employers without union participation, and the Commission failed to justify a different approach in the two situations. To be sure, its opinion did emphasize the historic difficulties that have been associated with the contracting-out system in the garment trades. But such difficulties had been passed over in silence by the Supreme Court in *Women's Sportswear*. The Commission emphasized also the need to give effect to the policy of the Taft-Hartley Act in applying the Sherman Act.⁸⁷ There was, however, nothing in the labor statutes, prior to the 1959 amendments,⁸⁸ that would have supported a limitation on the *Allen Bradley* rule.

The Commission's findings could not, however, change the fact that an employer-union combination had agreed to arrangements whose direct effect would be to insulate the participating unionized firms against nonunion competition and thereby to "benefit" them—at least in the short run. If such arrangements had been enforced by the employers without union participation, they would have violated the act. The rejection of any violation in *California Sportswear* appeared to rest primarily on the findings that the union was seeking to protect only its members and not the employers and that the employers were unwilling collaborators.⁸⁹ The issue of legality was thus made to turn on whether the employers were aiding the union in its market-control scheme or vice versa. That approach, although it gains some support from the Supreme Court's reading of the facts in *Allen Bradley*,⁹⁰ is vulnerable to two criticisms. First, it is enormously difficult to administer because of its dependence on ultimate and subjective purposes and on the effects of restrictive arrangements on supply and price, which are difficult of proof. Second, as indicated above, whenever union officers are not venal, their agreements with employer combinations to establish a sheltered market are designed for the ultimate benefit of the

⁸⁷ *Id.* at 889, 895.

⁸⁸ The second proviso to § 8(e), added by 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. V, 1963), exempts the garment trades from prohibitions against securing hot cargo agreements and securing or enforcing them by economic pressure. That proviso is, however, silent about antitrust exemption, and, in any event, does not purport to sanction horizontal price fixing.

⁸⁹ 54 F.T.C. at 891.

⁹⁰ See text accompanying notes 66-67 *supra*.

employees. Indeed, the realization of impressive benefit to employees did not operate in *Allen Bradley* to legalize the arrangements there involved. To make intended or actual employee benefit the passport to legality is wholly to ignore the value that *Allen Bradley* attached to the elimination of union-employer restraints on competition in the market for the employers' final product.

The language of the Supreme Court, although not its decision, in *Los Angeles Meat & Provisions Drivers Union v. United States*,⁹¹ may foreshadow an even more expansive privilege to union-business combinations to restrain trade in the employers' final product, at least where businessmen-workers are involved. That case arose from the following situation. Grease processors in the Los Angeles area procured waste grease, by direct purchases from restaurants, etc., picked up by the processors' own unionized employees and by purchases from "peddlers," who acted as intermediaries between various sources of supply and the processors. After the peddlers had been unionized, the union fixed the peddlers' purchase and selling prices, allocated accounts and territories, eliminated recalcitrant peddlers by barring processors from buying from them, and generally enforced its program by strikes and boycotts.

The union had stipulated that those practices had occurred, that they had violated the Sherman Act, and that they could properly be enjoined. It contested only the additional remedy imposed by the district court, an order terminating the union membership of the "independent businessmen."

In sustaining that order the Court⁹² relied on *Columbia River Packers Ass'n v. Hinton*,⁹³ which was plainly applicable, as a basis for condemning the union's organization of a cartel that controlled the marketing of the peddlers' final product. But the Court introduced uncertainty about its approach by emphasizing that there had been "no showing of any actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers and the other members of the union."⁹⁴ It pointed to the finding below that no such competition had existed, a finding based on a stipulation that no processor had ever substituted peddlers for employee-drivers or had threatened to do so.⁹⁵ On the basis of that finding, which, we will

⁹¹ 371 U.S. 94 (1962).

⁹² *Id.* at 102.

⁹³ 315 U.S. 143 (1942). (Act violated where a union comprised of fishermen and their employees sought to bar nonunion competitors from the market by refusing to sell to would-be purchasers unless they boycotted nonunion sellers.)

⁹⁴ 371 U.S. at 98.

⁹⁵ *Ibid.*

see,⁹⁶ was plainly unreal, the Court concluded that the union had had no legitimate interest in organizing the self-employed entrepreneurs; consequently, the union's suppression of competition fell within the Sherman Act and was not immunized by the Clayton or Norris-LaGuardia Act.

The reason for the Court's emphasis on the alleged lack of any economic interrelationship between the peddlers and the processors' employees is not wholly clear. That emphasis seemed to be related to the Court's recognition that in some cases unions may legitimately organize ostensibly independent contractors who are functionally employees.⁹⁷ But in such cases appropriate characterization would appear to depend on the functional role of the disputed group and not solely on whether the disputed group competes with individuals who are employees. Thus, the Court's emphasis implies that if the missing economic interrelationship between the two groups had been found to exist, it would have been permissible for the union to cartelize the peddlers even though they had properly been characterized as "independent contractors" rather than employees.

⁹⁶ See text accompanying notes 112-13 *infra*.

⁹⁷ 371 U.S. 103. The Court's supporting citations, introduced with a "Cf.", were: *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940); *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769 (1942); *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283 (1959). The cited cases, although they illustrate the conflict between the interests of unionized employees and those of businessmen-workers performing similar economic functions, are somewhat remote. Thus, it should be noted that the Court in *Lake Valley* intimated that the "vendors" were functionally "employees" and noted that they had been so characterized by the plaintiffs. See 311 U.S. at 95, 98. Furthermore, later developments raise questions about the vitality of *Lake Valley*, which was limited by *Hinton v. Columbia River Packers Ass'n*, 117 F.2d 310, 313 (9th Cir. 1941), *rev'd*, 315 U.S. 143, 147 (1942). The Taft-Hartley amendments to the NLRA were designed to limit the situations in which ostensible independent-contractor relationships were characterized as employment relationships. See § 2(3) of National Labor Relations Act, 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1958), amending 49 Stat. 450 (1935); House Comm. on Education and Labor, *Labor-Management Relations Act, 1947*, H.R. Rep. 245, 80th Cong., 1st Sess. 18 (1947); *NLRB v. Steinberg*, 182 F.2d 850 (5th Cir. 1950). Section 8(b)(4)(A), added by 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(4)(A) (1958), as amended, 29 U.S.C. § 158(b)(4)(A) (Supp. V, 1963), reinforces § 2(3) by proscribing union pressures designed to force self-employed persons to join unions. Even if courts in Sherman Act cases were bound to validate concerted activities of businessmen-workers protected by the NLRA, as amended, there would be no warrant in Sherman Act cases for expansion of the protection accorded by the NLRA. It is true that in the *Oliver* case the Court, without passing on the independent-contractor question, invalidated the application of a state antitrust law to minimum rental rates fixed by a collective bargaining agreement. But the Court carefully noted the absence of any claim that federal law had been violated and made it clear that the bargaining process was to be limited by federal standards. See 358 U.S. at 286. Finally, the position in *Lake Valley Farm* that the Norris-LaGuardia Act barred an injunction against Sherman Act violations growing out of labor disputes (311 U.S. at 102-03) was repudiated in *Allen Bradley*. Plainly, the Court's "Cf." carried quite a burden.

The basis for that position appears to be that businessmen-workers, such as the peddlers, are directly substitutable for unionized employees and, accordingly, that the organization of the businessmen is necessary for preserving union standards applicable to employees.⁹⁸ Furthermore, unless such organization is permitted, unions would have an incentive to prohibit unionized employers from dealing with the businessmen. Such prohibitions, which could be assimilated to no-subcontracting clauses, might be lawful under the NLRA,⁹⁹ as amended, and would appear to be lawful under the Sherman Act. An appealing argument could thus be made for permitting unions to regulate the prices, hours, etc. of businessmen who are directly substitutable for unionized employees and who could be wholly excluded from dealing with unionized firms.

There are, however, weighty opposing considerations. Such unionization collides with the tradition of "encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power."¹⁰⁰ The Taft-Hartley Act, as already suggested,¹⁰¹ responded to that tradition by seeking to limit situations in which "independent contractors" were classified as "employees" and by proscribing union pressures designed to force the self-employed into unions. To read the Sherman Act to give a more expansive reach to "employees" than was provided for by Taft-Hartley would be inconsistent with the purpose reflected in the latter statute. Such a reading would, moreover, be paradoxical in that it would disregard that the objective of the Sherman Act is to limit concerted activities by businessmen, while the objective of Taft-Hartley is to protect concerted activities by "employees." Under such circumstances it would be strange indeed to have a broader definition of "employees" under the Sherman Act than under Taft-Hartley.¹⁰² Furthermore, the interdiction of price fixing by businessmen-workers would operate, albeit modestly, as a check on union power. Indeed, the resultant check would not be essentially different from that provided by large firms offering products or services that could be economically

⁹⁸ See Note, *Employee Bargaining Power Under the Norris-LaGuardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98, 102 (1957); cf. *United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227, 234-35 (S.D.N.Y. 1960).

⁹⁹ See text accompanying note 160 *infra*.

¹⁰⁰ The quotation is from Frankfurter, J., in *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 475 (1950).

¹⁰¹ See note 97 *supra*.

¹⁰² Cf. *Taylor v. Local 7, Int'l Union of Journeymen Horseshoers*, 222 F. Supp. 812, 820 (D. Md. 1963), supporting the applicability of the Taft-Hartley test under the Sherman Act, but concluding, on the basis of "the common-law test," that the disputed group were "employees," rather than independent contractors. As a result, the "price-fixing" for services and the boycotts involved were held not to violate the Sherman Act.

substituted for unionized labor. Thus, the logical implication of the argument for union cartelization of businessmen-workers is that the union should be able to cartelize and fix prices of firms whose output may erode union standards. Finally, cartelization of businessmen-workers may be designed to and may operate to provide monopoly gains to businessmen rather than to protect the integrity of union standards. Thus, if one began with the union's cartelization of the grease peddlers, the unionization of the processors' employees or the policies adopted in collective bargaining for those employees could serve as a method for maintaining the cartelized rate of return for the businessmen. The choice between these two alternative explanations of the union's policies would require additional evidence. Such evidence might consist of data showing that the unionized employees of the processors had derived substantial or slight benefit from the union rate; such a showing would not be easy to make. Or the evidence might show that the cartelization of the peddlers resulted in great gains to them, or to union officials, or to union members flowing from their ties to the firms involved. In short, it would be difficult to determine whether the market restraints on the peddlers' final product were a means of protecting employees substitutable for the peddlers or whether it had more vulnerable objectives, such as achievement of monopoly gains for the peddler-businessmen.

Mr. Justice Goldberg's concurring opinion, in which Mr. Justice Brennan joined, was silent about the possibility of such gains and indicated that unionization of businessmen-workers was not to be limited to situations where they were directly substitutable for unionized employees. Thus, Mr. Justice Goldberg stressed that the Court's result was based on the absence of record evidence showing any legitimate labor interest for the organization of the peddlers and was not based on the absence of job and wage competition between the processors' employees and the peddlers¹⁰³—a point which, according to the Justice, had been "erroneously considered crucial by the District Court."¹⁰⁴ Furthermore, the Justice emphasized that the union by conceding the peddlers were independent businessmen had waived the argument that, under the NLRB's approach in *NLRB v. Hearst Publications, Inc.*,¹⁰⁵ the peddlers

¹⁰³ See 371 U.S. at 103-05.

¹⁰⁴ *Id.* at 105.

¹⁰⁵ 322 U.S. 111 (1944). The *Hearst* case had been repudiated by the Taft-Hartley amendments to § 2(3) of the NLRA. See note 97 *supra*. Perhaps the Justice's point was that a characterization of the peddlers as "employees" would have transformed what appeared to be price fixing and territorial allocation into legitimate incidents of collective bargaining. Douglas, J., dissenting, wrote as if the *Hearst* approach had been untouched by later legislation. See 371 U.S. at 108-09.

were employees. Finally, he pointed to the "egregious nature of the conduct involved,"¹⁰⁶ presumably referring to the use of union power to favor processors owned by union members.¹⁰⁷ The recurring emphasis on the special circumstances, as the Justice made explicit, was designed to suggest that the union might well have been privileged to effect a combination of the peddlers "for the purpose of bettering [their] economic condition."¹⁰⁸ Despite its reference to the *Hearst* case, the concurring opinion failed to indicate clearly whether such a privilege was conditioned on the characterization of the peddlers as "employees" rather than independent contractors. But to read such a condition into the concurrence would make a shambles of it; for if the "peddlers" were properly classified as "employees," no extended exposition would have been necessary either to characterize their "price-fixing" as privileged "wage-fixing" or to characterize the other restraints involved as constituting the "terms and conditions" of employment.

Mr. Justice Douglas in his dissent urged that the characterization of the peddlers as independent contractors was not decisive.¹⁰⁹ He emphasized that small entrepreneurs may disorganize an industry and that the employees of the processors and the peddlers were all "in the same boat";¹¹⁰ presumably, the Justice was rejecting the finding below that there had been no competition between those groups. The existence of such competition was, in his view, significant for two reasons: First, the impact of the peddlers' competition on the interest of the processors' employees was apparently an additional basis for the legitimacy of the union's interest "in the conditions of the industry that increase or reduce employment opportunities or increase or reduce labor's rewards."¹¹¹ Second, the peddlers' need for organization on their own behalf and to protect the processors' employees brought the controversy within the Norris-LaGuardia Act's broad definition of a "labor dispute"—a legal conclusion, indeed a jurisdictional determination, that devolved on the Court despite any stipulations to the contrary.¹¹²

Mr. Justice Douglas seems on sound ground in rejecting the finding of no competition between the processors' employees and the peddlers. Plainly, the availability of the peddlers as an alternative source of grease limited the union's power to get more for the processors' em-

¹⁰⁶ 371 U.S. at 103.

¹⁰⁷ *Id.* at 106-07.

¹⁰⁸ *Id.* at 106.

¹⁰⁹ *Id.* at 110.

¹¹⁰ *Id.* at 111. *But cf.* the quotation from Frankfurter, J., text accompanying note 100 *supra*.

¹¹¹ 371 U.S. at 111.

¹¹² *Id.* at 112.

ployees. Nor was such a limitation negated by the stipulation that the processors had neither substituted peddlers for their own employees nor threatened to do so. Even in the absence of actual or explicitly threatened substitution, the availability of the peddlers, like the existence of any other substitute for the processors' employees, would have influenced bargaining over their wages, etc. Furthermore, the relative costs of the two methods of collecting unprocessed grease would presumably have determined the method by which the processors secured any increased requirements. Hence, the Court's acceptance of the finding of no competition between the two groups seemed to fly in the face of elementary economic analysis.

The stipulated record, plus three elusive opinions, makes the *Meat Drivers* case a doubtful basis for generalization. Nevertheless, that case foreshadows the possibility that the legality of union-induced price-fixing by businessmen-workers is not to turn on the distinction between "employees" and "independent contractors." Presumably, the substitutability of the businessmen for unionized employees will legalize the cartellization of the former. But it is not certain whether that condition is to be a necessary condition for the legality of cartellization of the businessman-worker.

Market Restraints Potentially Detrimental to Participating Employers

Union power is, of course, checked to the extent that employers are able to reduce costs by substituting nonunion for union materials, by resorting to labor-saving equipment, or by subcontracting and similar arrangements. Unions have, however, sought to limit such checks not only by extending organization but also by restricting employers in their purchase or use of intermediate components and services.

