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PRINCIPLES OF LABOR ANTITRUST

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IN a series of cases, beginning with *Apex Hosiery Co. v. Leader*¹ in 1940, the United States Supreme Court has attempted to develop principles of labor antitrust analysis. Although the precise extent to which unions are subject to the antitrust laws has been uncertain, until recently the applicability of the antitrust statutes to union activity appeared to be relatively limited. This assumption has been called into question by the Court's decision in *Connell Construction Co. v. Plumbers Local 100*,² which suggests that the antitrust laws may be applicable to many kinds of union-instigated secondary boycotts. The resulting increase in labor antitrust litigation has made even more acute the need for the articulation of clear and consistent principles of labor antitrust analysis.

To understand the role of the courts, it is necessary to explain briefly the statutory framework of labor antitrust. During the first several decades of federal antitrust regulation, Congress had expressed no federal labor regulatory policy.³ The existence of unions was seriously threatened by courts applying the antitrust laws.⁴ In

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¹ 310 U.S. 469 (1940).

² 421 U.S. 616 (1975).

³ The Clayton Act of 1914 has two special labor provisions, § 6, 15 U.S.C. § 17 (1976), and § 20, 29 U.S.C. § 52 (1976), which appear to place the bulk of union activity beyond antitrust scrutiny. These sections do not purport to establish an affirmative federal regulatory policy, however, and were given a narrow reading by the Supreme Court. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). Even so, the sections are persuasive evidence that antitrust policy must sometimes yield to national labor policy.

⁴ For two of the best discussions of this history, see Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 661-66 (1965); Winter, *Collec-*

1935, however, Congress enacted the National Labor Relations Act (Wagner Act),⁵ which protects the right of workers to organize and to engage in concerted activities. Supplemented by the Taft-Hartley⁶ and Landrum-Griffin Acts,⁷ the Wagner Act establishes a national labor policy that permits, and even encourages, unionization, subject to the limitations imposed by these statutes.

Accommodating antitrust policy and labor policy is not an easy task. The conflict between the two is fundamental: the antitrust statutes promote competition and economic efficiency, while the federal labor statutes sanction activity that is arguably anticompetitive. The legislature has chosen to follow both policies, and the courts must determine the proper scope of each. The line of demarcation is suggested by the statutory framework: the antitrust statutes prohibit restraints of trade, that is, business-market restraints; the labor statutes permit concerted action by workers, that is, labor-market restraints.

This legislative scheme indicates that the distinction between permitted and prohibited acts should be based on qualitative distinctions among different types of restraints, rather than on quantitative measurements of relative economic effect. The effect of a labor-market restraint on price and output may be as great as that of a business-market restraint; however, the legislative choice to sanction some union acts but not others seems to rest on considerations beyond those of competition and efficiency. Moreover, a quantitative test for union antitrust liability would require judges to weigh the importance of the opposing policies in the context of particular cases, thus interjecting an element of uncertainty into labor antitrust—an uncertainty that would tend to deter socially valuable labor-management settlements. By contrast, a qualitative test for union antitrust liability can provide greater objectivity and certainty.

This article maintains that labor antitrust liability should turn on qualitative distinctions among intermediate tactical objectives—those intermediate restraints that lie between the immedi-

tive Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 *YALE L.J.* 14, 30-38 (1963).

⁵ 29 U.S.C. §§ 151-169 (1976).

⁶ *Id.* §§ 141-188.

⁷ *Id.* §§ 153, 158-160, 164, 186-187, 401-531.

ate acts of a union and its ultimate goal. Four categories of intermediate tactical objectives are identified: (1) monopolization of the labor supply; (2) suppression of input factors of production; (3) attacks on the product-market competitors of unionized firms; and (4) regulation of the product market by controlling prices and outputs. The first section of the article examines the economics of labor unions in the context of these four categories of intermediate restraints. The discussion of the first category—monopolization of the labor supply—treats the union as a price-setting, market-allocating cartel of sellers of labor that accumulates and exercises monopoly power to better the position of its members. This discussion emphasizes the negative effects of unions on efficiency and competition in order to illustrate the conflict between antitrust policy and labor policy and to emphasize that, by explicitly permitting unions to monopolize the supply of workers, Congress has made its choice along lines other than efficiency and competition. In addition, emphasizing the negative effects of union monopolization of the supply of workers clarifies the distinctions between the effects flowing from that monopolization and the effects flowing from the other three categories of intermediate restraints. The article then analyzes and illustrates these categories in the context of Supreme Court precedent and explores the Court's current thinking on labor antitrust issues. The article concludes that a court should find an antitrust violation only if one of the categories of intermediate restraints is used as part of a scheme to regulate the product market by controlling prices, outputs, or market allocations.

I. THE ECONOMICS OF LABOR UNIONS⁸

A. *Monopolization of Workers*

Unions seek to control the supply of workers in order to raise wages and better working conditions. Firms ordinarily pay employees the lowest wage at which the employees are willing to work. Competition among applicants establishes which applicant is hired and at what wage. By cooperating with each other and refusing to

⁸ This section presents a simplified version of the neoclassical model of labor union economics. The neoclassical model is based on certain assumptions about the labor market that this article neither discusses nor makes explicit. In addition, this section does not address the question of what unions attempt to maximize, nor does it examine various theories that challenge the traditional model by suggesting that some union activity enhances efficiency.

work at the competitive wage, however, workers may be able to command a higher wage rate. Cooperation is essential, for the firm will seek to replace, if it can, any employee who demands more than the competitive wage rate.

A union is a mechanism for effectuating cooperation. Through the union, workers demand a wage rate higher than that set by the competitive market. For the workers' cooperative action to be effective, competition from potential replacements must be barred. If over the short run the number of potential replacements is insufficient to maintain production, union members can prevent future competition from potential replacements by working for the firm only on the condition that it employ no worker at less than the union wage. When a union obtains such an agreement from a firm, it has monopolized the labor supply.⁹

There are costs associated with this monopolization. Most unions would like both to improve worker wages and to maintain or raise employment levels. Employers, however, tend to reduce the number of employees when wages are increased,¹⁰ because at a higher wage, the revenue attributable to some employees will be less than their wage. Whenever possible, an employer will also react to a wage increase by substituting machinery for employees or using other production methods such as subcontracting.

Monopolization of the labor supply not only reduces employment in unionized firms; it also imposes a cost on society by reducing output. The marginal or incremental cost to a firm of producing each additional unit may decrease as a firm begins to use its plant capacity, but at some point, as raw materials become scarcer, the assembly line reaches capacity, or an extra working shift is re-

⁹ For a more detailed discussion of the economics of union monopolization of the labor supply, see A. CARTTER, *THEORY OF WAGES AND EMPLOYMENT* 77-94 (1959).

¹⁰ This observation assumes that the prices of other goods and services in the economy remain the same, that is, that the wage increase is an actual increase relative to the prices of other goods and services.