Although such restrictions on purchases may be viewed as operating on product markets, their impact on acquiescent employers is not essentially different from the impact of union power exercised in the labor market. In both cases, the result is presumably some upward pressure on costs, a result that employers have every incentive to avoid. Since participating employers do not derive any commercial benefit (labor peace aside) from such restrictions, they do not, under what is probably the prevailing interpretation of *Allen Bradley*, run afoul of the Sherman Act.¹¹³ Under that interpretation *Allen Bradley* does not prohibit union-employer combinations from providing sheltered markets to other em-

¹¹³ See, e.g., *Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n*, 145 F. Supp. 864, 865-66 (S.D. Cal. 1956); *Meier & Pohlmann Furniture Co. v. Gibbons*, 113 F. Supp. 409, 410-11 (E.D. Mo. 1953); cf. *East Texas Motor Freight Line v. International Bhd. of Teamsters*, 163 F.2d 10, 12 (5th Cir. 1947); *Anderson Friberg, Inc. v. Justin R. Clary & Son*, 98 F. Supp. 75, 82 (S.D.N.Y. 1951). See also *California Sportswear & Dress Ass'n*, 54 F.T.C. 835, 849, 851-53 (1957).

ployers through direct restraints on product competition; rather *Allen Bradley* means only that employer-beneficiaries of such restraints may not invoke or accept the aid of unions in order to establish or maintain such restraints. Where, however, such beneficiaries combine with a union and with their employer customers, there is a greater likelihood of a violation. Indeed, such liability was, prior to *Allen Bradley*, imposed in *United States v. Brims*,¹¹⁴ among other cases¹¹⁵ and remains consistent with the "business monopoly" rationale of *Allen Bradley*.

Where customers for the products involved are effectively unionized, the union can exclude nonunion suppliers without any direct participation by their unionized competitors. Such exclusion can be effectuated through the union's power to compel unionized purchasers to boycott nonunionized suppliers, thereby reserving the market for the unionized firms. If such arrangements are not illegal under the Sherman Act when effectuated by union-purchaser combinations, their unlawfulness, solely because of the involvement of sellers in direct competition with the excluded firms, appears to result from the combination of market restraints plus monopolistic benefit to some of the participating employers. Such involvement may, of course, suggest that the protected suppliers are active sponsors of market restriction schemes rather than passive beneficiaries of union job-protection arrangements, or it may suggest that union officials, although ostensibly protecting employee interests, are in fact protecting the interests of selected employers and may be receiving venal rewards for these services.¹¹⁶ Plainly, those considerations do not necessarily affect the extent to which competition in the sale of components is directly restrained in particular situations. Nevertheless, under either assumption, the reason for according unions a qualified exemption from the Sherman Act, *viz.*, to permit their protection of employee interests in the labor market, would not exist; and the withholding of that exemption is sound.

¹¹⁴ 272 U.S. 549 (1926) (Combination of Chicago mill-work manufacturers, building contractors who purchased and installed it, and the union agreed to boycott of out-of-state nonunion mills; that agreement was implemented by refusal of union employees of contractors to install nonunion mill-work. The Chicago manufacturers received monopoly benefits as a result of the exclusion of competitors in the Chicago market.).

¹¹⁵ *Local 167, Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934); *Lumber Prods. Ass'n v. United States*, 144 F.2d 546 (9th Cir. 1944), *rev'd on other grounds, sub nom. United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947). *Cf. United States v. Hamilton Glass Co.*, 155 F. Supp. 878 (N.D. Ill. 1957) (upholding a complaint against union and employer "as conspirators which sought to eliminate the use of pre-glazed products in the Chicago market, except for the products supplied by Hamilton Glass or other co-conspirators." The opinion does not indicate the machinery by which certain suppliers were allegedly exempted from the boycott.)

¹¹⁶ Such pay-offs were proscribed by § 302, Title III of the LMRA, 61 Stat. 157 (1947), 29 U.S.C. § 186 (1958), amended by the LMRDA of 1959, 73 Stat. 537, 29 U.S.C. § 186 (Supp. V, 1963).

The Limits of the Labor Market Exemption

Union activity in the labor market relating to such matters as wages and hours is, of course, linked to the product market because of the connection between costs, supply and price. Nevertheless, such activity is the *raison d'être* for labor unions and is generally exempt from the Sherman Act. The applicability of that exemption is, however, uncertain when anticompetitive repercussions on the product market of participating employers are found to be the deliberate objective, rather than the ancillary result, of otherwise conventional collective bargaining arrangements.

The difficulties involved are illustrated by recent litigation involving the United Mine Workers. In *Lewis v. Pennington*,¹¹⁷ the jury brought in a substantial damage verdict against the UMW, after having been charged, in part, that multiemployer agreements fixing wages and barring the participating employers from buying or selling coal produced by companies that did not observe union standards constituted a violation of the Sherman Act, if those agreements were the "result of an agreement with large coal operators to drive small operators out of business."¹¹⁸ Although the court's charge endangers customary provi-

¹¹⁷ 1961 Trade Cas. 78125, 78132 (E.D. Tenn.), *aff'd*, 325 F.2d 804 (6th Cir. 1963), *rev'd sub nom.* *Pennington v. UMW*, 85 Sup. Ct. 1585 (1965). The opinions in the Supreme Court are discussed in the "Epilogue," beginning on p. 714 *infra*. For earlier UMW demands that raised antitrust issues, see *Penello v. UMW*, 88 F. Supp. 935, 941 (D.D.C. 1950).

¹¹⁸ 1961 Trade Cas. at 78135, 78136. The reports of the *Pennington* case do not clearly describe the bargaining pattern in the bituminous coal industry. According to NLRB reports, industry negotiations, since 1950, have begun with the Bituminous Coal Operator's Association, representing the Northern Appalachian group. The terms of the agreement between that association and the UMW are then presented to other associations and to individual operators. Those procedures have resulted in uniform agreements covering about 75% of bituminous coal production. See *United Mine Workers*, 144 N.L.R.B. 228 (1963). The Board has described the foregoing bargaining patterns in decisions condemning boycott provisions similar to those involved in *Pennington*. See also *United Mine Workers*, 148 N.L.R.B. No. 41 (1964).

The cross claimant in *Pennington* had not been a member of any of the employer associations but had entered into the BCOA agreement as a result of a variety of union pressures.

The trial court also instructed the jury to consider the following additional matters if, and only if, they were "a part of the conspiracy": (1) the UMW's approaches to the Secretary of Labor for the purpose of raising the minimum wages fixed under the Walsh-Healey Act (*id.* at 78135); (2) the efforts to reduce the amount of spot-coal purchased by the TVA from companies not meeting union standards and dumping of coal in the spot market (*id.* at 78127-28, 78137); and (3) the contract provisions barring companies with substandard wages from leasing mining lands owned by the signatories to the agreement (*id.* at 78127, 78135). The charge of approaches to government officials raises a substantial question under *Eastern Conf. v. Noerr Motors*, 365 U.S. 127 (1961), but the *Noerr* case is distinguishable on the ground that in *Pennington* the approach to officials was only one element of a larger "conspiracy." *Cf. id.* at 140.

It should also be noted that the union had a substantial investment in some of the larger companies charged with predatory price cutting. See 1961 Trade Cas. at 78128. Accordingly, the union may have had a commercial incentive for eliminating com-

sions of collective bargaining agreements, it is compatible with the *Allen Bradley* rule. The provisions involved were to be condemned only if they had been prompted by the participating employers', as well as the union's, specific purpose of driving the former's competitors to the wall. Arrangements directed toward that end and particularly the boycott provisions,¹¹⁹ if they had been developed by the employer group, would have been illegal.¹²⁰ Under *Allen Bradley* participation or instigation by the UMW, even though prompted by the ultimate purpose of benefiting employees, inculcates the union rather than exculpating the employers.

The foregoing argument, despite its formal appeal, involves formidable practical difficulties. It makes the legality of a classic union objective, uniform rates among competitive firms, turn on slippery issues of motivation.¹²¹ It requires unions to choose between uniformly higher wages for an entire industry and the survival of marginal firms; for whenever a union pursuing wage uniformity agrees to costs that may be beyond the capacity of such firms that are subject to the union's power, the foreseeable consequence, and hence the consequence "intended" by the union and the participating employers, may be said to have been the elimination of the weaker firms. Moreover, that intention may be inferred whether the weaker firms are members of a multiemployer unit or are subject to wage patterns fixed in bargaining in which they have no direct voice.¹²²

petitors. The trial court, however, charged that the union's substantial investment did not constitute a violation. *Id.* at 78134. The problems resulting from the union's dual status will not be pursued here. See *Streiffer v. Seafarers' Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La. 1958); Note, *Union Investment in Business: A Source of Conflict of Interest*, 46 MINN. L. REV. 573 (1962).

¹¹⁹ Those provisions in *Pennington* create special difficulties under the Sherman Act because the concerted boycotts were directed at potential suppliers who were also competitors of the boycotting firms. Insofar as the latter sold more than they bought, they presumably gained a monopoly benefit from their participation in the boycott.

¹²⁰ See *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

¹²¹ In *Pennington* that difficulty was aggravated by (1) a jury trial, (2) a complex record, and (3) the reception of evidence of violence as bearing on the conspiracy issue. See 325 F.2d at 810.

¹²² Suppose, e.g., that several substantial producers individually agreed to high wages and a most-favored-nation clause requiring the union to secure similar terms from other employers. Suppose also that other firms, because of a less intensive use of capital, were driven to the wall by higher wages and that had been the expressed purpose of the union and some of the employers. The consequences would be no different from those alleged in *Pennington*. In the case supposed, the parallel action required by the agreements might constitute a basis for finding implied conspiracy. See note 54 *supra* and accompanying text. Furthermore, where the employers to be eliminated were not members of the bargaining unit, the requirement that the union impose the same terms on them might be attacked as incompatible with the union's

Pennington thus arises from, and highlights, the basic tension between the object of *Allen Bradley* and the Sherman Act, on the one hand, and the national policy in favor of collective bargaining, on the other hand. *Allen Bradley* is designed to prevent employer exploitation of the bargaining process as an instrument of employer monopoly, but collective bargaining, even when restricted to such traditional matters as wages and without any tainted purposes on the part of employers, may, willy nilly, have anticompetitive effects in the product market.

A solution that would limit the threat that *Pennington* poses to collective bargaining would be in order. But the cases scarcely provide a principled basis for an escape from the difficulties involved. To be sure, it is arguable that *Apex* excluded wage bargaining from the Sherman Act,¹²³ but *Apex* plainly was not concerned with wage determinations exploited by employers as a method of excluding competitors. Indeed, *Apex's* reaffirmation of the vitality of *Coronado II*¹²⁴ implied that such purposeful attacks on competition in sales of the employers' final product remained subject to the act. Another possibility would be to distinguish *Allen Bradley* on the ground that the wage agreements in *Pennington* did not involve any price-fixing or any other direct encroachment on the product market. Finally, it is also arguable that the NLRA protection of both wage bargaining and multi-employer organization should not be contingent on matters as elusive as the intent imputed to the parties. But that argument merely asserts that the policy of collective bargaining should prevail over the Sherman Act even though the dominant members of multiemployer groups purposefully participate in converting their bargaining alliance into a weapon against their associates or against competitors denied an effective voice in the determination of wages—a result that is far from attractive. A similar assertion of the paramountcy of the NLRA over the Sherman Act lies behind arguments for plenary or primary jurisdiction of the NLRB when “mandatory bargaining” is involved—arguments considered below.¹²⁵

*Jewel Tea*¹²⁶ involved a situation that was in an important sense the obligation to bargain in good faith. But see text accompanying note 121 *supra* and note 123 *infra*.

¹²³ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503-04 (1940).

¹²⁴ *Id.* at 511-12.

¹²⁵ See text accompanying notes 137-54 *infra*.

¹²⁶ *Jewel Tea Co. v. Local Unions, Amalgamated Meat Cutters, AFL-CIO*, 274 F.2d 217 (7th Cir.) (affirming, on interlocutory appeal, denial of motion to dismiss), *cert. denied*, 362 U.S. 936 (1960); 215 F. Supp. 839 (N.D. Ill. 1963) (complaint dismissed after trial), *rev'd*, 331 F.2d 547 (7th Cir. 1964), *rev'd*, 85 Sup. Ct. 1597 (1965). The statement of facts in the text is based on the trial court's opinion after trial, rather than the record. See epilogue for a discussion of the Supreme Court's opinion.

obverse of *Pennington*—one in which a collectively bargained restriction on marketing, challenged under the Sherman Act, was defended on the ground that the only purpose of the marketing restriction was the protection of traditional employee interests. The challenged provision barred retail food stores in the Chicago area from selling fresh meat at night or on Sundays; it had been pushed by the union during negotiations and had been agreed to by an employer association that in the negotiations had apparently represented independent stores as well as Jewel Tea, the plaintiff. The plaintiff, after a favorable strike vote, agreed to the restriction.¹²⁷ A similar provision of long standing had originally been designed to promote the union's objective of limiting working hours and had, apparently, been negotiated prior to the institution of multi-employer bargaining.¹²⁸ Although the plaintiff had alleged that one group of employers, the independents, had favored that provision and had "conspired" with the union to achieve it, that allegation failed of proof. The union, the trial court found, had fashioned the marketing restriction solely to serve its own interests in hours of work, work loads, work jurisdiction, and compensation.¹²⁹ Agreements concerning those

127 The reviewing court rejected the defense of "pari delicto" on the ground that the plaintiff's participation had been induced by economic necessity. See 331 F.2d at 550-51.

128 See 215 F. Supp. at 841-42. The earlier agreement barred service to customers after 6:00 p.m. Whether that prohibition applied to service by proprietors or supervisors, as distinguished from members of the bargaining unit, is not clear.

129 *Id.* at 846. To establish a connection between those legitimate union interests and the marketing provision, the trial court reasoned as follows: (1) that provision was necessary to protect the butchers' work jurisdiction since night sales, even though the meat was pre-cut and sold on a self-service basis, would require incidental services, such as replenishment of stocks, etc.; (2) that provision was necessary to avoid excessive work loads that might arise from the need to pre-cut the meat during the day. Jewel Tea contended that once self-service counters were stocked during the day, there would be no need at night for further incidental services encroaching on the butchers' work jurisdiction. The trial court, in rejecting that contention, urged "that the evidence showed that in stores where meat is sold at night it is impractical to operate without either butchers or other employees." *Ibid.* That finding might indicate only that an enterprise would prefer to have butchers present when the agreement preserves that option. In view of the uncertain basis for that finding, it was regrettable that the Seventh Circuit adopted a broad and unduly abstract approach that made review of that finding unnecessary.

If that finding had been rejected, it is plain that the union's interest in work jurisdiction as well as work loads could have been protected by contract clauses directly dealing with those matters. Rejection of such clauses as insufficient to protect job opportunities would rest on the assumption that the company would publicly violate its contractual obligations. But such an assumption would mean that the only effective method of protecting the union's interests would have been that of closing the stores at night; for so long as the stores were open, sales of meat, contrary to the agreement, were possible. Even if the union's claim that night operations would necessarily encroach on the butchers' work-jurisdiction is accepted, that claim would raise problems under § 8(b)(4)(D) of the NLRA, as amended. That section proscribes economic pressures directed at preserving work-jurisdiction and the case for its application would

matters, the court observed, are "terms and conditions of employment" and are exempt from the Sherman Act. Since the disputed provision was directed solely at advancing the union's interest in "terms and conditions," that provision, the court ruled, should itself be characterized as a "term and condition of employment" rather than "price and market control" and should, accordingly, be exempted from the Sherman Act.¹³⁰

The Seventh Circuit, without disturbing the factual determinations below, reversed on the following grounds. The disputed clause dealt with a "proprietary function"¹³¹ rather than with a "term and condition" of employment. It had resulted from the collaboration of the unions and a nonunion group and had imposed a restraint on marketing with the necessary impact on commerce. Accordingly, under *Allen Bradley*, the agreement itself was illegal. The court attached no weight to the findings below that the clause had resulted from arm's length bargaining and that, the agreement aside, there was no evidence of a "conspiracy" among the employers or a segment of them to secure the marketing restriction or otherwise to restrain competition.

Although the court's result is, as we will see, defensible, its opinion is subject to two difficulties. First, it took an unduly narrow view of "terms and conditions" of employment. Second, it assumed that any restraint on marketing imposed either by multiemployer or parallel bargains, ran afoul of *Allen Bradley*, without regard to whether the participating employers sought or received monopolistic benefits, actual or potential.

With respect to the first difficulty, the court excluded from "terms and conditions" of employment the time when work was to be done as distinguished from the length of the work period. It thus ignored that the time of work is normally one side of a coin and operating hours the

be especially strong where a union claims work-jurisdiction but bars the employment of its constituents at the time their work is desired by the employer. Despite doctrines of preemption and primary jurisdiction, it appears proper for the courts to give weight to that section in an antitrust action in the same way as weight was accorded to § 8(a)(5). Indeed, the case for considering § 8(b)(4)(D) is stronger because § 303 of the LMRA gives courts independent jurisdiction of damage actions based on a violation of the former section.

The relationship of the ban on night sales to regulation of hours of work is more complex and is discussed below.

¹³⁰ 215 F. Supp. at 846. An alternative ground for decision was that the marketing restriction, even if it had been agreed to solely by the employers, would have been valid under "the rule of reason." *Id.* at 848-49. Since that approach does not purport to give any weight to the imposition of the restriction by collective bargaining, it will not be pursued here; it is sufficient to note that it involves substantial difficulties, and especially the difficulty that results from the existence of alternatives, other than market restriction, by which the union's interests might have been protected. See 331 F.2d at 550.

¹³¹ 331 F.2d at 549.

other side, because operations normally require the services of employees. The court's approach is, moreover, inconsistent with both a formal analysis of the individual employment relationship and the frequency with which the time of the work period has been dealt with in most collective bargaining agreements and in the previous agreements of the parties to the action. Hence, the court's dictum, if viewed as a general delineation of the duty to bargain (the Sherman Act aside), is drawn too narrowly.

If, however, the court's characterization is restricted to the particular situation before it, it is easier to defend. The argument in *Jewel* was that the usual interdependence between operating and working time did not exist. The company was not requesting night work, but only night sales—sales that allegedly could be made through self-service without the presence of bargaining unit employees and without encroachment on their usual work assignments. Under those circumstances, "terms and conditions" of employment does not in any direct way embrace marketing hours. Nevertheless, for the purposes of the NLRA, and apart from any Sherman Act questions, marketing hours might constitute an item of mandatory bargaining. That result would appear to follow from the acceptance of the union's contention that night sales of meat through self-service markets would generate strong pressure for night operation of service markets and, accordingly, for night work by some members of the unit. Under those circumstances marketing hours would probably have been deemed to have had a sufficiently close relationship to wages, hours, etc. to have been a mandatory item of bargaining.¹³² The Seventh Circuit's failure to consider that relationship obviously undermines its characterization of marketing hours as a "proprietary function." But the correctness of that characterization is not conclusive of the issue involved unless it is assumed that the antitrust question turns on characterization for the purpose of the NLRA—an assumption examined later and rejected.

A more formidable difficulty arises from the court's premise that any restraint imposed on the marketing of goods and services by a union-employer combination is ipso facto illegal. That premise ignores that restraints imposed by collective bargaining on purchases of intermediate components and services do not appear to run afoul of the Sherman Act. Similarly, where restraints are imposed on sales of final products, e.g., sales to "unfair" firms, a violation would not appear to result, for such restraints do not involve the kinds of benefit which employers, collective bargaining aside, seek to achieve by collusive arrangements. Under this analysis the critical difficulty posed by *Jewel Tea* is whether the market-

¹³² See Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 293 (1959).

ing restriction should be invalidated because it relates directly to competition in final products and because it might provide benefits to one group of employers who were or may have been opposed to night marketing because they lacked self-service counters. If such employers had agreed among themselves to secure the elimination of night sales and had invoked the union's aid, a violation would presumably have been established. To ban such an agreement, even though it occurs within the context of collective bargaining, is to cut down slippery issues concerning the origination of, and the purpose behind, arrangements that directly restrain competition in final product markets and that potentially benefit some or all of the participating employers. Furthermore, even when the union is the actuating force behind such arrangements and even when they are designed to advance legitimate union interests, they are not essentially different from arrangements condemned under *Allen Bradley*. Thus, if a union were to press for price fixing of the employers' final products as a method of financing a wage increase, the employers' agreement in the context of arm's length collective bargaining would not legalize the price restraints. An acceptable basis for distinguishing such price restraints from the market restriction in *Jewel Tea* is not readily discernible. In both situations the restraints on final product competition are designed to advance legitimate employee interests. In both situations such protection is sought not by direct regulation of the terms and conditions of employment but by regulation of competition. In both situations there is the possibility that some of the participating employers will benefit from the restraints involved. Indeed, in *Jewel Tea*, it seems likely that the primary importance of the marketing restriction lay in its protection of the independents against nighttime competition; for that restriction was scarcely necessary to protect the butchers employed by the stores selling at night against nightwork, or against overwork during the day, or against any significant encroachment on their traditional work jurisdiction.¹³³ But that restriction was necessary to protect the employers opposed to night operations and their employees against the pressure of nighttime sales by others. Such sales might, as already suggested, have generated pressure on independents without self-service counters to stay open and thereby would have exerted pressure for nightwork by butchers. Furthermore, the high cost of such operations might have adversely affected the interests of the independents' employees. Such adverse effects might also have obtained if the refusal of independents to operate at night resulted in their loss of daytime business. But the foregoing considerations merely indicate that competition in product markets may adversely affect some firms and their employees. The same effects might

133 See note 129 *supra*.

result from vigorous price competition that attracted consumers away from independents. Such effects do not warrant price fixing under the umbrella of collective bargaining, and it is not easy to see why they should warrant restrictions on marketing hours which may benefit some firms and which directly invade the consumers' interests.

The condemnation of such restraints without any requirement of showing specific intent on the part of the employers or the union to restrain competition would avoid slippery evidentiary issues—precisely the kind of issues that the lower courts found critical in *Pennington*. If it is desirable to avoid such issues with respect to wage determination, it is not easy to see why they should be confronted with respect to market restrictions, such as those involved in *Jewel Tea*. Such issues could be reduced by drawing a line between employers' markets for their final products and their labor markets and by proscribing direct restraints on the former market by union-employer combinations. Because of the inextricable connection between those two markets, unions might be able to achieve indirectly what they could not achieve by direct market regulation.¹³⁴ Nevertheless, the proscription of such direct regulation would presumably obstruct the development of anticompetitive arrangements impinging directly on the final product market by unions and employer groups.¹³⁵ Despite some dubious aspects of the Seventh Circuit's approach, it has at least that desirable result.

Jewel Tea and *Pennington* have also raised issues as to the impact of the NLRA on the jurisdiction of the federal courts to apply the Sherman

134 For example, in *Jewel Tea* the union might have sought to make night sales prohibitively expensive by demanding additional butchers during the day for the stated purpose of absorbing the increased work loads or by demanding a highly paid complement of butchers at night to perform work incidental to self-service sales. Presumably, those demands would have been exempt from the Sherman Act. Nevertheless, the *Pennington* approach might result in their condemnation if their "purpose" was shown to be the imposition of a marketing restriction.

135 In *National Ass'n of Window Glass Mfrs. v. United States*, 263 U.S. 403 (1923), reversing, 287 Fed. 228 (N.D. Ohio 1923), the Court upheld a collective bargaining arrangement considerably more restrictive than that involved in *Jewel Tea*. The former agreement provided that manufacturers of hand-blown glass should be divided into two groups, each of which was permitted to operate only during the portion of the year assigned to it. In upholding the agreement the Court rested on the "rule of reason" rather than any special immunity for unions or collective bargaining. The Court's decision seems to be an aberration. The Court subsequently held the Sherman Act inapplicable to employer agreements on hiring halls and prerequisites for employment notwithstanding the declaration in § 6 of the Clayton Act that the "labor of a human being is not . . . an article of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958). See *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926). Furthermore, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), despite its uncertainties, has been read as making an agreement among competitors to limit the supply of a commodity as intrinsically unreasonable and illegal. See Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 28-29 (1964).

Act to collective bargaining agreements. Concurrent jurisdiction of several tribunals involves the possibility of conflicting determinations of issues that may be common to proceedings under each of the statutes. In order to avoid such conflict, it has been urged that judicial competence should be held to have been displaced by that of the Board or, at least, that courts should withhold adjudication until the Board has dealt with conduct that is arguably protected or prohibited under the NLRA. Thus, in *Jewel Tea* the union has urged that the Seventh Circuit, acting independently of, and prior to, the Board, instructed the district court "to enjoin as a violation of the Sherman Act what the Board may compel as a duty under the NLRA."¹³⁶ But that argument toots only one horn of the dilemma, for the Board, if its jurisdiction were exclusive, might also compel as a duty under the NLRA what courts might condemn as a violation of the Sherman Act.

The argument in a case such as *Jewel Tea* for plenary and exclusive Board jurisdiction appears to rest on a misconception of the purpose of the duty to bargain and its relationship to the Sherman Act. That duty is designed in general to promote industrial peace and to give employees, through their representatives, a voice in the determination of wages, hours, conditions of employment and in other decisions affecting those matters.¹³⁷ That duty is concerned essentially with employer-union relationships and not with the impact of such relationships on competitive markets. The Board in delineating the scope of that duty has, in general, not been concerned with the preservation of such markets. Consequently, the characterization of a demand as bargainable under the NLRA (the Sherman Act aside) would not necessarily validate that demand under the latter act—unless the NLRA were held to constitute a repeal, pro tanto, of the Sherman Act whenever collective bargaining on "mandatory items" was involved—an issue considered later.

An illustration may clarify the foregoing discussion. In a situation where employee compensation is a fixed percentage of product prices, the union, in order to raise wages, might insist that a group of employers

¹³⁶ Petition for Cert., p. 28, *Local Unions, Amalgamated Meat Cutters v. Jewel Tea Co.*, cert. granted, 379 U.S. 813 (1964) (No. 240, 1964 Term). See also *United States v. Fish Smokers Trade Council*, 183 F. Supp. 227, 229 (S.D.N.Y. 1960); Brief for the AFL-CIO as Amicus Curiae, p. 21, *UMW v. Pennington*, cert. granted, 377 U.S. 929 (1964) (No. 48, 1964 Term).

¹³⁷ Cf. *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). The NLRB's recent decisions have expanded the scope of the bargaining duty. See, e.g., *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961), modified, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), cert. granted, 375 U.S. 963 (1964) (No. 610, 1963 Term; renumbered No. 14, 1964 Term), motion to move from sum. cal. granted, 377 U.S. 962 (1964). For a critical discussion of the evolution of the duty to bargain, see Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

adhere to a minimum price schedule. Such a demand could be said to have a sufficiently direct link with wages to constitute a bargainable item under NLRA precedents.¹³⁸ But that characterization would not resolve the issue of whether the price-fixing agreement would be repugnant to the Sherman Act. Furthermore, if all of the employers acquiesced in the demand for price fixing, no question of the scope of the bargaining duty would even be presented to the Board.¹³⁹ But the Sherman Act question would remain; indeed, such questions usually arise as a consequence of agreement rather than failure to agree. It is true that that question might be raised in a Board proceeding if an employer defended his refusal to bargain concerning price fixing on the ground that agreement would violate the Sherman Act. Such a defense would presumably require the Board to consider not only its doctrine as to bargainability but also whether the demand, if otherwise bargainable, was barred by, or perhaps raised a substantial question under, the Sherman Act. But consideration of the Sherman Act would be necessary not because bargainability under the NLRA coincides with legality under the Sherman Act, but because the Board generally is required to take account of other federal laws and unpreempted state law in its administration of the NLRA.¹⁴⁰ That requirement scarcely means that the Board has plenary jurisdiction of all federal law and all unpreempted state law that may be implicated by a bargain or by negotiations. The corollary of the foregoing analysis is that the duty to bargain is subject to the Sherman Act and not vice versa.

Although the Board in some cases might consider the Sherman Act questions in the course of proceedings under the NLRA, it does not follow that the Board should have exclusive or plenary jurisdiction over such questions. It has no special competence with respect to the Sherman Act as such. Its remedial powers are quite different from the sanctions that

¹³⁸ Cf. *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 293-94 (1959).

¹³⁹ "[T]he Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of unfair labor practice." *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 108 (1958). Furthermore, the parties may voluntarily bargain on matters that fall outside of the area of mandatory bargaining.

¹⁴⁰ The Supreme Court, citing *Allen Bradley*, stated in 1959 that "[F]ederal law sets some outside limits . . . on what [the parties] . . . agreement may provide . . ." *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 296; cf. *American News Co.*, 55 N.L.R.B. 1302 (1944). See also *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 110-11 (1958); *Truck Drivers Local 728, Teamsters Union*, 119 N.L.R.B. 399, 410 (1957); *Fort Indus. Co.*, 77 N.L.R.B. 1287, 1299 (1948). Whether such limits are exceeded by a bargaining demand is relevant to a party's duty to bargain. Thus a union or an employer faced with a seniority clause discriminating against Negroes could presumably defend its refusal to bargain on the ground of a violation of the Civil Rights Act of 1964.

support that act. Furthermore, where Congress has sought to give an administrative agency power to grant exemptions from the Sherman Act, it has usually done so explicitly.¹⁴¹ In the absence of such authorization, a determination by an agency that a given transaction is compatible with the Sherman Act does not automatically foreclose the application of the act in other proceedings.¹⁴² Neither the NLRA, as amended, nor its legislative history suggests such a purpose; nor do they suggest that the jurisdiction of the courts and the Federal Trade Commission with respect to the Sherman Act is to be displaced where collective bargaining is involved.¹⁴³

Such displacement is not warranted by the cases preempting state jurisdiction over matters arguably prohibited or protected by the NLRA.¹⁴⁴ Those cases are designed primarily to bar the application of state substantive doctrines and state procedures and scarcely control the issue of whether the jurisdiction of other federal tribunals charged generally with the enforcement of the fundamental national policy embodied in the Sherman Act should be obliterated.¹⁴⁵

An alternative to displacing judicial competence is a doctrine of

¹⁴¹ See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350, 353 (1963); *California v. FPC*, 369 U.S. 482, 487, 490 (1962).

¹⁴² See *United States v. RCA*, 358 U.S. 334 (1959).

¹⁴³ Cf. *California v. FPC*, 369 U.S. 482, 490 (1962).

¹⁴⁴ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). If the preemption cases were followed, judicial competence to apply the Sherman Act to collective bargaining agreements would, in some cases, be ousted whether or not an agreement dealt with a mandatory item. If the agreement encompassed a mandatory item of bargaining, ouster would rest on the ground that judicial interference with the bargaining would encroach on "protected activities." If the union, faced by employer resistance, had pressed a demand for a nonmandatory item to the point of impasse, the union would have engaged in "prohibited activity," viz., refusal to bargain in good faith. With respect to nonmandatory items the union's violation of the NLRA, as amended, would depend on whether the employers had resisted the union's demand. Under the *Garmon* approach a show of employer resistance to a nonmandatory item and a resultant impasse would be sufficient to oust the courts of jurisdiction—a dubious result that would invite disingenuous maneuvers in the bargaining process.

¹⁴⁵ "Preemption" doctrine has not destroyed the competence of federal or state courts over contract issues overlapping with unfair labor practices. See *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962). Nevertheless, it should be observed that § 10(a) of the NLRA, as amended, preserves the Board's plenary jurisdiction over unfair labor practices overlapping with contractual issues.

But that difficulty does not apply to judicial enforcement of § 303 of the LMRA, providing for damage actions for violations of the provisions of § 8(b)(4) of the NLRA, as amended. Such enforcement has been held to be completely independent of the Board. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952). The case for independent judicial competence for enforcement of the Sherman Act is considerably stronger, since that act has different purposes and provisions and hitherto has been left exclusively to judicial enforcement. Cf. *Meltzer, Jurisdiction Over Labor Relations II*, 59 COLUM. L. REV. 269, 287 (1959).

primary jurisdiction,¹⁴⁶ under which courts confronted with Sherman Act questions would defer adjudication until the Board had disposed of NLRA issues on the scope of mandatory bargaining. The difficulty with that suggestion is that such characterization would generally be irrelevant or of only minor significance on the Sherman Act issue. The NLRA governs the mode or procedure for reaching agreement; except in a few specialized situations, it does not govern the legality of the resultant agreement. Furthermore, the Board, unlike regulatory agencies, does not pass on the desirability of contract terms. Nevertheless, it is arguable that NLRA characterization has some relevance in that it identifies legitimate union interests that should be taken into account by courts in their administration of the Sherman Act. But such relevancy, even assuming that it exists, appears too insubstantial to call for primary jurisdiction. Furthermore, the notorious slowness of the Board's machinery, coupled with the slowness of antitrust proceedings, is an additional reason to permit the courts and the Federal Trade Commission to act without waiting for Board characterization.¹⁴⁷

The argument for displacement of, as distinguished from postponement of, judicial competence is, it is worth emphasizing, an argument for a fundamental alteration of substantive standards under the guise of a jurisdictional alteration.¹⁴⁸ The underlying contention appears to be that collective bargaining is so basically anticompetitive that Congress, by protecting the bargaining process, has rendered the Sherman Act inapplicable either to all collective bargaining agreements or, at least, to those embracing mandatory items. But *Allen Bradley*, which was decided after the passage of the Wagner Act, rejected that far-reaching contention;¹⁴⁹ hence, the issue becomes whether subsequent amendments

¹⁴⁶ See 3 DAVIS, *ADMINISTRATIVE LAW* § 19.04 (1958, Supp. 1963).