Several theories suggest that other factors may sometimes keep employment levels from falling even when a union imposes a wage increase. One theory is that the "shock" effect on management of the union's intervention may result in an increase in the firm's productivity. See, e.g., C. MULVEY, *THE ECONOMIC ANALYSIS OF TRADE UNIONS* 136-37 (1978). Another theory suggests that, in the short run, capital-labor ratios are fixed by technology so that an increase in wages will not reduce the number of employees. See A. REES, *THE ECONOMICS OF WORK AND PAY* 60 (2d ed. 1979). This article does not discuss these theories because it is the tendency of a wage increase to reduce employment levels that is important to the point made in the text, not that there will be such an effect in every instance.

quired, each additional unit becomes more expensive to produce. If the market is competitive, the firm will sell its units at the prevailing market price regardless of its level of output.¹¹ The optimal level of production for the firm is that level at which the marginal cost of producing a unit of output just equals the marginal revenue brought in by the sale of that unit. Assuming that no other input factor interchanges perfectly with workers, or that the union effectively blocks the substitution, an increase in wages will raise the marginal cost of each unit of output and the firm will reduce production. Indeed, if costs increase enough, the marginal cost of producing every unit will exceed marginal revenue and the firm will not want to continue production.

The effect of a union wage increase imposed across an industry is similar to the effect of a union wage increase on an individual firm: it will tend to reduce employment and output.¹² As wage increases drive up the costs of workers to individual firms, employment drops in the industry.¹³ A union wage increase prevents some workers from finding employment in the industry; although they would be willing to work below the established wage rate, and the industry could profitably hire them at a lower wage, the established wage blocks their employment. Moreover, so long as consumer demand for the industry's product is responsive to price, an increase in price occasioned by a wage increase will decrease demand. Over the long or short run, depending on the nature of the industry, output will be reduced and some capital investment will move out of the industry.

A union wage increase also affects employment levels when the union has organized only part of an industry. Potential employees

¹¹ The analysis becomes somewhat more complex if the firm has monopoly power, but the fundamentals do not change.

¹² The amount by which the industry will reduce output when the cost of production rises depends on how purchasers respond to a price increase. If purchasers are very responsive to a price increase, they will reduce or eliminate purchases when the price is raised. One limiting case exists when everyone who will buy a product will do so at X price, but no one will buy at $X + 1$. Another limiting case occurs when those purchasers who want the product will buy it at virtually any price. The more price-responsive the purchasers, the more a wage (or other cost) increase will tend to reduce output.

¹³ The amount by which a wage increase reduces industry employment depends on the slope of the demand curve for labor and on the price elasticity of the industry's product or service. If, in the short run, the industry's required number of employees varies over a small range regardless of output (e.g., it requires 50 employees to operate a plant, but only 52 to run it at full capacity), a wage increase may have no effect on employment.

who because of the wage increase are unable to find employment in the unionized sector of the industry will compete for positions in the nonunion sector,¹⁴ increasing the supply of potential employees. Employment in the nonunion sector is likely to increase, but at a wage less than the competitive wage. Assuming that before unionization both sectors of the industry operated at the right combination of employees, other input factors, and product output, neither sector will operate at the optimal combination after the union imposes its wage rate on part of the industry. The increased output of the nonunion sector will not offset the loss of output of the unionized sector.

In sum, union wage activity can affect both employment levels and product-market output. When these effects occur, they are the result of the federal labor statutes, which permit union monopolization of the labor supply. The antitrust laws, therefore, cannot prohibit a union's monopolization of a firm's employees or its wage bargaining with that firm; however, when unions do more than organize employees and bargain for wages, the antitrust laws may apply.

B. Suppression of Input Factors of Production

Both machines and employees are input factors of production. In many instances a firm could purchase more machinery and maintain the same production level with fewer employees. The degree of flexibility that firms have to substitute employee hours and machine hours for one another depends on several variables. Over the short run, for example, it is likely that some capital is frozen in existing plants and equipment, making inputs relatively inflexible. As plants and equipment wear out, new input-factor choices become available. The mix of input factors depends on relative prices and productivity. For example, when a union-imposed wage settlement results in an increase in the cost of employee hours, the employer may find it less expensive to produce the same level of output by substituting machine hours for some or all of his employees. The same tendency to substitute machine hours for employee hours occurs whenever a currently available machine becomes

¹⁴ Increased competition in the nonunion sector is particularly likely if the workers have skills unique to the industry.

cheaper or is improved so as to produce more output per dollar invested, or a new machine becomes available that produces output cheaper than can employees at their wage rate.

If a union successfully pressures a firm to increase wages without reducing the number of employee hours, the firm may not be operating at its cheapest combination of labor and machines. A union will want to prevent substitution of machines for employee hours unless output can be increased sufficiently so that although the ratio of machine hours to employee hours is higher, there is a net increase in employee hours.¹⁵

Unions seek to reduce or eliminate competition between employees and any input factor of production that will substitute for employees whom the union represents. There are many examples of input factors that substitute for employees: the automatic packager for the assembly line (reducing the number of production employees); the spray gun for paint (reducing the number of painters); and the factory-prefabricated boiler (reducing the number of pipefitters). Employees of a subcontractor are another alternative input factor of production. Other groups of the firm's employees may also be competing input factors of production.¹⁶

The employees and the union have a substantial interest in suppressing input factors because these factors directly affect employment levels. Although outlawing union suppression of input factors would not bar a union from organizing employees and bargaining for wage gains, in many instances the potential substitution of other input factors would put a ceiling on union gains.¹⁷ The impact of union suppression of input factors on the market for the firm's product is no different from the impact of union monopolization of the workers: each raises the cost of producing the product and tends to reduce industry output levels. In this sense, union suppression of input factors is no more "control of the product

¹⁵ This observation assumes that the union wants to maintain or increase the number of workers employed.

¹⁶ Competition between groups of employees often gives rise to jurisdictional disputes subject to special regulation under §§ 8(b) (4) (D) and 10(k) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(D), 160(k) (1976).

¹⁷ Unionization will be impossible in the rare case where an alternative input factor can so closely substitute for the firm's employees that *any* additional cost of those employees to the firm will cause the firm to substitute. Even the cost of negotiating with the union, or of a guarantee of discharge only for just cause, will precipitate such a substitution. The employees of a subcontractor may sometimes be such a substitute.

market" than is monopolization of the labor supply. Suppression of inputs, however, does affect the market for *other* firms' products in a more obvious way than does a monopolization of the labor supply. A union that blocks the purchase or rental of machines, of prefabricated inputs, or of a subcontractor's employees will be seen by the machine owner, prefabricator, or subcontractor as interfering with *his* product market.