¹⁴⁷ See generally Jaffe, *Primary Jurisdiction Reconsidered*. *The Antitrust Laws*, 102 U. PA. L. REV. 577, 591-92, 603 (1954), for a caution against a wooden emphasis on "expertise" as distinguished from an approach seeking to balance all relevant considerations.

It is worth noting that the case for primary jurisdiction is stronger where the issue is whether particular groups are "employees" or independent contractors, for in such a situation the issue of whether illegal price fixing is involved will coincide with the issue of characterization. And a strong argument may be made that judicial action should be guided by the Board's characterization. Cf. *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173 (1962). But even in the "employee" or "independent contractor" situation, the case for primary jurisdiction is doubtful because of the delay factor and the express legislative preference for the application of common law concepts in determining the existence of an independent contractor relationship. See note 97 *supra*.

¹⁴⁸ Cf. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 438 (1954).

¹⁴⁹ The Court emphasized the need to reconcile the two congressional policies and the absence of any congressional purpose wholly to exempt collective bargaining from the Sherman Act. 325 U.S. at 806, 810.

to the NLRA may be viewed as a repudiation of that case. Two kinds of amendments may be invoked to support such a view: (1) those proscribing practices, such as hot-cargo provisions and secondary pressures,¹⁵⁰ that have been useful in restraining product competition and (2) the legislative endorsement of multiemployer bargaining.¹⁵¹

Neither the language nor the legislative history of those amendments suggest that their purpose was to reject the "business monopoly" rationale on which *Allen Bradley* rested. Thus, the secondary boycott amendments were designed to plug the "loopholes" in the Taft-Hartley provisions and to eliminate the questionable distinctions that had developed with respect to hot-cargo provisions.¹⁵² There is nothing in the legislative history to suggest that their purpose was to liberate collective bargaining from restrictions imposed by the Sherman Act.¹⁵³ Similarly, the legalization of multiemployer bargaining was designed to promote a better "balance" between the bargaining power of employers and unions. The Sherman Act and *Allen Bradley* were concerned with a wholly different objective, preserving a balance between the interests of union-employer combinations, on the one hand, and those of other employers and of the general public on the other. There is nothing in the endorsement of employer bargaining coalitions that suggests that union-employer action endangering the interests of competing employers and consumers was to be freed from the limitations imposed by the Sherman Act.

Resort to NLRA amendments to displace the Sherman Act with respect to collective bargaining would run counter to the basic rule against repeals by implication¹⁵⁴—a rule that should have special force for a statute, such as the Sherman Act, that embodies a central value of our tradition.

¹⁵⁰ See National Labor Relations Act § 8(b)(4), added by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964); and National Labor Relations Act § 8(e), added by 73 Stat. 543 (1959), as amended, 29 U.S.C. § 158(e) (1964), discussed in text accompanying note 155-63 *infra*.

¹⁵¹ See *NLRB v. Truck Drivers Local 449, Teamsters Union*, 353 U.S. 87 (1957).

¹⁵² See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271-72 (1959).

¹⁵³ The 80th Congress rejected proposals for withdrawing the "labor exemption" from union activities involving price fixing and other direct market restraints. That action was explained on the ground that boycotts, which had been used to effectuate such restraints, were regulated by the Taft-Hartley amendments. There was, however, no suggestion that the refusal to eliminate the labor exemption was intended to expand the labor exemption into areas previously subject to the Sherman Act. See H. Conf. Rep. No. 510, H.R. 3020, 80th Cong., 1st Sess. 65 (1947), appearing in 1 NLRB, LEG. HIST. OF LABOR-MANAGEMENT RELATIONS ACT (1947) 569. Compare Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 59 n.217 (1963).

¹⁵⁴ See *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

Restraints on Product Markets and the NLRA

Amendments to the NLRA have supplemented *Allen Bradley* by outlawing certain secondary pressures and so-called hot-cargo provisions¹⁵⁵—weapons that unions have used to restrict transactions in the product market. The applicability of those amendments does not turn on concerted action by, or benefit to, employer groups.¹⁵⁶ Accordingly, those amendments have led to the suggestion that they have reduced the need for additional legislation condemning union involvement in what are, from some points of view, restraints on product competition.¹⁵⁷

In appraising such suggestions an important consideration is the failure of the NLRA to reach a variety of practices that directly restrict the sale of goods and services without violating the *Allen Bradley* rule. Thus, the broad language of section 8(e) of the NLRA (the ban on hot-cargo provisions) has already been significantly limited by interpretation. The language, read literally, applies to any agreement, expressed or implied, whereby any employer agrees to refrain from dealing in, using, or handling the products of another employer.¹⁵⁸ But section 8(e) appears to have been aimed at more limited restrictions, *i.e.*, those which bar one employer from dealing with another because the latter either is not on good terms with the contracting union or another union or pays "sub-standard" wages.¹⁵⁹

The NLRB, limiting section 8(e) in accordance with that purpose, has upheld agreements and pressures designed to preserve jobs within

¹⁵⁵ See National Labor Relations Act § 8(b)(4), added by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964); and § 8(e), added by 73 Stat. 543 (1959), as amended, 29 U.S.C. § 158(e) (1964). See generally Leskin, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965).

¹⁵⁶ *Ibid.*

¹⁵⁷ See Sovern, *Some Ruminations on Labor—the Antitrust Laws and Allen Bradley*, 13 LAB. L.J. 957, 963 (1962).

¹⁵⁸ Section 8(e) prohibits agreements whereby (1) an employer agrees to cease or refrain from handling products of another employer and (2) by which an employer agrees to cease doing business with another employer. Since the term "refrain" does not appear in the latter prohibition, it is arguable that agreements barring the subcontracting of services are illegal only if they disturb pre-existing relationships. But that argument has properly been rejected by the Board. See *NLRB v. Joint Council of Teamsters*, 338 F.2d 23, 30-31 (9th Cir. 1964); Comment, 45 CORNELL L.Q. 725, 749-50 (1960).

¹⁵⁹ See Comment, 45 CORNELL L.Q. 725, 749-50 (1960). See also Comment, 62 MICH. L. REV. 1176, 1178-79 (1964). But cf. Fairweather, *Implied Restriction on Work Movements—The Pernicious Crow of Labor Contract Construction*, 38 NOTRE DAME LAW. 518 (1963). In *Orange Belt Dist. Council No. 48 v. NLRB*, 328 F.2d 534, 538 (D.C. Cir. 1964), the validity of clauses limiting subcontracting to employers meeting union standards was upheld. The court, in rejecting the NLRB's apparent proscription of such clauses, urged that they were designed to protect primary work opportunities by removing the incentive to subcontract. See also *Teamsters Union v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964).

the bargaining unit.¹⁶⁰ The Board has, however, applied that section to condemn agreements designed to acquire new work for the unit, as distinguished from work that has been traditionally or regularly performed therein.¹⁶¹ It is not easy to see a basis for that distinction in the language or purpose of section 8(e), even though it is conceded that a union's effort to capture new work is likely to be more disruptive than its effort to retain old work. Thus, the Court of Appeals for the District of Columbia has questioned that distinction and implied that the union efforts to expand jobs should not be limited by prior work-jurisdiction.¹⁶² The job-protection justification has also served to validate comprehensive no-subcontracting clauses and clauses barring the use of prefabricated materials.¹⁶³ However the issues on the scope of section 8(e) are finally resolved, one point is clear: the limitations already engrafted on that section, tested by the objective of maintaining open channels of trade, are paradoxical. They permit a total blockade barring dealings with unionized as well as nonunion firms, while condemning a limited blockade applicable only to nonunion suppliers.

160 See *Orange Belt Dist. Council v. NLRB*, *supra* note 159.

161 See *Meat & Highway Drivers (Swift & Co.)*, 143 N.L.R.B. 1221, 1229-30 (1963), *enforcement denied (in part)*, *Teamsters Local 710 v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964); *Ohio Valley Carpenter's Dist. Council*, 136 N.L.R.B. 977, 986 (1962); *Milk Drivers & Dairy Employees (Minn. Milk)*, 133 N.L.R.B. 1314, 1317 (1961).

162 See *Teamsters Local 710 v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964); see also *Comment*, 62 MICH. L. REV. 1176, 1188 (1964).

163 See *Ohio Valley Carpenters' Dist. Council*, 136 N.L.R.B. 977, 986 (1962). But *cf. Glaziers Union, Local 27*, 99 N.L.R.B. 1391 (1952), *enforced sub nom.*, *Joliet Contractors Ass'n v. NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953). The dissenting members of the Board relied on the make-work point (99 N.L.R.B. at 1398-99), which was passed over in silence by the Board majority and by the reviewing court. Where a subcontractor who has agreed with a union not to install prefabricated material agrees to supply only labor to a general contractor (or owner) who specifies the proscribed material, a strike against the subcontractor to enforce his contractual obligation has been held to violate § 8(b)(4)(B). *Ohio Valley Carpenters' Dist. Council*, 144 N.L.R.B. 91 (1963) (Member Brown dissenting), *enforced sub nom. Carpenters' Dist. Council v. NLRB*, 338 F.2d 958 (6th Cir. 1964). The rationale for this result was that the subcontractor had been "powerless to effect the result sought" by the union (144 N.L.R.B. at 93); hence, the ultimate object of its pressure had been to bring about a cessation of business between the subcontractor and the party with power over the disputed work. There are, however, weighty opposing considerations disregarded by the Board: First, its approach invites subcontractors to circumvent restrictions embodied in collective bargaining agreements through arrangements reserving to others power to choose the materials to be used. Such arrangements are not calculated to promote respect for agreements or harmonious labor relations. Second, pressures designed to cause a subcontractor to boycott prefabricated material and thereby to preserve traditional work for the bargaining unit are deemed "primary" even though such pressures force a cessation of dealings with suppliers. It is not clear why pressures on the subcontractor designed to cause the general contractor to engage in such a boycott are secondary rather than primary. The purpose of such pressures is, after all, to preserve traditional bargaining unit work rather than to affect the general contractor's labor relations.

The foregoing survey has pointed to the following limitations in existing regulation of restrictions imposed by collective bargaining on competition by firms in the sale of goods and services:

(1) Under the Sherman Act, arrangements restricting price competition and allocating markets in the final products of employers participating in such restraints have sometimes been legitimized on the ground that the participating employers did not "benefit" from such restrictions.

(2) There is controversy as to whether market control schemes are legal, provided that unions impose them by arrangements with individual employers as opposed to formal employer groups.

(3) Neither the Sherman Act nor the NLRA appears clearly to reach arrangements designed to protect jobs traditionally within the union's jurisdiction by proscribing the use of new materials or new equipment or by barring all "subcontracting" without regard to the union relationships of the potential sellers.

(4) Substantial uncertainty surrounds the boundary between the labor and the product markets as well as the appropriate method for accommodating enforcement of the Sherman Act with the Board's jurisdiction over the subject matter of collective bargaining.

Legislation To Promote Open "Product Markets"

The first two difficulties listed above could be moderated by legislation that condemned union participation in price fixing, territorial restrictions of sales, direct limitation of production or sales, or regulation of the number or kind of employers eligible to engage in a particular kind of business activity.¹⁶⁴ Such regulation would plainly foreclose the formalistic distinction announced in *Allen Bradley* between parallel agreements and agreements with employer groups. It would also avoid questions as to whether employers were unwilling beneficiaries of market control arrangements involving their final products and whether such arrangements had produced demonstrable and significant monopoly benefits.

Such legislation has also been supported on the ground that it is important to check union power in the labor market by maintaining open product markets.¹⁶⁵ It is, however, doubtful that the proposal would constitute a meaningful check on, as distinguished from a redirection of, union power. Nevertheless, in some cases unions have cartelized

¹⁶⁴ Such legislation has been proposed by commentators. See Abramson, *Organized Labor and the Antitrust Laws* (pts. 1-2), 3 ANTITRUST BULL. 531, 645, 674-77 (1958); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 284 (1955).

¹⁶⁵ Apparently, such a check was envisaged by the somewhat general proposals for opening up product markets, made in the Labor Study Group Report published by the COMM. FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 138-39 (1961).

product markets as a means of re-enforcing or consolidating their power over labor markets. Hence, it is possible that in limited circumstances the desired check might be provided by the legislation in question. Such legislation would not, however, avoid difficult questions arising from the shadowy line between labor markets and final product markets. Thus, prohibition of night work in enterprises employing a night shift may be viewed as a regulation of hours of work or as a form of production control. Similarly, the UMW's well-known insistence on the three-day week could have been viewed as a legitimate work-sharing device or as an attempt to stabilize prices by production control.¹⁶⁶ An acceptable line would appear to be that between restraints directly limiting volume and those limiting volume only by way of restrictions on hours of work. Such a line would limit legal interference with collective bargaining concerning the incidents of the employment relationship while condemning arrangements aimed directly at product markets.

If collective bargaining is to have such freedom, there is a strong case against illegalizing otherwise legal arrangements merely because they were originated by employers rather than unions or because employers could be shown to have the specific purpose of restricting competition in the market for their final product. Such limitations on immunity would, as already indicated, make legality turn on issues of motivation that are both difficult of proof and largely irrelevant to the issue of whether competition has been restrained. Furthermore, such limitations ignore that an employer, as well as a union, has an interest in the welfare of his employees, flowing from either his economic interest in their morale and efficiency or from ideas of businesses' social responsibility. New patterns of bargaining, including arrangement for continuing consultation designed to avoid crisis bargaining, may be viewed as a response to those joint interests. Such patterns further complicate the task of determining whether unions or employers originated arrangements bristling with the potential for market restrictions. Indeed, in some cases such arrangements may be suggested by neutrals. To make the validity of such arrangements depend on who initiated them or on whether the employers resisted them is likely to promote disingenuous rhetoric and mock resistance rather than competitive markets.

Union limitations on components, equipment and services that may be purchased from other firms by employers in contractual relations with the union appear to be a considerably more significant restraint on product markets than union controls on sales of final products by employers. Again, there have been suggestions that appear to call for the

¹⁶⁶ See Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 282-83 (1955).

proscriptions of such restraints on purchases as a means of checking union power over labor markets¹⁶⁷ and preventing the waste of resources.¹⁶⁸ But such suggestions, like other "bad practice" legislation that leaves the sources of union power undisturbed, raise difficult problems of enforcement.

Such problems are illustrated by the issues raised by technological change. Union efforts to cushion the effect of change on employees through severance pay, retraining allowances, and similar arrangements command broad and justifiable support. Furthermore, unions have a legitimate interest in the health and safety of employees, an interest that may at times serve as an actual or colorable basis for opposition to technological change or for costly manning requirements in connection with the use of new processes. Arrangements that are frequently desirable methods for cushioning change may, of course, be exploited to obstruct it completely or to delay it for long periods. Thus, unions with sufficient power (absent legal restrictions) to block or delay technological change frequently could do so indirectly by demands for severance pay for displaced employees and for wages and manning provisions for retaining employees that would destroy, and might indeed be calculated to destroy, the economies of proposed changes. Even such evasive action might be preferred to direct union prohibitions of the use of new technology. Such prohibitions differ from a union-imposed tax on change in the same way as an import embargo differs from a tariff; they exclude suppliers from a market without regard to the price of their output and its potential contribution to the operations of the putative purchasers. Furthermore, it would underestimate the complexities involved to assume that in each case the union's tax could be nicely adjusted to the level of the resultant economies. And insofar as union miscalculation, employer resistance, or other factors preserved some economies for employers, the new technology would break through.

Despite the foregoing considerations, it seems clear that in many situ-

¹⁶⁷ *Ibid.*

¹⁶⁸ The foregoing discussion is based on the assumption that enough work remains to be done so that waste of resources is still an evil. That assumption makes it unnecessary to consider here the debate on the effect of "automation" on employment and the possibility that waste becomes a virtue in an unemployment economy. See generally *AUTOMATION AND TECHNICAL CHANGE* (Dunlop ed. 1962); Silberman, *The Real News About Automation*, *Fortune*, Jan. 1965, p. 124. It is enough to note that an attack on general unemployment through featherbedding is erratic and may, as in the railroads, threaten industries acutely in need of cost reduction in order to meet competition. Furthermore, bottlenecks resulting from waste of relatively skilled and scarce manpower resources may retard the growth necessary for a general increase in employment and may, as a result, deny employment opportunities to those displaced by technological change. See Comment, *Drafting Problems and the Regulation of Featherbedding—An Imagined Dilemma*, 73 *YALE L.J.* 812, 847 (1964), and references cited therein.

ations legal prohibitions against union bans of new technology could be circumvented by formal demands for cushioning change that would be prompted by the desire to block it completely. Such possibilities raise the question of whether the law should scrutinize such formal demands with a view to determining whether they are subterfuges designed to block change by imposing prohibitive costs. Without such scrutiny a legal prohibition could be easily evaded. But enforcement which sought to determine whether demands for cushions were subterfuges would be enormously difficult.¹⁶⁹ It would frequently turn on the magnitude of demands whose form was unobjectionable. Such issues would, of course, be complicated by the absence of generally accepted criteria for the level of wages, severance payments, manning, or the interval for synchronizing the introduction of new methods with employee attrition rates, and by the special traditions and problems of diverse industries. Although the issue is not one that permits me to be dogmatic, my judgment is that legislation should not at present authorize the intrusion in the bargaining process that would be involved in any effort to distinguish between "good faith demands" for cushions against change and ostensible demands for such cushions that are in fact directed at blocking change altogether.

The foregoing considerations suggest that if the law is directly and effectively to deal with union-sponsored obstructions to technological change, it may have to adopt one of two difficult alternatives: (1) regulate the bargaining process completely and not merely at the point where the process has the potential of imposing such obstructions; or (2) limit the power on which such obstructions rest. Otherwise, union power contained at one point could usually transform its demands to escape the force of regulation or, at least, to introduce serious complications into the regulatory scheme.

If regulation designed to promote open markets for components or for services that enter into the production of an employer's final product is rejected as impracticable, it is doubtful that there would be much practical significance in regulation clarifying, or extending the applicability of, the *Allen Bradley* doctrine to restraints on competition in the employers' final product. It is doubtful that such restraints now involve important magnitudes, although more empirical data are required for an informed judgment. Furthermore, such restraints on competition in the

¹⁶⁹ Such an effort might be supplemented by regulation of union demands for unneeded employees, unneeded services, etc. Although such regulation is difficult to administer, the difficulties have been exaggerated. See Comment, 73 YALE L.J. 812 (1964); compare the suggestion that "featherbedding" provisions should activate sanctions only after such provisions have been condemned by a regulatory tribunal. See SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 68 (1947).

employer's final product as are visible seem to involve overt collaboration on the part of employer combinations and, consequently, are likely to be a violation of existing law or to involve serious risks of illegality. To be sure, litigation may have exposed such formal group action only because it was more vulnerable to legal attack. But it is unlikely that an individual employer will agree to price restrictions or territorial allocations unless he has assurance that his competitors have agreed or will agree to similar restraints. And if the union serves as the intermediary for achieving such agreements, it is likely that liability would result under the *Allen Bradley* rule.¹⁷⁰ This is not to suggest that a clarification of *Allen Bradley* to interdict restraints on competition in the employers' final product would not be desirable, but only that such legislation is unlikely to be a significant check on "excessive" union power in the labor market.¹⁷¹

Whatever the scope of new regulation of union restraints on "product competition," there is a troublesome question as to whether such regulation should consist of amendments to the NLRA or to the Sherman Act. That choice turns in part on an assessment of the relative advantages of the administrative and judicial process and of the essentially remedial approach of the labor statute as compared with the more drastic criminal and treble-damage sanctions that supplement the injunctive remedies of the Sherman Act. I cannot undertake a comprehensive discussion of those issues here.

In summary, the labor legislation route would avoid the complications resulting from concurrent jurisdiction of the Board and the courts over the same set of activities. It would also avoid the anomaly of drastic criminal penalties for union conduct no more heinous than that proscribed as unfair labor practices. It would provide victims with a publicly financed remedy—a consideration that might be of special importance to smaller or necessitous firms. Finally, it would bring the actual (or mythical) expertise of the Board to bear on the problems involved.

The antitrust route has, however, strongly competing advantages. An antitrust approach would have the virtue of explicitly linking the remedial legislation to its underlying social purpose. Furthermore, unions engaged in market restraints sometimes have business groups as willing collaborators. Disparate penalties and disparate modes of enforcement for co-conspirators, depending on whether they represented labor or management, would raise serious questions of equal and fair classification—especially so when business had been bludgeoned into market-

¹⁷⁰ See Sovorn, *supra* note 157, at 961.

¹⁷¹ But cf. Labor Study Group Report, *op. cit. supra* note 165, at 138-39, which, although not wholly clear, may reflect a contrary view.

rigging arrangements. On the other hand, to exempt employers from the Sherman Act merely because they had used collective bargaining as an anticompetitive tool would give the exempted employers an unduly favorable position compared to that of employers acting without the aid of unions. That disparity might induce employers to seek the active aid of unions in connection with the development and enforcement of anti-competitive arrangements. Such aid, by increasing the durability of the arrangements, would frustrate the statutory purpose. Finally, under an antitrust approach, aggrieved individuals could activate the legal machinery by treble-damage and injunctive actions, and the Department of Justice could also act without a formal private complaint. Such a dispersion of remedies appears desirable in an area where public enforcement agencies are overburdened, where the agencies may be inept, or politically motivated, and where formal charges by private interests are often withheld because of fear of reprisal. Although the considerations bearing on the appropriate remedy are closely balanced, the considerations supporting an antitrust approach appear persuasive to me.¹⁷²

III

The preceding discussion has suggested that neither the general anti-trust proposal nor an expanded proscription of union restraints on product markets would be likely to result in a significant limitation on the power of entrenched unions. Skepticism concerning the effectiveness of such regulation, coupled with concern about the consequences of union power,¹⁷³ has led to suggestions for legislation that would seek to dismantle existing bargaining structures. For example, so-called limitist proposals would seek to curb union power by a direct attack on its source, that is, substantially industry-wide or market-wide organization of employees by a single union. A familiar variant of such proposals would limit union representation to the employees of a single employer, with exceptions allowing multi-firm bargaining where small and numerous employers in local labor markets were involved,¹⁷⁴ and would prohibit collusion among unions on bargaining terms.

The drastic surgery contemplated by limitist proposals would, of course, generate the most stubborn opposition from well organized and

¹⁷² But see *ibid.*, recommending that union restrictions on product markets be dealt with by labor laws.

¹⁷³ That concern goes beyond the economic consequences of monopoly, but extends to the impact of the increasing size and centralization of the union structure on "internal democracy" and on the general political process—issues that cannot be developed here.

¹⁷⁴ See generally Lewis, *The Labor-Monopoly Problems: A Positive Program*, 59 J. POL. ECON. 277 (1951). See also bills referred to in note 4 *supra*.

powerful groups, whose survival would be threatened. Such proposals might, accordingly, be dismissed out of hand on the ground that they could not in the foreseeable future command political support. But such a disposition by political amateurs is far from satisfactory, quite apart from the variability of political weather. Nevertheless, the intense opposition which limitist proposals would provoke cannot wholly be divorced from the merits. Such opposition, if expressed in widespread political strikes, would tear apart the social fabric. Such opposition would also gravely complicate the problem of enforcement. Furthermore, the enactment of such proposals might so alienate the employee class as to increase its support for radical alterations of our economic structure.¹⁷⁵ Such objections, although difficult to assess, must be soberly weighed in connection with any legislative proposal—even though the objections may somewhat ironically underscore the power of the groups at which the legislation is aimed. On the other hand, despite important differences in degree, similar objections are to be expected against any serious attempts to limit union power—as is clear from the savage debate that preceded the passage of the Taft-Hartley Act. Consequently, putting aside political considerations and the possibility of massive resistance, we turn to the merits.

The principal objection to the limitist proposal is that in some situations it would not substantially reduce union power and that in others it would reduce it so much as to obliterate unions as meaningful institutions.¹⁷⁶ Such differential effects would be a function of the different environments in which market-wide unions operate. Thus, they are found in industries with relatively few firms (*e.g.*, auto, rubber, steel) and industries with numerous firms (*e.g.*, coal, garment trades, textiles).¹⁷⁷ In the oligopolistic industries the fragmentation of bargaining might be neutralized by covert collusion, by wage leadership, pattern bargaining, and the like. Such possibilities are especially strong because both the unions and the employers are used to common settlements and may find them mutually convenient. Hence, unless collusion or pattern-following is made difficult by increasing the number of firms through dismemberment, the consequences of market-wide unions might well continue in another guise. Nevertheless, the problem of dealing with covert collusion is not essentially different from that problem with respect to enterprises. Furthermore, the need to disguise collusion would hamper the exercise of monopoly power. Finally, the resources of a national union would not be available to finance a strike against a single firm, for the purpose of

¹⁷⁵ Cf. REES, *THE ECONOMICS OF TRADE UNIONS* 195 (1962).

¹⁷⁶ Lewis, *supra* note 174, at 281, acknowledges the risk that limitist proposals would be over-effective.

¹⁷⁷ See Cox, *supra* note 166, at 277.

making a pattern-setting settlement. Hence, there are grounds for believing that the level of individual settlements would be more responsive to market forces once the centralizing force of the market-wide union were absent. No one firm could be sure that an autonomous union bargaining with a competitor would demand or would receive a package involving substantially the same costs. Individual firms might, accordingly, resist demands that seemed "excessive" in relation to market considerations.¹⁷⁸

Where there are many firms in an industry, the fragmentation of bargaining jurisdiction might result in bargaining units too small to be viable¹⁷⁹ and might, as already suggested, deprive unions of any meaningful power. They might, for example, lack the power to achieve protection against arbitrary managerial power through grievance procedures and the development of industrial jurisprudence—innovations that have justifiably been hailed as a major contribution to an industrial system.¹⁸⁰ If such consequences were coupled with a negligible impact on truly strong unions in oligopolistic industries, the net effect of the limitist approach would be plainly perverse in relation to its objective of curbing excessive union power: it would have negligible effect on strong unions while making weak unions even weaker.

The radical institutional surgery contemplated by the proposal to fragment existing structures into enterprise unions imposes a heavy burden of persuasion on its proponents. That burden would be discharged only if there were a convincing basis for concluding that the proposal would promote a better social and economic balance. It is, however, precisely that conclusion that is so conjectural.

The limitist proposal, despite its deficiencies, has the virtue of emphasizing that if regulation is to curb union power, it must confront and

¹⁷⁸ But cf. *id.* at 278-79; Lester, *Reflections on the "Labor Monopoly" Issue*, 55 J. POL. ECON. 513, 533 (1947). These authors urge that the international union exercises a moderating influence on the locals. But that influence is exercised in a situation where the international's industry-wide organization is a basic source of power and where internal political factors may shape the local's "irresponsible demands." Such factors would, of course, be made inoperative by the fragmentation of existing unions.

¹⁷⁹ Such results would be reduced if enterprise unionism were qualified by permitting a single union to represent employees in a local labor market area. But such a qualification would leave the powers of the construction unions untouched. The policies of those unions have presented extremely serious problems, including costly jurisdictional demarcations, racial discrimination, and price fixing. Regulation, although allowing one union to represent the employees of more than one employer, might restrict representation by a single union to a fixed percentage of an "industry." But a general formula for dismantling of the diverse union structures involved could scarcely avoid artificial rigidity and unpredictable consequences.

¹⁸⁰ See SLICHTER, *TRADE UNIONS IN A FREE SOCIETY* 12 (1947); Rees, *Some Non-Wage Aspects of Collective Bargaining*, in *THE PUBLIC STAKE IN UNION POWER* 124 (Bradley ed. 1958).

deal with its sources rather than with its symptoms. Perhaps others will be able to formulate measures that will succeed in avoiding the procrustean aspect of that proposal while providing workable criteria for an enforcing agency. My own struggles with that problem have not been fruitful. They do, however, suggest several possibilities that may merit consideration. One is a restriction on union expansion into more than one "industry."¹⁸¹ The proposal made by Mr. Hoffa several years ago for the combination of all transportation workers into a single union suggests the dangers of the present policy of laissez faire for union jurisdiction and structure. Such a combination, which was the target of Senator McClellan's bill,¹⁸² would be legal today. There is, however, in my view, no justification for allowing a single union to achieve such commanding power over the economy. It might, of course, be urged that the risk of such leviathans must be run in order to minimize government regulation of labor relations. But that abstraction was rejected a long time ago. And, more importantly, it is plain that a hands-off policy towards union structure and jurisdiction results in increasing regulation and intervention—which is, however, likely to be ineffective in redressing power imbalances because of previous indifference to structure.

The drafting of a more generalized restriction on multi-industry representation would involve difficult issues, such as the following. Should existing multi-industry structures be left intact? Should the NLRB be barred from certifying unions with jurisdiction in one industry as a bargaining representative in another industry, at least in the absence of a history of substantial representation in both areas or penetration in both areas by a single employer some of whose employees are represented by the union involved? Should, per contra, enforcement be left wholly to another agency, such as the Department of Justice?¹⁸³ Before such issues of detail are resolved, it would be desirable to have full data regarding existing jurisdictional patterns and an effort to assess the consequences of interindustry penetration in particular contexts. Legislation establishing a commission to collect and assess such data might provide a useful foundation for policy-making.

Proposals for legislation that is closely associated with the antitrust tradition cannot be sharply separated from issues raised by proposed changes in the NLRA and in the general framework in which collective bargaining operates.¹⁸⁴ Although those issues, like the antitrust proposals,

¹⁸¹ See Lester, *supra* note 178, at 536, suggesting (*semble*) such a restriction qualified, however, by a variety of exceptions.

¹⁸² See S. 2573, 87th Cong., 1st Sess. (1961).

¹⁸³ See also Lester, *supra* note 178.

¹⁸⁴ See, e.g., the proposals made by the Labor Study Group Report, *op. cit. supra* note 165; Research and Policy Committee of the COMMITTEE FOR ECONOMIC DEVELOPMENT, UNION POWERS AND UNION FUNCTIONS (1964).

impinge on relative power and frequently are resolved on the basis of power considerations, they cannot be considered here. It is, however, appropriate to suggest that they deserve re-examination because of the significant changes in bargaining institutions and in appraisals of their impact since the 1930's, when the governing premises of our national labor policy were articulated.

The changes in, and clarification of, policy suggested here are extremely limited. They support only legislation that would apply the Sherman Act to direct restraints by unions on prices, production, and sales of employers' final products and that would, at the same time, make it clear that collective bargaining over wages, hours, work loads and work sharing are exempt from the Sherman Act.¹⁸⁵ The proposal is a corollary of general antitrust policy as currently applied to employers; it would be designed to prevent unions from serving as a shield and to provide an enforcement mechanism for restrictions on product markets that have the potential for securing monopoly benefits for employers. By dispensing with any requirement of proving either actual monopoly benefits or concerted action by employer groups, that proposal would avoid difficult issues of proof and would eliminate the formalistic distinction between parallel and individual action adumbrated in *Allen Bradley*.

By itself, that proposal would not affect union power to restrain competition in the purchase of intermediate components by employers party to such restrictive arrangements. Some restraints in that category are subject to the NLRA, as amended, but the coverage of that statute is limited and uncertain. Hence, the distinction between the two types of market does not rest on the NLRA amendments, but on two other considerations: (1) the existence of employer incentive to resist restrictions on their purchases; and (2) the difficulty of enforcing proscriptions of such restrictions without regulating the total bargaining process.