C. *Attacks on Product-Market Competitors of Unionized Firms*

An industry's nonunion firms present a substantial threat to the industry's unionized firms. If a union-imposed wage bill increases the cost of production, the unionized firm will earn less profit than it could absent the union's intervention.¹⁸ A firm, therefore, often has an incentive to resist unionization and, once unionized, to seek to return to a nonunion status. The firm's current ownership of assets that cannot easily be sold or transferred to another industry may limit its opportunity to leave the industry for other investments. Ultimately, however, these impediments to the movement of capital will diminish. At the same time, opportunities in the industry's nonunion sector are enhanced by a rise in the price of the product and a decrease in the cost of labor. Because it enjoys a greater than average return on capital, the nonunion sector will draw more capital into the industry, driving down the product price and making the unionized sector's position more untenable. Consequently, a union has a considerable incentive to organize along product-market lines.

Once it organizes the entire industry, the union will want to prevent entry by nonunion firms. An entrant with lower costs made possible by a nonunion wage rate may price its output below that of its unionized product-market competitors and, unless its size makes it relatively insignificant, threaten union gains. Because the fortunes of unionized employees rise and fall with those of their employer,¹⁹ substantial competition from a nonunion firm with a

¹⁸ This conclusion assumes that purchasers will not pay more for a product or service because it is produced by union labor.

¹⁹ This analysis is not belied by the existence of union and nonunion firms apparently in competition in the same product or service line. Union and nonunion firms may have different regional product markets. In addition, a nonunion firm may incur considerable costs in preventing unionization, such as maintaining the same wage and benefit scales as its unionized competitors. Finally, firms in apparent competition may actually be producing goods or

lower wage bill directly threatens the effectiveness and even the continued existence of the union. The more direct the competition between firms, the greater is the threat to unions. Moreover, non-unionized firms that have any competitive advantages, including those gained other than by a reduced wage bill, threaten unionized employees.²⁰ Thus, the union has an incentive to prevent nonunion firms from competing.

When nonunion competition threatens unionized firms, the union has three predictable responses: (1) organize the nonunion firm; (2) pressure the nonunion firm to match the union's wage package with the unionized firms; or (3) force the nonunion firm out of the market. The first response protects the union's wage bill and increases its membership; the second insures that any competitive advantage to the nonunion firm does not come from a lower wage bill, but it does not protect the unionized firms from other competitive disadvantages; the third completely protects the unionized firms. The third response has the added benefit of permitting the union to concentrate on fewer firms when negotiating and administering bargaining agreements. Although the unionized firms benefit from each of the union responses, they benefit most from the third response, which tends to concentrate the market.²¹

D. Union Regulation of Prices and Outputs

Opportunities to regulate prices and outputs arise when a union represents the employees of firms that compete in the same product market. Employers in a competitive product market generally earn more if they form a cartel to restrict output and increase the price of the product.²² Establishing and maintaining a price-fixing cartel, however, requires a mechanism for the prevention of cheat-

services of unequal quality and purchasers may differentiate. A building constructed by union labor, for instance, may be of a higher quality than one constructed by nonunion labor.

²⁰ More enlightened management techniques, inventiveness, and specialized location are examples of efficiencies by which a nonunion firm may directly threaten a unionized firm and its employees.

²¹ Reducing the market to a single firm gives that firm monopoly power. Reducing the market to a few firms facilitates collusive pricing.

²² See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 211 (2d ed. 1977); Stigler, *A Theory of Oligopoly*, 72 *J. POL. ECON.* 44 (1964).

ing by cartel members²³ and a barrier to entry by potential competitors. Although a cartel would prefer to bar entry by all competitors and retain all the cartel profits, the best alternative is to limit entry to competitors that will observe the cartel agreement.²⁴

A union organized along product-market lines is a potential organizer and enforcer of an industry cartel.²⁵ At the very least, the union can serve as a messenger between firms by virtue of its legitimate role in dealing with each firm on matters central to the production process. Through multiemployer bargaining, employers can coordinate labor policy as well as discuss product prices and outputs. The union can prevent competition from firms that enjoy the advantages of nonunion wages by picketing, employee and consumer boycotts, and violence. These tools can also be used to bar entry and protect an employer price-fixing cartel.²⁶ The employers can compensate the union for facilitating and enforcing the cartel by increasing wages and benefits.

Union activities designed to build or enforce a cartel of firms in the product market present the strongest case for application of the antitrust laws to unions. Firms are prohibited from agreeing with one another to set prices and restrict output; such arrangements should not be permitted merely because a union is a party to the arrangement. In some instances, however, union involvement in such arrangements is difficult to distinguish from other, lawful union activities.

II. JUDICIAL TREATMENT OF LABOR ANTITRUST

A. *Early Application*

Shortly after the turn of the century, the Supreme Court held that the Sherman Act was applicable to labor unions.²⁷ By the

²³ A cartel member can gain greater profits by secretly violating the cartel agreement. See Stigler, *supra* note 22, at 46.

²⁴ Because supracompetitive profits are not infinite, a cartel can admit only a limited number of firms.

²⁵ See Winter, *supra* note 4, at 21.

²⁶ In particular, the union strike is a quick and often effective weapon to punish a firm caught violating the cartel agreement.

²⁷ *Loewe v. Lawlor (Danbury Hatters)*, 208 U.S. 274 (1908). The Court's short analysis hardly treats the issue as one in serious dispute:

The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show

1920's the labor movement was seriously threatened by antitrust liability.²⁸ The labor antitrust doctrines of that period have been superseded by subsequent legislation and court decisions, but two cases, the *Coronado* cases, still merit discussion because they illustrate one possible mode of labor antitrust analysis.

The United Mine Workers had used violence to shut down a coal mine in response to a management lockout and attempted nonunion operation. In *Coronado I*,²⁹ the evidence indicated that the union had a local motive for the shutdown.³⁰ Although the exclusion of the employer's coal from the product market might have affected supply and prices, the Court held that this local motive was insufficient to impose antitrust liability on the union.³¹ Evidence at a second trial, however, indicated that the union had viewed the company's nonunion coal production as a serious threat to unionized firms and therefore to union organization. Substantial competition from the nonunion coal would stiffen resistance to union organizing efforts and give unionized firms an incentive to oust the union. In *Coronado II*,³² the Court held that the newly proved union purpose was sufficient to establish antitrust liability. Noting that a successful strike reduces the flow of output into interstate commerce, the Court said this reduction of supply was "ordinarily an indirect and remote obstruction to that commerce."³³ The reduction in supply, however, when accompanied by a union intent "to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, . . . is a direct violation of the Anti-Trust Act."³⁴

The *Coronado* cases illustrate the shortcomings of two possible tests of union antitrust liability: a direct effect on the product

that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

Id. at 301. The issue should not have been so free of doubt. For a critical appraisal of this passage, see Winter, *supra* note 4, at 31-32. See also E. BERMAN, LABOR AND THE SHERMAN ACT 3-54, 81-87 (1930) (suggesting that the Sherman Act was not intended to cover unions and that this issue was inadequately presented to the Court in the *Danbury Hatters* case).