The elimination of restraints in product markets would not affect the substantial power of some unions to interfere with the efficient allocation of resources by bargains confined to wages and other conditions of the employment relationship. Those troubled by such power will understandably dismiss even the broadest legislation to promote open product markets as dealing with the symptoms, rather than the sources, of union power.

The key difficulty for regulation is that a significant curtailment of union power requires limitations on bargaining jurisdiction and that such limitations presuppose both meaningful criteria for determining the extent of power that unions should possess and methods for assessing union power generally or in particular contexts. But it is precisely such criteria and such methodology that seem to be lacking. Furthermore, there

¹⁸⁵ See text accompanying notes 166-71 *supra*.

is a lack of comprehensive data about the bargaining jurisdiction of various unions. Without such criteria and data, radical surgery on the union movement would appear to be a dangerous gamble with institutions that command stubborn loyalties and reflect important noneconomic values.

These concluding observations suggest, first, that general antitrust proposals are not the answer to the problem of "excessive" union power and, second, that the problem should be re-examined in the context of particular bargaining relationships and jurisdictional patterns. It would be congenial to conclude with more affirmative and specific recommendations or with a general endorsement of the existing structures of power. But such a happy ending would involve either a disregard of what appear to be serious power imbalances or a conscious disregard of the limits of my own ignorance.

* * * * *

EPILOGUE

On June 7, 1965, long after this paper had been submitted for publication, the Supreme Court reversed the decisions below in *Pennington*¹⁸⁶ and *Jewel Tea*.¹⁸⁷ The Court split into three groups of three composed of the same Justices in each case. One group consisting of Mr. Justice White, joined by the Chief Justice and Mr. Justice Brennan, held in effect that the allegations in *Pennington*,¹⁸⁸ if established, made out a violation by the union, whereas the findings below in *Jewel Tea* failed to do so. A second group, consisting of Mr. Justice Douglas, joined by Justices Black and Clark, upheld the substantive claim of a violation by the union in both cases. These two groups agreed, however, that the union in *Pennington* was entitled to a new trial because of errors in the instructions to the jury.¹⁸⁹ The third group, consisting of Mr.

¹⁸⁶ *UMW v. Pennington*, 85 Sup. Ct. 1585 (1965). The facts and issues of this case were discussed in the text accompanying note 117, *et seq.*, *supra*.

¹⁸⁷ *Local 189, Amalgamated Meat Cutters v. Jewel Tea Company*, 85 Sup. Ct. 1596 (1965). The facts and issues of this case were discussed in the text accompanying note 126, *et seq.*, *supra*.

¹⁸⁸ In *Pennington*, Mr. Justice White's opinion is described as that of the Court. That description is questionable in view of the fact that Mr. Justice Douglas' argument for finding a violation emphasized considerations significantly different from those stressed by Mr. Justice White. See text accompanying notes 212-13 *infra*.

¹⁸⁹ Reversal was based on errors in the trial court's charge to the jury. One such error had consisted of non-compliance with *Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), which the Court read as legalizing joint efforts to influence a public official even though such efforts do not stand alone but are part of a larger scheme violative of the Sherman Act. See *UMW v. Pennington*, 85 Sup. Ct. 1585 at 1593. For an alternative interpretation of *Noerr*, see note 118 *supra*. Mr. Justice White's somewhat summary treatment of that case is perhaps explainable

Justice Goldberg, joined by Justices Harlan and Stewart, rejected the claim of violation in both cases. The composition of those groups is interesting and should, incidentally, serve as a caution against simplistic classifications of individual members of the Court. It may also be of interest that a majority of the Court turned the suggestion in the main paper¹⁹⁰ on its head by condemning a bargain about wages on the ground that it was actuated by predatory purposes while upholding a market restriction on the ground that its purpose was limited to protecting the legitimate interests of employees.

I propose to examine the main themes in the three sets of opinions, to relate them to the discussion in the principal paper, and to identify positions that now command the support of a majority of the Court.

In *Pennington*, the union, as already indicated, won the immediate battle, but lost the war; for the Court imposed significant restrictions on the use of collective bargaining to achieve either wage uniformity or wage differentials within an industry. To be sure, Mr. Justice White, who announced the judgment of the Court, acknowledged that "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."¹⁹¹ But he immediately declared that that privilege was a conditional one:

A union forfeits its exemption from the anti-trust laws when it is *clearly* shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.¹⁹²

Although *Pennington* involved charges of the predatory purposes referred to in the second sentence quoted above, Mr. Justice White's approach apparently did not require such purposes as a condition for denying the labor exemption and finding a violation of the Sherman Act. The "more basic defect," in his view, was an agreement between a union and members of one bargaining unit that calls for the imposition of a given structure of costs on firms outside that unit.¹⁹³ (In this paper

by his reliance on an independent error: the charge that had permitted recovery of damages resulting from Walsh-Healy determinations by the Secretary of Labor. *Ibid.*

¹⁹⁰ See p. 690 *supra*.

¹⁹¹ 85 Sup. Ct. at 1591.

¹⁹² (Emphasis supplied.) *Ibid.*

¹⁹³ *Id.* at 1592.

such agreements will sometimes be described as "extra-unit agreements.")

Mr. Justice White urged that extra-unit agreements are not supported by the national labor policy and are incompatible with the anti-trust laws. His argument based on labor policy rested on the following grounds.¹⁹⁴ The duty to bargain operates on a unit-by-unit basis, and is, accordingly, inconsistent with bargaining in one unit concerning the standards to govern another unit or the whole industry. A union would, moreover, probably serve its members better by preserving its freedom to adjust bargaining to the individual circumstances of each bargaining unit. Finally, the Board has condemned the refusal of an employer to recognize a union or to enter into an agreement with it until the union organizes or secures similar agreements from the employer's competitors.¹⁹⁵

Mr. Justice White's argument against extra-unit bargaining based on labor policy involves serious difficulties. The Justice implied that members of the Court are better judges of the interests of the union constituency than the union itself and, by ignoring the realities of collective bargaining, immediately raised doubts about that proposition. Thus a familiar obstacle to concessions by employers in a given bargaining unit is the fear that competitors may secure a better bargain or one that will exert "undue pressure" on the competitive position of the employers engaged in prior negotiations. That fear may be overcome in a variety of ways: by the union's established policy in favor of uniformity or historic differentials; by union assurances in the initial negotiations; or by the organization of multiemployer bargaining units. Mr. Justice White appears to have given decisive effect to the form by which such assurances are given. More important, he ignores that the interests of the extra-unit employees are often profoundly affected by the patterns or comparisons established by prior bargains. The union's limitation of its freedom with respect to future bargaining thus does not necessarily involve any injury to the employees whose interests will be involved in such bargaining. On the contrary, those employees may benefit from employer concessions previously secured with the help of limitations on the union's freedom in future bargaining.

Where, as in the *Pennington* case, such limitations advance a policy of wage uniformity, there are special and deep-seated reasons for questioning Mr. Justice White's blanket condemnation of extra-unit agreements. Thus, a classic objective of the union movement has been "to

¹⁹⁴ See *id.* at 1591 for the development of his argument.

¹⁹⁵ See *American Range Lines, Inc.*, 13 N.L.R.B. 139, 147 (1939), cited, *inter alia*, 85 Sup. Ct. at 1591.

take competition out of wages" by extending the scope of organization and by imposing uniform labor standards on competitors. The preamble to the NLRA seems, moreover, to have endorsed that objective by recognizing the desirability of promoting, through union organization, "the stabilization of competitive wage rates and working conditions within and between industries."¹⁹⁶ As Mr. Justice Goldberg charged,¹⁹⁷ Mr. Justice White's approach appears to have ignored the realities of bargaining, the history of the union movement, and an important purpose of the national labor policy.

Equally vulnerable was his reliance on NLRB decisions proscribing employer insistence on demands that the terms bargained for, or agreed to, with respect to one unit should either be imposed on another unit or should be suspended. That reliance was, as Mr. Justice Goldberg argued,¹⁹⁸ misplaced because demands that the NLRA forbids a proponent to press may, nevertheless, be proposed and voluntarily accepted by the other party, without any violation of that statute.

The foregoing difficulties with his argument from labor policy may have moved Mr. Justice White to attach primary importance to the anti-trust laws as a basis for condemning extra-unit bargaining. His anti-trust argument went like this.¹⁹⁹ One group of employers could not lawfully demand that the union impose on other employers (presumably competitors) wage costs significantly higher than those granted by the first group. The anti-competitive thrusts of such demands are obvious and no different in purpose and effect from the conspiracy alleged in *Pennington*—the elimination of marginal employers. But predatory purposes were not a prerequisite for condemning such extra-unit bargaining; its basic defects, as indicated above, consisted of its limitation on the union's freedom of action in future bargaining and its binding the union's interest to that of the favored employers. Such restraints on the freedom of economic units to act according to their own choice run counter to antitrust policy.

Mr. Justice White was silent about objections to his position that were forcefully presented in Mr. Justice Goldberg's opinion.²⁰⁰ Thus, section 6 of the Clayton Act²⁰¹ appears to exempt from the Sherman Act col-

¹⁹⁶ See Section 1 of NLRA, as amended, 49 Stat. 449, as amended by 61 Stat. 136, 29 U.S.C. § 151 (1965).

¹⁹⁷ See 85 Sup. Ct. 1617-22.

¹⁹⁸ *Id.* at 1622 n.25.

¹⁹⁹ *Id.* at 1591.

²⁰⁰ *Id.* at 1614.

²⁰¹ "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the

lective bargaining agreements covering only wages and other "conventional terms"; nor is there anything in that section that warrants a withdrawal of that exemption from extra-unit agreements. Such a withdrawal appears, moreover, to run counter to important elements of the antitrust laws, interlaced, as they are, with the Norris-LaGuardia Act. First, the broad definition of a labor dispute in section 13 of the Norris-LaGuardia Act²⁰² recognizes the interest of both unions and employers in the labor standards operative in other bargaining units. Second, the celebrated immunity proclaimed in *Hutcheson*²⁰³ is incompatible with a blanket condemnation of extra-unit agreements. Similarly, the recognition in *Apex*²⁰⁴ that the antitrust laws do not prohibit unions from eliminating price competition based on differences in labor standards implies that that objective may be pursued by such agreements.

In addition, union consent to multi-employer bargaining involves a surrender by the union of its freedom of action vis-à-vis the firms composing such a unit and a reciprocal surrender by those firms. To be sure, that surrender affects only a single bargaining unit appropriate under the NLRA and is, accordingly, formally consistent with Mr. Justice White's effort to safeguard unit-by-unit bargaining. But the endorsement of multiemployer bargaining indicates that the national policy has, at least in one context, made other objectives paramount over individuated adjustment to the varying conditions of different firms. That endorsement is, moreover, particularly significant because multiemployer bargaining involves special dangers that unified labor policies will lead to unified pricing policies. It is thus not clear why a union is able lawfully to surrender its freedom of action by consenting to an industry-wide bargaining unit and yet is subject to an automatic loss of exemption if it enters into an extra-unit agreement.

The condition engrafted on labor's exemption by Mr. Justice White thus appears to have ignored two fundamental aspects of antitrust policy as applied to unions. First, that policy has tolerated their accumulation and vigorous exercise of monopoly power and the resultant restraints on choices by individual economic units, both employees and employers. Second, it has tolerated the imposition of uniform rates on

purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

²⁰² 47 Stat. 73 (1932), 29 U.S.C. § 113 (1964).

²⁰³ See notes 39-40 *supra* and accompanying text.

²⁰⁴ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503-04 (1940), discussed in text accompanying notes 27-30 *supra*.

competitors whatever the differences in their labor markets—the union aside. Those ingredients of national policy involve far greater dangers to a competitive order than does extra-unit bargaining. The blanket condemnation of such bargaining, accordingly, reflects a lack of proportion. It suggests that the law, having swallowed an anti-competitive whale, was gagging at what, at best, was a minnow.²⁰⁵

The formidable legal and functional objections to a blanket condemnation of extra-unit agreements manifestly called for a clear-cut statement of why they were repugnant to antitrust policy. Furthermore, the balancing approach adopted by Mr. Justice White in *Jewel Tea*²⁰⁶ called for a weighing of those objections and the union interests that they reflected against such anti-competitive results as were brought about by extra-unit agreements. But Mr. Justice White in *Pennington* did not seek to identify and weigh these conflicting interests. He offered only a remote and unsatisfying generality: the union's surrender of its freedom was like "other restraints upon the freedom of economic units to act according to their own choice . . . that run counter to anti-trust policy."²⁰⁷ But that generality ignored that any agreement involves a restraint on freedom of choice and that "labor's" exemption means that collective agreements are presumptively different from restrictions that firms impose on their own freedom of action.

To be sure, the Justice was able to muster a citation to one case that involved labor relations, if not unions, namely, *Anderson v. Shipowners' Ass'n*.²⁰⁸ But the applicability of that case is far from clear. In *Anderson*, the Court upheld the sufficiency, under the Sherman Act, of a complaint setting forth the following allegations. Members of an association, controlling virtually all merchant vessels on the Pacific Coast, had combined to control employment on those vessels by fixing wages, requiring association clearance of seamen as a condition of their employment and by assigning them to particular jobs. That arrangement had divested individual employers of control over the selection of their personnel and

²⁰⁵ Mr. Justice White's approach also raises questions about the validity of arrangements for a common bargaining policy by different unions representing different bargaining units within the same enterprise. If two such unions agree that each of them will demand a specified wage increase, their agreement would be incompatible with unit-by-unit bargaining. Perhaps such agreements would be distinguished from those involved in *Pennington* on the ground that they are not directed at imposing specified labor standards on competitors constituting separate bargaining units. For a discussion of inter-union agreements, see generally Trade Union Alliances for Collective Bargaining, in *Monthly Lab. Rev.*, May, 1965, p. III.

²⁰⁶ See text accompanying note 223 *infra*.

²⁰⁷ 85 Sup. Ct. at 1592.

²⁰⁸ 272 U.S. 359 (1926).

had deprived the plaintiff, who had been denied clearance, of employment.

The Court there emphasized that the basic vice in that arrangement was that "each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the associations."²⁰⁹ Without mentioning section 6 of the Clayton Act,²¹⁰ the Court also declared that "ships and those who operate them are instrumentalities of commerce."²¹¹ It found that the effect of the combination was to limit "the freedom to trade" of both the seamen and the owners. Accordingly, "it was not important . . . to inquire . . . whether the object of the combination was to regulate the employment of men and not to restrain commerce."²¹²

Despite the similarity of the Court's language in *Anderson* and that of Mr. Justice White's in *Pennington*, there are significant differences in the two situations. Thus, *Anderson* did not involve collective bargaining but only a unilateral arrangement established by the association. Accordingly, there was no room for the argument that immunity from the Sherman Act was necessary to achieve the basic purpose of section 6 and section 20 of the Clayton Act (later expanded by Norris-LaGuardia)—the safeguarding of conventional collective bargaining from antitrust liability. Arrangements such as those involved in *Anderson* were, moreover, an obvious vehicle for an anti-union blacklist. Finally, post-*Anderson* developments raise questions about the current applicability of *Anderson* to restrictions on union or employer freedom of action. Thus, the legalization of multiemployer bargaining and of hiring halls makes it clear that there is no basis for drawing from the Sherman Act a general condemnation in the context of labor relations of "restraints upon the freedom of economic units to act according to their own choice and discretion."²¹³

The difficulties with respect to both the rationale for, and the results of, a broad proscription of extra-unit agreements may lead to its being confined to situations that also involve a "conspiracy" to eliminate competitors. Since *Pennington* involved such a conspiracy, Mr. Justice White's more expansive approach may be dismissed as dicta. More important, none of the other opinions in *Pennington* adopted his broad approach. Thus, Mr. Justice Douglas' opinion rested explicitly on the

²⁰⁹ *Id.* at 362.

²¹⁰ Quoted in note 201 *supra*.

²¹¹ 272 U.S. at 363.

²¹² *Ibid.*

²¹³ See 85 Sup. Ct. at 1592.

existence of a predatory purpose. He "read the opinion of the Court" as advising the trial judge to give the following instruction, among others, to the jury in the new trial:

[I]f there [was] an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and . . . if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participate in the arrangement with the union should be found to have violated the anti-trust laws.²¹⁴

That instruction, it is worth noting, is indifferent to the formal scope of the bargaining unit through which the condemned agreement was secured, and indicates that it is immaterial whether the condemned agreements were the product of joint or successive negotiations.²¹⁵ Mr. Justice Goldberg's opinion would, as indicated below, have given the Sherman Act the narrowest possible scope in relation to collective bargaining. Hence, Mr. Justice White's preoccupation with extra-unit bargaining and his resultant refusal to make predatory purposes a prerequisite for a violation plainly do not now have the support of a majority of the Court. Mr. Justice White's opinion in *Pennington* does not, moreover, make it clear whether pursuit of a predatory purpose directed against some firms within a multiemployer unit by bargaining confined to that unit would make out a violation. Nevertheless, his opinion in *Jewel Tea* appears to resolve that ambiguity in favor of finding a violation, by emphasizing that exemption does not necessarily extend to bargaining between a union and a single employer.²¹⁶

²¹⁴ *Id.* at 1595. The Justice stated that the Court's opinion called also for this instruction: "[A]n industry-wide agreement containing these features is prima facie evidence of a violation." *Ibid.* (Presumably, the Justice was not using "containing" literally.) There are two uncertainties raised by this instruction: (1) If it is established that an industry-wide agreement had been accompanied by arrangements with the features described in the first instruction quoted in the text, presumably a violation, as distinguished from "prima facie evidence" thereof, has been made out. (2) It is doubtful that "industry-wide agreement" is used literally; presumably, it means an agreement that in fact covers a substantial part of the industry or that the union and the participating employers wish to extend to all, or a substantial part of, the industry.

The instructions suggested by the Justice were directed at wage bargaining and did not expressly deal with the boycott provisions of the collective agreements or with the UMW's control over several companies. Nevertheless the Justice later referred to the latter items (*id.* at 4524-25) without, however, indicating that they were significant beyond their bearing on the issue of purpose. But *cf.* note 119 *supra*.

²¹⁵ In a footnote the Justice made it clear that "conscious parallelism" is to be applied to collective bargaining. See the material preceded by an asterisk, after n.5, 85 Sup. Ct. at 1595.

²¹⁶ See 85 Sup. Ct. at 1602.

Violations that turn on the existence of particular "purposes" or "motives" in collective bargaining confront triers of fact with slippery evidentiary issues and, as a corollary, place collective bargaining under a Damoclean sword. We will later refer to Mr. Justice Goldberg's forceful objections to those difficulties and to the disingenuous bargaining tactics they are likely to generate.

It is, however, important to note that the two cases show that purposes operate not only to condemn, but also to validate collective bargaining agreements. In *Pennington*, a majority of the Court was prepared to condemn collective bargaining that, on the surface, went to the core of mandatory bargaining, on the ground that such bargaining was actuated by improper purposes. By contrast, in *Jewel Tea*, Mr. Justice White and the two Justices concurring with him (all of whom were necessary for a majority) upheld what was on its face a marketing restriction by a group of employers which concededly restrained their sales on the ground that the disputed restriction was free from any predatory purpose and was independently pressed in good faith by the union to protect its legitimate interests. Before examining the reasoning by which Mr. Justice White upheld the disputed restriction in *Jewel Tea*, a word about his disposition of the union's challenge to judicial competence is in order.

The union had contended that the NLRB's primary jurisdiction over the controversy should have been recognized and that judicial determination should have been deferred until the Board had decided whether the disputed restriction was to be characterized as "a term or condition of employment." In rejecting that contention—a point on which the Court was unanimous²¹⁷—Mr. Justice White relied on the following consideration. Courts had gained experience with such characterizations in applying the Norris-LaGuardia Act, which defines "labor dispute" as including "any controversy concerning terms and conditions of employment." Furthermore, *Pennington* had indicated that prior administrative adjudication would not have been warranted by its potential contribution to the disposition of the antitrust issues; for *Pennington* had made clear that a collective bargaining agreement dealing with the wages to be imposed on other employers are not necessarily exempt from the antitrust laws even though wages are plainly at the core of mandatory bargaining. Similarly, in *Jewel Tea*, if the allegation of a union-employers' conspiracy to impose the marketing restriction on Jewel had been established, the union would not have been

²¹⁷ Mr. Justice Goldberg, although rejecting the basic approach of Mr. Justice White's opinions, noted his agreement with the Court that primary jurisdiction did not apply to these cases. 85 Sup. Ct. at 1614 n.18.

exempt—regardless of how the Board would have characterized that restriction. Consequently, at the beginning of the litigation in *Jewel Tea*, when a determination to refer the matter to the Board would have been in order, the Board's characterization would have been of subsidiary importance at best. Finally, Mr. Justice White argued that in some circumstances there is no procedure for securing a Board determination.²¹⁸

Although, as indicated in the principal paper,²¹⁹ the rejection of primary jurisdiction in *Jewel Tea* and *Pennington* is, in my view, sound, the reasons for this result advanced in Mr. Justice White's opinion are not free from difficulty. Thus, his reference to judicial experience with the classification problem under Norris-LaGuardia ignores that the situations involved were not cognizable by an administrative agency.²²⁰ Independent judicial action in those situations did not, accordingly, raise questions about the value of uniformity and administrative expertise that underly the preemption doctrine in labor relations. Furthermore, the reference to *Pennington* implies that the agreement there alleged, to impose particular terms on firms outside the bargaining unit, was a mandatory item of bargaining. But the Board precedents invoked by Mr. Justice White²²¹ and the whole thrust of his opinion point in the opposite direction. Finally, the emphasis on the unavailability, in some cases, of an administrative mechanism ignores the particular facts of *Jewel Tea*. Jewel had acquiesced in the marketing restriction only after a strike threat and therefore could have filed a non-frivolous charge with the Board. It is true that Jewel would have been faced with the NLRA's short limitation period; but if primary jurisdiction were otherwise desirable, the dilatoriness of a litigant would be a doubtful basis for dispensing with that requirement. It is also true that the General Counsel could have blocked access to the Board's machinery. But in view of the presumption of official regularity, his denial of a complaint (where the Board's jurisdictional yardsticks had been satisfied) could have been accepted as the equivalent of a Board determination that the

²¹⁸ The Board would be unavailable (a) where agreement to a provision attacked under the Sherman Act had been reached without insistent bargaining or the application of economic pressure even though that provision related to a non-mandatory item of bargaining; (b) where the Board's general counsel refuses to issue a complaint on an unfair labor practice charge based on allegations that also serve as a basis for attack under the Sherman Act; and (c) where the six months' limitation period prescribed by the NLRA, as amended, would bar the processing of a charge.

²¹⁹ See text accompanying notes 146-47 *supra*.

²²⁰ See, e.g., *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960) and *Bakery Sales Drivers Local v. Wagshal*, 333 U.S. 437 (1947), cited in 85 Sup. Ct. at 1600.

²²¹ See note 195 *supra* and accompanying text.

charge of a refusal to bargain lacked substance. Indeed, as a footnote in Mr. Justice White's opinion intimated,²²² his concern with possible obstructions to the Board's machinery contrasted with the Court's denial of state competence over cases within the Board's theoretical jurisdiction despite the Board's declination, as a matter of policy, to handle such cases.

On the merits, Mr. Justice White, while upholding the exemption for the market restriction, declined to recognize an expansive exemption for collective bargaining. With reference to the contrary implications of *Hutcheson*²²³ and *Allen Bradley*,²²⁴ he announced, as already indicated, that even agreements between a union and a single employer were not necessarily exempt, *e.g.*, when they reached into areas of non-mandatory bargaining.²²⁵ He characterized a hypothetical union demand on Jewel that it adhere to a price schedule for its meats as non-mandatory; consequently, a union-employer agreement with respect to such prices would probably fall outside the exemption although it would not necessarily constitute a violation of the Sherman Act. On the other hand, when agreements were restricted to mandatory items, that fact weighed heavily in favor of an antitrust exemption. But the scope of that exemption was not co-extensive with the area of mandatory bargaining. Characterization of the subjects of agreement as mandatory appears, in other words, to be a necessary but not a sufficient condition of exemption. Whether any particular demand is exempt depends on weighing the interest in competition against the competing interests of the employees.²²⁶

The general approach described above shaped, without however controlling, Mr. Justice White's formulation of the question that *Jewel Tea* presented to the Court:

whether the marketing hour restriction, like wages, and unlike prices, is so intimately related to wages, hours, and working conditions that the union's successful attempt to obtain that provision through bonafide arms-length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is, *therefore*, exempt from the Sherman Act.²²⁷

²²² See 85 Sup. Ct. 1601 n.4. The no-man's land has been eliminated by § 14(c) of the NLRA, as amended in 1959.

²²³ See text accompanying notes 39-40 *supra*.

²²⁴ See text accompanying note 50 *supra*.

²²⁵ See 85 Sup. Ct. at 1602.

²²⁶ *Ibid.* at note 5, quoted in text accompanying note 232 *infra*.

²²⁷ Emphasis supplied. See 85 Sup. Ct. at 1602.

That formulation, it may be noted, appeared to depart from the balancing approach; for it emphasized the union's interests but was wholly silent about the competing interest in competition in the product market. Furthermore, that formulation, in negating any combination of non-labor groups, ignored that the marketing restriction had not only been the product of group bargaining but also was the kind of restriction that one firm was unlikely to accept without assurance that its competitors would also be bound.²²⁸

In resolving that issue in favor of exemption, Mr. Justice White first rejected the Seventh Circuit's conclusion that the time when work was to be done was a managerial prerogative. The Justice recognized that agreements regulating the time of work have "an effect on competition, both apparent and real, perhaps more so than in the case of the wage agreement."²²⁹ But "the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."²³⁰ That conclusion with respect to the time of work, read literally, was not confined to the *Jewel Tea* case and is likely to be read as having general applicability. But such an interpretation presupposes that the relative weight to employee and competitive interests is the same, regardless of the character of the provision with respect to the time of work. The weighing process is so elusive that it is not easy to come to grips with that proposition. Nevertheless, some provisions, *e.g.*, one that employees shall not work for three months and shall not be replaced, might well fall outside the exemption. Such provisions might be viewed functionally as a scheme for production control and different weights might, accordingly, be ascribed to the competing interests at stake.²³¹ Mr. Justice White had, after all, declared: "the crucial determinant is not the form of agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members."²³²

Having rejected the Seventh Circuit's unnecessary and unsound characterization of the time when work is to be done, Mr. Justice White

²²⁸ In his formulation of the issue in *Jewel Tea*, Mr. Justice White completely ignored the trial court's finding that the collective bargaining agreement also provided that "the unions agree not to enter into a contract with any other employer designating lower wages, or longer hours, or any more favorable conditions of employment." See 215 F. Supp. at 842. That omission is striking in view of the Justice's emphasis on extra-unit agreements in *Pennington*.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Cf. *Penello v. UMW*, 88 F. Supp. 935, 941 (D.D.C. 1950).

²³² 85 Sup. Ct. at 1602 n.5.

turned to the issue at hand: whether the restriction on marketing, as distinguished from working, hours was within the labor exemption. The decisive factor for him was the trial court's finding, apparently undisturbed on appeal, that night sales were impractical without butchers and that such sales would result in an encroachment on their work jurisdiction and an increase in their work load.²³³ That finding served as the basis for the conclusion that marketing hours, like working hours, constituted "a subject of immediate and legitimate concern to union members."²³⁴ But, under Mr. Justice White's balancing test, that conclusion did not necessarily warrant an exemption for the disputed provision; for that test required consideration of the "relative impact" of that provision on the product market and the interests of union members (or employees). Although Mr. Justice White had, albeit somewhat generally, focused on the competing interests implicated by clauses regulating the time of work, he examined only the union side of the scale in considering the restriction on marketing hours, the only clause before him. Furthermore, he appeared to assume that the employees' interests served by restrictions on the time of work and the marketing restrictions were identical. But such an assumption is extremely dubious. As indicated in the main paper,²³⁵ the increase in the butchers' work load, which seemed insubstantial at best, could have been dealt with by other clauses. Similarly, the potential encroachment on work jurisdiction appeared to be slight even if Jewel's willingness to contract against such encroachment were ignored. More important, an employee's interest in avoiding night work for himself is quite different from his interest in barring others from performing tasks peripheral to his principal jurisdiction at a time when he declines to work. Furthermore, even if the butchers had been willing to perform such peripheral work at night, a strike, actual or threatened, to obtain its assignment would run counter to section 8(b)(4)(D) or would, at least, raise a sub-

²³³ The Seventh Circuit, because of its unduly broad approach, did not pass specifically on that finding. Nevertheless, that court did make a general finding that the material allegations of the complaint had been sustained by the record. See *Jewel Tea Co. v. Associated Food Retailers of Greater Chicago*, 331 F.2d 547, 548 (7th Cir. 1964). Paragraph 11 of the complaint had alleged that night sales were feasible without the presence of butchers and that such incidental tasks as stocking the self-service containers could be performed by others or could be performed by butchers prior to their leaving. See Record, p. 20, Local 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 85 Sup. Ct. 1596 (1965). The conflict between the general finding of the reviewing court and the specific finding of the trial court was not mentioned in any of the opinions by members of the Court.

²³⁴ 85 Sup. Ct. at 1603.

²³⁵ See note 129 *supra*.

stantial question under that section.²³⁶ To be sure, the initial enforcement of that section devolves on the Board; but courts, although similarly preempted with respect to sections 8(a)(5) and 8(b)(3), are, under Mr. Justice White's approach, to take account of those sections and generally to accommodate antitrust and labor policy in applying the Sherman Act. Such accommodation would seem also to call for consideration of the legitimacy under section 8(b)(4)(D) of the union's effort by economic pressure to prevent other employees from performing work at a time when employees represented by the union are unwilling to work.

There are thus difficulties with Mr. Justice White's ultimate conclusion even if the trial court's finding of the inevitability of jurisdictional encroachment is accepted. The Justice, moreover, recognized that that finding, although not "clearly erroneous," was scarcely inexorable.²³⁷ It is, accordingly, unfortunate that the Seventh Circuit, because of its unduly broad approach to the case, had failed to pass specifically on the finding that Mr. Justice White found to be decisive. Nevertheless, as already indicated,²³⁸ that court's general finding that the material allegations of the complaint had been established could be read as rejecting the trial court's finding. In view of the unsatisfactory review by the Seventh Circuit, the questionable nature of the underlying evidence, the partial rejection of the trial court's finding by the dissenters in *Jewel Tea*,²³⁹ and the public interest involved, a remand to the Seventh Circuit to secure its views and, if necessary, to permit the taking of additional evidence would have been desirable.

Mr. Justice Douglas' brief dissenting opinion in *Jewel Tea* rested on *Allen Bradley* and thereby avoided the obvious difficulties of applying the balancing test to the disputed provision. His argument for the applicability of *Allen Bradley* was simplicity itself: the disputed provision had restricted competition in the marketing of goods and services and was no different from price-fixing. The dissent ignored, moreover, the undisturbed finding that there had been no subsidiary conspiracy between the unions and some employers to impose the marketing restric-

²³⁶ Although the NLRB has generally required for a violation of section 8(b)(4)(D) that at least two groups of employees be actively competing for the same work, that requirement is not an inflexible one. See *Longshoreman's Union*, 152 N.L.R.B. No. 69 (May 18, 1965), 59 LRRM 1152. Hence, the absence of evidence that employees, other than the butchers, wished to restock the self-service units would not be decisive on the issue of whether that section had been violated.

²³⁷ See 85 Sup. Ct. at 1604-06.

²³⁸ See note 233 *supra*.