²⁸ See note 4 *supra*.

²⁹ *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922).

³⁰ *Id.* at 396-401.

³¹ *Id.* at 411.

³² *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925).

³³ *Id.* at 310.

³⁴ *Id.*

market test and a subjective intent test. The difficulty with a direct effect on the product market test is that it would make all union strikes illegal. A successful strike will always have a direct effect on the product market:³⁵ when a union strikes, it is attempting to use its control of the supply of workers to block production. The success of the strike will depend on whether production can be blocked until the union's demands are met.

The *Coronado* cases attempt to limit the scope of the product market effect test by making antitrust liability turn on whether the union's subjective intent was to extend its organization (a lawful goal) or to attack the product-market competitors of unionized firms (an unlawful goal). There are two difficulties with this distinction. First, although an increase in membership may be an end in itself for the union,³⁶ organizing efforts may also be motivated by a desire to protect current members from the increased resistance that unionized employers put up when their competitive position is threatened by nonunionized firms. Frequently, these motives will exist concurrently. If, as *Coronado II* suggests, the motive of eliminating competition from nonunion competitors is sufficient to impose antitrust liability, unions could be limited to organizing the employees of a single firm.³⁷ Second, the test is subject to the vagaries of evidence; liability will tend to turn on whether the union's lawyers have properly advised union officers as to what motives they should articulate.

This analysis suggests that the choice for purposes of the anti-trust law³⁸ is between always allowing union organizing activities such as strikes, picketing, and sit-ins, or never allowing them. But not all union actions taken against nonunion firms have organizing as their purpose. Had the union in the *Coronado* cases sought only to force the nonunion mines out of business—that is, had the nonunion firms been denied the option of ending the shutdown by un-

³⁵ In a perfectly competitive product market, however, the loss of the struck firm's output will not affect the market price of the product.

³⁶ The accomplishment of the union's social and political goals may be enhanced by an increase in membership. In addition, union officers may seek the satisfaction of leading greater numbers of workers.

³⁷ Regardless of whether this would produce a sound result, Congress has never opted for it.

³⁸ Labor statutes can, and do, regulate organizing activities with great particularity. See, e.g., § 8(b)(7) of the National Labor Relations Act, 29 U.S.C. § 158(h)(7) (1976).

ionizing—a different situation would have been presented. The union's purpose, objectively determined, would have been to enhance the unionized firms' product-market position,³⁹ presumably permitting greater profits to be earned which could be shared with the workers. This article argues later that this is properly made an antitrust violation;⁴⁰ for present purposes the point is that such a situation is distinguishable from union acts where the targeted firm can extricate itself by unionizing or perhaps by paying union wages.

B. Apex and Hutcheson

The development of modern Supreme Court labor antitrust principles began in 1940 with *Apex Hosiery Co. v. Leader*.⁴¹ A union had pursued its demands for a closed shop with a violent sit-down strike, stopping production. In addition, the union refused to permit the employer to ship existing goods to out-of-state customers. The Supreme Court reversed the lower court's finding of a Sherman Act violation. The Court reasoned that the Sherman Act only prohibits restraints on "commercial competition,"⁴² those market restraints aimed at monopolizing the supply, controlling the price, or allocating the distribution of commodities. Under this test, the union was not liable because it had been furthering its organizational goals in the labor market rather than acting on behalf of an employer to suppress competition. Furthermore, the Court recognized that a "combination of employees necessarily restrains competition among themselves in the sale of their services to the employer,"⁴³ but held that section 6 of the Clayton

³⁹ There has been one case, *Hunt v. Crumbach*, 325 U.S. 821 (1945), in which the union's motive was neither to organize nor to enhance the product-market position of a unionized firm. In *Hunt*, the union apparently sought revenge for the death of a union member, allegedly at the hands of an owner of the firm the union sought to force out of business. Such a motive has to be exceedingly rare, and it is of little significance whether antitrust liability attaches in such a case.

⁴⁰ See notes 124-25, 128 *infra* and accompanying text.

⁴¹ 310 U.S. 469 (1940).

⁴² *Id.* at 497, 499, 510-11.

⁴³ *Id.* at 502. The Court also stated:

[S]uccessful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-

Act⁴⁴ had adopted the common-law rule that such employee restraints were not illegal restraints of trade.⁴⁵ Thus, union monopolization of workers was not assimilated into the forbidden class of restraints on commercial competition even though, as the Court recognized, such monopolization affected the ability of some employers to compete and increased prices by eliminating wage competition.

There are thus two strands of *Apex* analysis. First, unions can violate the antitrust laws, but only when they fix prices, restrict output, divide marketing territories, or allocate customers—in short, when unions act as firms do when they violate the antitrust laws. Second, the Court relied on the Clayton Act⁴⁶ in holding that union monopolization of labor does not fall within the class of forbidden restraints.⁴⁷ When unions organize workers and bargain over wages they are insulated from liability even though these labor-market restraints affect prices and output; on the other hand, they commit substantive violations when they act to control prices, outputs, or customer allocations.⁴⁸

The *Apex* opinion formulates a principled test for determining whether union conduct violates the antitrust laws.⁴⁹ National labor

union made goods . . . , an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

Id. at 503-04.

⁴⁴ 15 U.S.C. § 17 (1976).

⁴⁵ 310 U.S. at 502-03.

⁴⁶ See note 3 *supra*.

⁴⁷ 310 U.S. at 502-03.

⁴⁸ See *id.* at 512.

⁴⁹ The Court's opinion was not entirely free from difficulty. In holding that the union had not violated the antitrust laws, the Court emphasized that the restraint "has not been shown to have any actual or intended effect on price or price competition." *Id.* at 504. See also *id.* at 501. In this context, there is a considerable difference between a restraint affecting prices and one intended to affect prices. The effect depends only on the success of the strike and on the market position of the struck employer. Read literally, the opinion might prevent a strike against a large manufacturer. Typically, a union does not use a strike or other economic weapon to influence product price. Such a use would suggest that the union has a purpose beyond bettering wages and working conditions through direct pressure against the employer. The Court may have been concerned that a union could impose a restraint to affect prices in a context where intent was difficult to prove; it thus did not want to preclude evidence of a price effect as relevant to the existence of a restraint on commercial competition. On the other hand, the Court may have been prepared to make a distinction between purpose and effect if a case required it; since no effect on prices was

policy—as expressed in the Wagner Act—permits unions to monopolize the labor supply and to standardize wages and working conditions. Consequently, even without the express exemption in the Clayton Act,⁵⁰ it would be inappropriate to subject union labor-market restraints to antitrust liability. It would be equally inappropriate, however, to hold that unions could never be defendants in antitrust suits. National labor policy nowhere directs that when a union assists, or even coerces, a firm to engage in an act that would otherwise be an illegal price, output, or market-share fix, or an illegal monopolization, the firm or the union is sheltered from antitrust liability. The *Apex* “commercial competition” test expresses this distinction: unions are immunized from antitrust liability when they restrain the labor market, but they are subject to antitrust liability when they join with firms to restrain the commercial market.

One might argue that the commercial competition test is too narrow, that other union-imposed restraints so affect the efficient production or marketing of goods that they should be held to violate the antitrust laws. This argument fails to recognize that by means of the comprehensive labor regulatory statutes Congress has limited—to the degree it wishes—the ability of unions to restrain the labor market. Because the labor statutes do not regulate union restraints on commercial competition, subjecting such restraints to antitrust liability does not interfere with national labor policy. However, using the antitrust statutes to limit union restraints on the labor market on the ground that those restraints affect the efficient functioning of business markets does interfere with national labor policy. Such limitations on union power are properly found, if they are found at all, in the labor statutes.⁵¹

shown in *Apex*, the first step was to rely on the absence of both.

The *Apex* opinion discussed but neither approved nor disapproved of earlier cases condemning secondary boycotts. See *id.* at 505-07. Those cases had condemned secondary boycotts because they “were directed at control of the market and were so widespread as substantially to affect it.” *Id.* at 506. As discussed below, however, both a primary strike and a secondary boycott are targeted at output and have organizational or wage goals. See notes 60-61 *infra* and accompanying text. Query whether *Apex* should be decided differently on the antitrust issue if the union’s sit-down strike was unsuccessful but the union successfully persuaded railroad clerks and teamster drivers not to handle the *Apex* Company’s goods.

⁵⁰ 15 U.S.C. § 17 (1976).

⁵¹ An alternative would be some form of balancing test. A balancing test, however, is neither consistent with the congressional design nor sound as a matter of policy. See notes

Unfortunately, the Court interrupted its development of the *Apex* principles in *United States v. Hutcheson*,⁵² which involved a nationwide jurisdictional dispute between the Carpenters' and the Machinists' unions. Pursuing its jurisdictional objective, the Carpenters struck and picketed the Anheuser-Busch brewing company, picketed another company located next to Anheuser-Busch on land leased from Anheuser-Busch, and asked union members and their friends for a national boycott of Anheuser-Busch beer. Officers of the Carpenters were charged with a criminal violation of the Sherman Act.⁵³

The Court, with Justice Frankfurter writing for the majority, found no violation. It first rejected the Government's argument that strikes growing out of jurisdictional disputes are Sherman Act violations:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.⁵⁴

The Court then considered whether the picketing of Anheuser-Busch and its tenant and the call for a consumer boycott fell within the immunity granted to labor unions by section 20 of the Clayton Act. The Court reasoned that this conduct was lawful unless the enlistment of employees of other employers made it a violation. The Court found the conduct within an antitrust immunity⁵⁵ by reading the Norris-LaGuardia Act's definition of a labor dispute, which applies "regardless of whether or not the disputants stand in the proximate relation of employer and employee,"⁵⁶ into the Clayton Act. In the Court's view, the Sherman, Clayton, and Norris-LaGuardia Acts, read together, provided "a harmonizing text of outlawry of labor conduct."⁵⁷

113-14 *infra* and accompanying text.

⁵² 312 U.S. 219 (1941).

⁵³ *Id.* at 220.

⁵⁴ *Id.* at 232 (footnote omitted).

⁵⁵ *Id.* at 232-37.

⁵⁶ 29 U.S.C. § 113(c) (1976).

⁵⁷ 312 U.S. at 231. The Court's interpretation was controversial because by its terms the Norris-LaGuardia Act only restricts the power of the federal courts to grant injunctive

Hutcheson is significant because it immunized calls for secondary employee boycotts and national consumer boycotts. Perhaps its greater significance is its creation of the term "immunity." By deciding the case on this basis, the Court never reached the substantive liability issue.⁵⁸ *Hutcheson* did not involve an agreement between a union and a firm, and the Court did not indicate whether the antitrust outcome changes when an employer becomes a willing or unwilling party to a union's restraint. The Court shed no light on the issues likely to arise as collective bargaining became the cornerstone of labor relations. The opinion alluded to these issues only cryptically when it declared an immunity "[s]o long as a union . . . does not combine with non-labor groups."⁵⁹ Although later Court decisions have concentrated on the immunity issue, its scope is too narrow to supplant the commercial competition test of *Apex*.

The reasoning of *Apex* suggests a broader ground that the *Hutcheson* Court could have used to guide future development. Such an approach would be based on the nature of the union activity. In normal industrial relations contexts,⁶⁰ unions are limited in the ways in which they can act: strikes, picketing, calls for boycotts, and collective bargaining are the only activities available. The ultimate goals of unions are also limited: better wages, hours, and working conditions for their members and, usually, increased membership. Unless all union activity is to be characterized as lawful, or unlawful, the antitrust liability of unions cannot be determined by examining either the immediate acts of unions or their underlying goals. Between the immediate acts of a union and its goal, however, lie a variety of intermediate tactical objectives. For example, one union pickets a firm employing union members with the plan of forcing a wage increase through a disruption of the firm's business. The disruption may come from the withdrawal of enough of the firm's employees so that production is halted, or by a loss of customers or suppliers with a similar result. Another union pickets a firm employing its members to force that employer to join with other firms also employing the union's members to set

relief.

⁵⁸ The *Apex* commercial competition test was not mentioned.

⁵⁹ 312 U.S. at 232.

⁶⁰ For example, industrial relations do not include legislative lobbying.

a common price and to restrict product output. The union hopes to accomplish a wage increase by sharing in the firms' monopoly profits.

The two examples are qualitatively different not in acts (picketing) or goals (higher wages), but in the respective intermediate tactical objectives, or strategies, of the two unions. The first union could be said to have confined itself to the labor market; the second union has not. *Apex* suggests that at this level of analysis union tactical objectives⁶¹ may be distinguished for antitrust purposes. When the union's tactical objective has been to fix prices, restrict output, or allocate market shares—to restrain commercial competition—the union has violated the antitrust laws, and no immunity attaches.

If the antitrust laws condemned only those tactical objectives that restrain commercial competition, while the immunity protected unions only when they restrained labor-market competition, the commercial competition test for substantive liability and labor's immunity would be opposite sides of the same coin. This would not be the case, however, if the Norris-LaGuardia Act immunized some tactical objectives that would otherwise be illegal restraints on commercial competition. Whether the Court was so holding in *Hutcheson* depends on the analysis of two issues. The first is whether a secondary employee or consumer boycott necessarily restrains commercial competition. This article argues that it does not, because it differs qualitatively from business boycotts designed to fix product prices or allocate markets.⁶² The second issue is whether a secondary boycott is a substantive antitrust violation when the boycott is used to force an employer to restrain commercial competition by, for example, joining a price-fixing cartel. This is the critical question with respect to secondary boycotts after *Hutcheson*, for that case could mean that every secondary boycott falls within the immunity regardless of what response it seeks from the targeted firm, or that a secondary boycott is unlawful if it is a tactic in a scheme to suppress commercial competition.