²³⁹ See text accompanying note 241 *infra*.

tion on *Jewel*. It was, accordingly, easy to conclude that under *Allen Bradley* "the unions can no more aid a group of business men to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices."²⁴⁰

Mr. Justice Douglas and his colleagues in dissent dismissed or passed over the countervailing considerations urged by Mr. Justice White as justification for the restraint on marketing. They asserted that his conclusion that the concern of the union members over marketing hours is immediate and direct depended upon the existence of a necessary connection between marketing hours and working hours. They rejected the conclusion as to the immediacy of the union concern on the ground that the undisputed evidence showed that, without night-time butchers, there had been night sales of meat in Indiana and of fresh poultry and sausage in Chicago.²⁴¹ Since the broad approach of Mr. Justice Goldberg and the two Justices joining in his opinion made it unnecessary for them to pass on the factual predicate for the conclusion that the union's interest in operating hours was immediate and direct, only three members of the Court accepted the factual finding that was the critical factor in reversal.

As indicated in the principal paper, Mr. Justice Douglas placed his finger on the heart of the controversy by stressing the difficulty of distinguishing price fixing from other forms of market control, including the one involved in *Jewel Tea*. His supporting argument is, however, less appealing, in my opinion, than his ultimate conclusion, for three reasons: first, his summary reliance on a case as elusive as *Allen Bradley*; second, his disregard of factual findings that raised questions about the applicability of that case; and, finally, his failure to indicate whether the acceptance of Mr. Justice White's conclusion with respect to the union's direct and immediate interest in the market restriction would have called for the upholding of that restriction. In connection with the last point, it is worth noting that Mr. Justice Douglas' failure in *Jewel Tea* squarely to consider the significance of the union's purpose involves a sharp contrast with the decisive effect he attached to the union's purpose in *Pennington*. If, as seems to be the case, the Justice would ascribe different significance to the union's purposes in the two situations, the difference presumably depends on whether a market re-

²⁴⁰ 85 Sup. Ct. at 1607.

²⁴¹ *Ibid.* The dissenters were silent about the related finding that such sales would infringe on the butchers' work jurisdiction. The dissenters did, however, notice the union's alternative contention that night self-service would place some stores at a competitive disadvantage and would generate pressure for night work by butchers at stores lacking self-service facilities. They summarily dismissed that contention as involving an expansive labor exemption wholly incompatible with *Allen Bradley*.

striction, rather than a restriction on wages, hours or other aspects of the employment relationship, is involved.

Mr. Justice Goldberg, joined by Justices Harlan and Stewart in a sweeping and lengthy opinion, vigorously attacked the approaches adopted by his brethren in both cases. He began with a lengthy historical essay about the application of the Sherman Act to union activities and the development of labor legislation. His essay was an instrument of advocacy rather than of inquiry;²⁴² it was designed to show, not the complexity of the problem, but the simplicity of the solution. With that essay as a foundation, he recurred to two themes throughout his opinion. First, his brethren would turn the clock back to the pre-*Hutcheson* era when courts condemned conventional collective bargaining on the basis of their own social and economic predilections.²⁴³ Second, his brethren had ignored the congressional intent by refusing to accord to collective bargaining an exemption from the Sherman Act co-extensive with the area of mandatory bargaining.²⁴⁴ It is convenient to deal with his argument case by case and thereafter to return to his larger themes.

As to *Pennington*, his rejection of the approaches in the two competing opinions rested on the following grounds: the antitrust laws do not proscribe, and the national labor policy affirmatively promotes, wage uniformity throughout an industry.²⁴⁵ Although Mr. Justice White had recognized that such uniformity is a proper objective, his proposed withdrawal of exemption from extra-unit agreements would impede such uniformity and would seriously inhibit free discussion in the bargaining room.²⁴⁶ Bargaining frequently involves employer re-

²⁴² That essay is open to the following general criticisms: it ignores that in the pre-*Hutcheson* period the Supreme Court cases that applied the Sherman Act to union activities dealt primarily with union efforts to secure or to extend organization. See cases cited in notes 11-13 *supra*. The repudiation of those cases on the basis of the Norris-LaGuardia Act tells us very little about the limits imposed by the antitrust laws on collective bargaining agreements that appear to be directed at restraining competition in product markets or about how the lines between the labor market and the product market are to be drawn. Those questions, as *Allen Bradley* made clear, were not answered by the Wagner Act or by the *Hutcheson* case. Indeed, those questions were sharpened by the legislative protection accorded to union activities and the growth of union power. Nor are answers to be found in the proscriptions of "specific" union activities embodied in the amendments to the NLRA—unless one draws from those amendments a partial repeal of the Sherman Act. The Justice, although apparently tempted to find such a repeal, in the end properly resisted that temptation. The tangled history thus scarcely provides support for the particular solution urged by the Justice.

²⁴³ See 85 Sup. Ct. at 1617-19.

²⁴⁴ *Id.* at 1614.

²⁴⁵ *Id.* at 1616.

²⁴⁶ *Id.* at 1617-18.

liance on competitive conditions as a justification for rejecting union demands. But such talk by the employer, coupled with subsequent union action directed at other bargaining units, might become the basis for inferring a union-employer agreement that the union would impose particular standards on other employers. Inquiry as to whether such an agreement existed would inescapably confront elusive issues as to the purposes and motives attending negotiations. Such inquiry would also lead to a substitution of judicial for congressional judgment as to how collective bargaining should work—a substitution that would ignore the judicial ineptitude in regulating collective bargaining reflected in the pre-*Hutcheson* era.²⁴⁷ Thus, in *Pennington*, the contention that wage rates were set high so as to drive out the weaker firms invited the trier to find an unlawful or a non-exempt agreement on the basis of his judgment as to a proper wage rate. His brethren's approaches would also invite disingenuous bargaining and unnecessary economic warfare. Thus, to reduce the possibility of meritorious charges of predatory or extra-unit agreements, employers would make a show of resistance to union demands, and unions would seek to establish the arms length nature of the bargaining by resorting to strikes. Finally, the Court's approach would make antitrust liability turn on an irrelevant consideration, that is, whether multiemployer or pattern bargaining had been used to achieve standardized rates. We may dispose of this point at once by noting that Mr. Justice Douglas' opinion plainly did not give decisive weight to the scope of the bargaining unit and that Mr. Justice White's opinion is open to the same interpretation.²⁴⁸ We will return to the other points made by Mr. Justice Goldberg in *Pennington* after describing the principal elements of his argument in *Jewel Tea*.

He urged the following objections against Mr. Justice White's opinion. It denied to collective bargaining an exemption from the anti-trust laws that would be co-extensive with the area of mandatory bargaining. Its suggestion that the labor exemption would have been inoperable if night sales had not infringed on the butchers' interest in work loads and jurisdiction reflected an unduly narrow view of the area of legitimate union concern²⁴⁹ interposed by *Allen Bradley* to such a purposeful attack on competition in the product market. To meet the obstacles interposed by *Allen Bradley*, Mr. Justice Goldberg resorted to labels and to a somewhat disingenuous summary of that case. He de-

²⁴⁷ *Id.* at 1618.

²⁴⁸ See text accompanying notes 211-13 *supra*.

²⁴⁹ *Id.* at 1624. The union interests deemed by the Justice sufficient to warrant the market restriction are described in note 237 *supra*.

clared: "The direct interest of the union in not working undesirable hours by curtailing all business at those hours is, of course, a far cry from the indirect 'interest' in *Allen Bradley* in fixing prices and allocating markets solely to increase the profits of favored employers."²⁵⁰

As my principal paper indicated,²⁵¹ Mr. Justice Goldberg is, in my opinion, on sound ground in stressing the difficulties that result from giving decisive effect to motive or purpose as a basis for denying exemption to collective bargains covering wages and other matters at the core of mandatory bargaining. But I must express a contrary judgment about his suggestion that labor's exemption from the antitrust laws should be co-extensive with the area of mandatory bargaining. The principal paper pointed to the difficulties raised by that suggestion,²⁵² and I find no answer to them in the Justice's opinion. His reliance on that plastic perennial, the intent of Congress, is not even supported by a single reference to a statutory provision or to the legislative history of the NLRA, as amended. Furthermore, although it is, as indicated below, difficult to spell out the impact of his formula, its acceptance would probably not curtail line-drawing based on explicit or unvoiced value choices; it would merely shift the rubric under which such choices were made from the antitrust laws to the provisions of the NLRA that delineate the area of mandatory bargaining.

Several considerations may illuminate the consequences and the complications implicit in the Justice's formula. It will be recalled that he did not dissent from the rejection of primary jurisdiction when collective bargaining agreements are challenged under the antitrust laws. Consequently, issues as to the scope of the antitrust exemption in that context would be independently determined by the courts. With respect to such determinations, it would be undesirable, if not bizarre, to conclude that NLRB precedents as to the area of mandatory bargaining bind the courts under the Sherman Act. Such an approach would have much in common with the primary jurisdiction approach unanimously rejected by the Court. Moreover, and more important, the

²⁵⁰ (Emphasis supplied.) 85 Sup. Ct. at 1624. Earlier the Justice in discussing *Allen Bradley* (1) had supported his characterization of the union's interest in the firms' monopoly profits as "indirect" on the ground that there was only a possibility of those profits trickling down to the employees, and (2) had also emphasized that the union had joined a combination of employers. *Id.* at 1612. Given the union's power in *Allen Bradley* and the link between its wage demands and price-fixing schemes, the first item of the Justice's summary appears to have overstated the contingent nature of the employees' benefits. Furthermore, the second item adopts the fiction by which the union in *Allen Bradley* was transformed from an active architect of the combination into an accessory after the fact. See notes 66-67 *supra*.

²⁵¹ See text accompanying notes 121-22 *supra*.

²⁵² See text accompanying notes 136-145 *supra*.

NLRB precedents have been directed at different purposes from those behind the antitrust laws.²⁵³ The NLRB not only lacks any special competence with respect to those laws but has not, in general, taken account of them in delineating the area of mandatory bargaining. Indeed, the expansiveness of that area may be explainable in part on the ground that it has been marked out without explicit concern for any radiating effects on immunity from the Sherman Act.²⁵⁴ Under such circumstances, to invoke NLRB precedents as the touchstone for resolving antitrust issues would involve the most mechanical kind of jurisprudence.²⁵⁵

Where antitrust proceedings involved agreements whose status as mandatory or non-mandatory items was uncertain under Board precedents, the value choices confronting the courts would not be materially affected by resort to the Justice's formula. An examination of the problems involved in applying that formula to *Allen Bradley* and *Jewel Tea* will, in my opinion, support this point.

In *Allen Bradley*, the union's program advanced its legitimate interests—job security and higher pay for the employees' involved, coupled with an expansion of union jurisdiction. The resulting monopoly benefits to the firms (contrary to Mr. Justice Goldberg's implication) were not ends in themselves but means to promote the union's interests. Indeed, the connection between the benefits to the firms and to their employees moved the highly respected Second Circuit,²⁵⁶ as well as one member of the Supreme Court,²⁵⁷ to immunize both parties to the program of cooperative monopoly from the Sherman Act. Plainly, the underlying issue would not have been different in substance or easier to resolve if it had then been presented or were presented prior to the instant cases, as an issue concerning the scope of mandatory bargaining rather than an issue as to the coverage of the Sherman Act.

An examination of *Jewel Tea* leads to the same conclusion. The em-

²⁵³ See text accompanying, and following immediately after, note 137 *supra*.

²⁵⁴ Thus, in *Teamsters v. Oliver*, 358 U.S. 283, 296 (1959), the Court in characterizing the disputed provisions as items of mandatory bargaining as a basis for preempting the state antitrust laws cited *Allen Bradley* and carefully noted that "federal law sets some outside limits (not intended to be exceeded here) on what [the parties'] agreement may provide."

²⁵⁵ Mr. Justice Goldberg's reliance on the assumed classification of the disputed clause as a mandatory item was in sharp contrast to his insistence, in *Los Angeles Meat*, that the Court, in administering the Sherman Act, should not be bound by classification of groups as "independent contractors" under the NLRA, as amended. See text accompanying and immediately following notes 103-08 *supra*. See also 371 U.S. at 107 for his criticism of "mechanically affixing naked labels imported from other concepts."

²⁵⁶ See 145 F.2d at 220, 224-25.

²⁵⁷ See note 67 *supra*.

ployee interests that the trial court found would be invaded by night operations were insubstantial, and of questionable legitimacy, under section 8(b)(4)(D). So long as night work by butchers was not directly required, the issue as to the status of the marketing restriction might have been resolved by characterizing operating, as distinguished from working, hours as falling outside the mandatory area. That characterization would have been even easier to defend if the union's only interest in the marketing restriction was its desire to insulate the independents and their butchers against the pressure to stay open generated by night self-service sales or against the high cost of night operations. As indicated in the principal paper,²⁵⁸ such pressures merely indicate that competition in product markets may adversely affect some firms and their employees. The existence of such pressures tells us nothing about the extent to which collective bargaining may lawfully restrain product competition in order to protect concededly legitimate employee interests. Nor does Mr. Justice Goldberg's formula tell us why the market restriction in *Jewel*, should be validated although price-fixing by way of collective bargaining should be denied exemption. The difficulties are, moreover, not overcome by characterizing the market restriction as "directly related" to the employees' interests but price-fixing as "indirectly related." Thus, suppose a union demands and secures a generous wage increase by getting the employers' agreement to a price schedule and to the union's role as the enforcement mechanism for the price-fixing. Is price-fixing in that context less directly related to the employees' legitimate interest in more pay and more stable employment than the marketing hour restriction viewed essentially as a means of protecting independents and their employees against the competitive pressure of self-service operations? Mr. Justice Goldberg said "yes" to that question, but not even his embattled resourcefulness supplied a single reason. If there is an acceptable basis for distinguishing the two situations, it does not consist of a visible difference in the directness of the employee interests. It does consist of the fact that, like other groups, employees are subject to limitations in the methods they may use in advancing the most benign purposes. One such limitation, however obscure, is embodied in the Sherman Act. Because of that limitation, the operative considerations cannot be solely the directness or importance of the employees' interests; they must also reflect the impact of the methods used on competition in the product market.

As indicated in my main paper, there is no clear principle for distinguishing between exempt and non-exempt collective bargaining. Thus, one could follow Mr. Justice Goldberg if he urged that that con-

²⁵⁸ See text accompanying and immediately following note 133 *supra*.

sideration, coupled with the toleration of monopoly in the labor market, would justify a blanket exemption for collective bargaining agreements provided that they did not involve any pay-offs to union leaders; one could also follow him if he urged that legislative default also makes it appropriate for the Supreme Court to create such an exemption. But he makes no such sweeping claims. Nor does he articulate the genuine difficulties that are inescapable in any judicial effort to accommodate antitrust and labor policies rather than wholly subordinating one policy to the other. Instead of a frank recognition of such difficulties, he offers us what is essentially a new word game based on substituting "mandatory items of bargaining" for the Sherman Act.

Mr. Justice White's opinion in *Jewel Tea*, as distinguished from *Pennington*, has, at least, the virtue of acknowledging that the Court must somehow balance the conflicting objectives of our national policies. His balancing test is, of course, easier to state than to apply, a difficulty that is no novelty, especially in the antitrust or the labor field. Nevertheless, the deep uncertainties that remain, although no occasion for cheers, may serve to restrain the anti-competitive potential of collective bargaining while permitting it a large field in which constructively to advance labor's interests. Furthermore, the opinions of Mr. Justice White and Mr. Justice Douglas, read together, have supplied one important and desirable clarification; for they show that a majority of the Court rejects the formalistic distinction between parallel collective bargains with individual employers and bargains by employer groups—a distinction that disfigured *Allen Bradley*.

Apart from that clarification, the opinions in *Pennington* and *Jewel Tea* are disappointing for reasons that are quite independent of the immediate results. Those opinions have failed to shed much light on a dark corner of the law. They have failed also to exhibit fruitful internal communication or even a serious effort by the members of the Court to state clearly and to grapple with the problems raised by the competing approaches of their colleagues and by the precedents. The failures registered in the opinions may constitute a form of serendipity if they encourage Congress to discharge its responsibility for accommodating central and conflicting elements of our national policy. Although there will be acute disagreement as to the content of the appropriate adjustment, there will, I believe, be a substantial consensus that Congress should attempt to draw clearer lines and that its continued abdication will confront the Court with intractable problems.