⁶¹ For convenience, the word "intermediate" has been dropped.

⁶² See notes 137-67 *infra* and accompanying text.

C. Allen Bradley

The next major Supreme Court labor antitrust case presented a severe test of the labor antitrust immunity. In *Allen Bradley Co. v. Local No. 3, IBEW*,⁶³ a New York City local union representing electrical workers secured closed shop agreements with city electrical contractors by picketing and boycotts. The contractors agreed to purchase electrical equipment only from city manufacturers who employed Local 3 members, and the manufacturers agreed to sell equipment locally only to contractors who employed Local 3 members. Prices of equipment were inflated by common agreement and construction bids were rigged. The union and representatives of the manufacturers and contractors policed the scheme. Electrical equipment manufacturers who were located outside New York City and excluded from the New York City market brought suit against Local 3. The Court found a Sherman Act violation.

The scheme in *Allen Bradley* reflects the economic incentives firms have to control prices and outputs through the use of cartel arrangements. In general, a firm earning only a normal profit because of competition can benefit from an enforceable agreement with competitors to fix prices and outputs. The effectiveness of the resulting cartel requires a mechanism for ensuring compliance and a barrier to entry by noncartel firms. If compliance is not policed, each cartel member has an incentive to cheat. Indeed, the best position is that of a single competitor not subject to the cartel rules; such a firm can undercut cartel prices only slightly and capture an extra share of the supracompetitive profit. Because a cartel fixes prices higher than a competitive market would yield, outsiders have an incentive to enter the market. Thus, for the same reason that the cartel must be policed, outsiders must be excluded. In *Allen Bradley*, the employers fixed prices at both the manufacturing and construction levels. The union created the necessary barrier to entry by excluding non-Local 3 contractors from city construction through strikes, picketing, and boycotts. By raising this barrier to outside contractors and by refusing to allow its own contractors to install non-Local 3 manufactured electrical equipment, the union extended the barrier to protect Local 3's equipment manufacturers.

⁶³ 325 U.S. 797 (1945).

That some firms acquiesced only after union coercion is not inconsistent with the presumption of supracompetitive profits for the cartel. Those firms may have sought the advantage of being the only competitor (or one of the very few) not subject to cartel rules; although this would eventually break up the cartel, it might be profitable over the short run. Moreover, in the worst position is a firm that adheres to the restrictions of an inadequately policed cartel. The reluctant firms might have been unsure of the union's ability to establish and police the cartel.

The analysis would not be changed had the union individually approached each manufacturing and construction firm and signed separate but identical agreements. To establish a cartel, competitors can deal directly or they can hire an agent. Local 3 was no less an agent because it was a union. Nor is the analysis altered because, as apparently was the case in *Allen Bradley*, the agent was also the instigator of the cartel scheme.

Viewed from the employer's perspective, the *Allen Bradley* arrangement had all the benefits of a price-fixing, market-sharing cartel. It is less clear what benefit Local 3 and its members derived from the cartel, although as the actuating party in the cartel, the union presumably was benefited.⁶⁴ Perhaps the union used the scheme to organize New York City manufacturers. The trial court findings reveal that Local 3 had not done well for the employees of the city manufacturers prior to this time.⁶⁵ The inducement of the cartel arrangement may have lowered the manufacturers' resistance to the use of Local 3 labor. The cartel may also have helped Local 3 raise barriers to non-Local 3 electrical equipment; because cartel contractors agreed to use only equipment manufactured in the city by Local 3 members, the manufacturers could assist Local 3 in discovering possible cheaters.⁶⁶

⁶⁴ For the findings of the court-appointed master, see *Allen Bradley Co. v. Local No. 3, IBEW*, 41 F. Supp. 727, 738-41 (S.D.N.Y. 1941).

⁶⁵ *Id.* at 730-31.

⁶⁶ Local 3 may have had difficulty discovering whether equipment being installed in the city was manufactured by city firms using Local 3 members. Local 3 would have encountered this difficulty if some equipment made by its members did not carry a union label, or if individual union members were persuaded by their employers not to report the installation of equipment forbidden by the bargaining agreement. Under a cartel arrangement, city manufacturers could report sales to a suspected contractor; if there were none, it stood to reason that he was using non-Local 3 equipment.

If Local 3 could have excluded non-Local 3 contractors, it may not have needed the firms'

The Court began its analysis by stating the issue with precision: “[D]o labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which [the Sherman] Act prohibits[?]”⁶⁷ A substantive antitrust violation—a restraint on commercial competition—was obvious, and the Court did not elaborate the point. The crucial issue was whether the agreement was immunized. The Court held that it was not, but its reasoning was somewhat unclear:

It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act [citing *Apex Hosiery Co. v. Leader*]. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.⁶⁸

The difficulty with this passage is that a union only acts alone when it is *attempting* to force some action upon an employer; for example, employer action is necessary to secure a wage increase or a commitment to install only union-made goods. Therefore, every instance of a union successfully acting alone will culminate in an “agreement,” express or implied, with a firm. When the Court said that “had the union acted alone, it might have added to the cost of goods,” it cannot have meant that literally. Similarly, “individual refusals of all [Local 3] employers to buy electrical equipment not

participation in a cartel to maximize wages and hours. A complete monopoly in the labor market and a barrier to entry by other firms would have permitted Local 3 to raise wages, and it would presumably have done so up to that point at which a reduction in demand for construction in the city made further increases unwise. There would be an incentive, however, for contractors and manufacturers to cheat on the collective bargaining agreements. On the other hand, the existence of the cartel and the opportunity to capture supracompetitive profits might diminish the firms’ interest in cheating on the wages and hours provisions of the collective bargaining agreement. Cheating would not only mean union unrest, but also ouster from the cartel and the loss of supracompetitive profits.

⁶⁷ 325 U.S. at 801.

⁶⁸ *Id.* at 809.

made by Local No. 3" cannot result from the union "acting alone." The Court may have meant that a union acts alone when it coerces from an employer an agreement that yields no price-fixing, output-restricting, or market-allocating restraint and, conversely, that a union does not act alone when it reaches an agreement with an employer that does result in such a restraint. This analysis would make the immunity and substantive liability issues identical. The sole inquiry would be whether the union had engaged in price fixing, output restrictions, or market allocations. An alternative interpretation of *Allen Bradley*, however, limits the scope of the *Hutcherson* immunity: the immunity applies only to truly unilateral union activity, such as a strike or boycott. Once an agreement with an employer is reached, it is scrutinized under the *Apex* commercial competition test.⁶⁹

In any event, union antitrust liability in *Allen Bradley* clearly depended on the existence of a restraint on commercial competition. Because the restraint on commercial competition was obvious, the Court did not need to emphasize it. Nonetheless, its significance should not be overlooked. It is hard to imagine a true price-fixing or market-allocating restraint where the firm does not gain an economic advantage in the product market.⁷⁰ In determining union antitrust liability, such a restraint on commercial competition should be distinguished from a labor-market restraint that benefits unionized employees but not the firms employing them.

D. Pennington and Jewel Tea

After twenty years of relative quiet, in 1965, two major labor an-

⁶⁹ The Court eventually adopted a similar analysis in *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). See notes 135-36 *infra* and accompanying text.

⁷⁰ Of course, the union could demand that the entire supracompetitive profit be paid to its members in the form of wages. The firm would then serve as a conduit, but there nevertheless would be a restraint on commercial competition.

Another possibility is that the union would prefer a small number of large unionized firms to a large number of smaller firms because it would reduce the costs of negotiating and policing collective bargaining agreements. The union would thus attack all but a few favored union firms. This seems unlikely, however; for example, if existing unionized firms were attacked, the union would have to ensure that the employees whose jobs were lost as a result of the attack were also the employees hired by the favored unionized firms. It is more plausible that the union's purpose is to enhance the product-market position of the surviving firms.

titrust cases, *UMW v. Pennington*⁷¹ and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,⁷² deeply divided the Supreme Court. *Pennington* grew out of efforts in the coal mining industry to solve difficult tradeoffs between mine mechanization, oversupply of coal, and employment levels. At issue was an agreement between the UMW and a multiemployer bargaining group of large mine owners. In economic terms, the UMW had agreed that these employers could substitute one input factor of production (mechanized equipment) for another (miners' hours) and had been compensated with higher wages for the remaining miners. A smaller coal company, Phillips Brothers, alleged that the UMW and the large coal companies, recognizing that the smaller companies did not have the capital to substitute machines for labor, had also agreed that the UMW would impose the higher wage rate on all employers in an effort to drive the smaller companies from the market, thereby reducing the oversupply of coal and increasing its price.⁷³

The Court,⁷⁴ in an opinion delivered by Justice White, held that Phillips Brothers had alleged an antitrust violation. Justice White's decision to impose antitrust liability on the union followed a three-step analysis. The threshold issue was whether the union had accomplished its restraint by acting alone; if so, the *Hutcherson* immunity applied. Justice White held that the union had not acted alone because the restraint was embodied in an agreement

⁷¹ 381 U.S. 657 (1965).

⁷² 381 U.S. 676 (1965).

⁷³ Phillips Brothers also alleged that the UMW and the large companies had agreed on other devices to drive the small companies out of business. These included agreements by the companies not to lease coal lands to nonunion operators, not to buy coal from or sell coal for those operators, and to seek from the Secretary of Labor the establishment of a minimum wage for employees of operators selling coal to the TVA. See 381 U.S. at 660.

The Court disallowed a jury verdict in favor of Phillips Brothers, *id.* at 669-70, on the ground that the admission of evidence relating to the appeal to the Secretary of Labor was inconsistent with *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). *Noerr* held that efforts to influence public officials cannot violate the antitrust laws even though those efforts are intended to restrain competition.

⁷⁴ Each of the three opinions written in the case gained the adherence of three Justices. Justice White's opinion is designated the "Opinion of the Court." The opinion of Justice Douglas differs from Justice White's on the critical question whether predatory intent is required in these circumstances to establish a violation. Justice Goldberg concurred in the reversal but dissented from Justice White's reasoning in an opinion joined by two other Justices and written for both *Pennington* and the companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

between the union and a multiemployer bargaining group.⁷⁵ The second issue, whether the restraint was of a kind forbidden by the antitrust laws, was also resolved against the union.⁷⁶ Analogizing to an agreement between a union and a group of competing firms to set product prices or to drive competitors from the market,⁷⁷ Justice White was unpersuaded that the agreement was distinguishable because its subject matter was wages. A union and a multiemployer bargaining group can lawfully agree on wages, and the union can seek the same terms from other employers, but the union cannot "[agree] with one set of employers to impose a certain wage scale on other bargaining units."⁷⁸ The third and final issue was whether any consideration of national labor policy required that the immunity apply notwithstanding the resolution of the first two issues. It did not, according to Justice White, because national labor policy requires that collective bargaining be on a unit-by-unit basis and that the union's retention of its freedom of action best serves members' interests.⁷⁹

Justice White's analytical framework in *Pennington* is generally consistent with *Apex* and *Hutcheson*. The threshold inquiry, whether the union acts alone, derives from *Hutcheson*'s construction of the Clayton and Norris-LaGuardia Acts. If the union fails to gain this immunity, the inquiry turns on whether it has restrained commercial competition by fixing prices, output, or market allocations. Having found such a restraint in the allegations in *Pennington*, Justice White considered whether national labor policy might nevertheless immunize the restraint from antitrust liability. This final inquiry represents an expansion of the analytical framework previously developed in *Apex* and *Hutcheson*. The *Apex* and *Hutcheson* Courts looked no further than the cryptic provisions of the Clayton and Norris-LaGuardia antitrust statutes. Far more significant, however, is the Wagner Act, which gives workers a right to unionize and bargain with employers to improve conditions in the workplace. By necessary implication, the more comprehensive federal labor policy of the Wagner Act establishes a

⁷⁵ See 381 U.S. at 661-63.

⁷⁶ See *id.* at 664, 668-69.

⁷⁷ See *id.* at 663.

⁷⁸ *Id.* at 665.

⁷⁹ *Id.* at 666.

labor immunity of greater reach and specificity than the immunity found within the antitrust statutes.⁸⁰ Neither *Apex*, *Hutcheson*, nor *Allen Bradley* acknowledged this, although it would have changed the result in none of those cases. In *Pennington*, Justice White acknowledged the impact of the labor statutes, but this recognition almost escaped notice because the Justice nowhere indicated that he was breaking new ground.

The significance of Justice White's addition to the analytical framework for deciding labor antitrust cases was also obscured by his controversial handling of the issues within that framework. He held that national labor policy offers no protection for a union agreement with one set of employers to impose a wage scale on another.

On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being straight-jacketed by some prior agreement with the favored employers.

. . . [T]he employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.⁸¹

This passage states three reasons why national labor policy does not protect the bargaining agreement challenged in *Pennington*. The first, that national labor policy requires a union to bargain on a unit-by-unit basis, is grounded in sections 8(b)(3) and 8(d) of the National Labor Relations Act,⁸² which mandate that a union bargain in good faith. A union with a preexisting, binding commitment to impose a wage rate on a firm cannot in good faith enter into negotiations.⁸³ The second and third reasons, however, that

⁸⁰ Although the labor provisions of the Clayton Act are susceptible of broad interpretation, they were given a narrow reading by the Supreme Court. See note 3 *supra*.

⁸¹ 381 U.S. at 666-67.

⁸² 29 U.S.C. § 158(b)(3), (d) (1976).

⁸³ It is not clear, however, that the National Labor Relations Board has adopted Justice White's view. See *Dolly Madison Indus., Inc.*, 182 N.L.R.B. 1037 (1970) (most-favored-na-

the union has misperceived its members' best interest and that the employer's interest is solely "competitive," do not follow from the first and may be incorrect.⁸⁴

In putting aside the employer's interest as "competitive" and thus unsupported by collective bargaining policies, Justice White failed to discuss the fact that an employer pressured by a union for a wage increase must consider the effect of the wage increase on his costs, the effect of a price rise on product demand, and whether his competitors will face the same costs.⁸⁵ The union's inability to assure the employer that his unionized competitors will undergo the same increase in production costs may limit the wage increase that the union can realistically seek. Thus, the employer is concerned both with remaining "competitive" and with regulating his own labor relations.

The dual nature of the employer interest in *Pennington* calls into question Justice White's conclusion that, unless immunized by labor policy, the agreement to impose a uniform wage rate violates antitrust policy "without regard to predatory intention or effect in a particular case."⁸⁶ Such an agreement is likely to have tactical objectives other than restraining commercial competition. A union might use high wage demands to reduce the number of firms in an industry in order to permit the remaining firms to earn supracompetitive profits or to reduce the costs of bargaining and administering the agreement.⁸⁷ The same vigorous imposition of an industry-

tion clause a mandatory subject of bargaining in the absence of predatory intent).

⁸⁴ A union is often faced with conflicting, interdependent interests between groups of its members. For example, a wage increase for one group of a firm's employees may foreclose a wage increase for another group. In *Pennington*, the interests of employees working at small mines were allegedly sacrificed for those of employees working at the large mines. Justice White may have meant that national labor policy demands that a union refrain from sacrificing the interests of the employees at one firm in favor of the employees at another firm, and that consequently the alleged agreement was not in the members' "best interests." The existence of two or more firms, however, should not necessarily determine this point. A similar conflict in members' interests is presented when a firm demands that the bargaining agreement permit the use of new equipment that will reduce its demand for labor, and offers to compensate by raising the wages of the remaining employees. A union that only wished to maximize its membership would resist the employer's demand. Based on the allegations of *Pennington*, however, the UMW chose to permit mechanization and employee layoffs so that the remaining members would share in the resulting savings.

⁸⁵ Justice Goldberg's dissenting opinion raised some of these considerations. See 381 U.S. at 714-16. See also Meltzer, *supra* note 4, at 716-17.

⁸⁶ 381 U.S. at 668.

⁸⁷ Such a strategy, however, is likely to create pressures for a reduction in employment,

wide wage rate, however, may simply represent the imposition of wage equality, a labor-market restraint protected by national labor policy.⁸⁸ Although wage equality, like all labor-market restraints, may affect prices and outputs, standing alone it is not a restraint on commercial competition. In sum, the imposition of an industry-wide wage rate is an inherently ambiguous action.⁸⁹ Only "predatory intention" distinguishes the lawful tactical objective from the unlawful.

A union should not be held to violate the antitrust laws simply because it agrees to impose a uniform wage rate on all employers.⁹⁰ Rather, a court should look at other evidence to determine whether the union is participating in a scheme to restrain commercial competition.⁹¹ In *Pennington*, it was alleged that the imposition of a uniform wage rate was the first step in an industry plan to reduce output and increase prices. If so, evidence of the plan—the "predatory intention"—should have become available as it was carried out. For instance, the alleged scheme in *Pennington* might well have evolved into an *Allen Bradley* conspiracy in which the UMW policed the cartel to insure that the production of coal was limited.⁹² Antitrust liability should turn on evidence of such activi-

for monopolists tend to reduce output. Moreover, if the industry requires specialized employees, product-market monopoly may create monopsony power in the labor market, a further incentive to reduced employment.

⁸⁸ Section 1 of the National Labor Relations Act speaks of eliminating practices that prevent "the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. § 151 (1976).

⁸⁹ Moreover, it is virtually inevitable that the bargaining process will include at least some discussion of whether the union intends to demand a uniform wage rate from all employers. Frequently, it may be difficult to determine whether a union has unilaterally decided to impose a uniform wage rate, which was described as lawful by Justice White, or whether it has "agreed" with an employer to impose a uniform wage rate.

⁹⁰ Although an agreement with one firm to impose a wage rate on another firm may violate the duty to bargain in good faith, *but see* note 83 *supra* and accompanying text, it does not follow that antitrust liability should be imposed on the union. *See* notes 158-59 *infra* and accompanying text.

⁹¹ The smaller companies that cannot afford to pay the higher wage suffer the same effect—exclusion from the market—regardless of whether the union is unilaterally attempting to standardize wages or is conspiring with other firms to reduce industry output and earn supracompetitive profits. *See* Meltzer, *supra* note 4, at 689-91.

⁹² Driving the smaller companies out of business would not insure that coal production was limited. The remaining coal companies would have to agree to limit production; this agreement would have to be policed, lest some companies cheat by increasing production. Furthermore, new companies would have to be barred from the market.

ties,⁹³ not solely on evidence that the union has agreed to impose a uniform wage rate.

In practical impact, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,⁹⁴ the companion case to *Pennington*, is more significant because similar fact situations arise more often in collective bargaining. Justice White's opinion has had the greatest impact, although he spoke only for himself and two other Justices.⁹⁵ In 1957, a multiemployer bargaining group of 9,000 Chicago retailers of fresh meat signed a bargaining agreement with seven unions representing virtually all the butchers in the Chicago area. The agreement included the following provision: "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."⁹⁶

Jewel Tea, another retailer, signed an identical agreement under the duress of a union vote to strike and then sued to invalidate the clause as a Sherman Act violation. Jewel Tea alleged that one

⁹³ Justice Douglas, writing for himself and two others, concurred in a separate opinion. The operative language comprises two sentences:

First. On the new trial the jury should be instructed that if there were 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 participated in the arrangement with the union should be found to have violated the antitrust laws.

Second. An industry-wide agreement containing those features is prima facie evidence of a violation.

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

The difficulty with the first element of this test is that a uniform wage scale will usually reduce employment in the industry by increasing the costs of workers. When uniformity is extended across an industry, some firms may be put out of business by the increased costs. Thus, a wage scale beyond "the financial ability of some operators to pay" should not be evidence of predatory intent. Moreover, determination of ability to pay may be very difficult in a given case. The second element mentioned, a purpose of forcing some employers out of business, seems the critical inquiry, yet Justice Douglas fails to define it adequately. It is not clear how such a "purpose" can ever be said to be "contained in" an agreement—certainly not by express language. Moreover, if an excessive clause and an illicit purpose make out an antitrust violation, calling them "prima facie evidence of a violation" does not advance the analysis. Finally, Justice Douglas did not indicate what evidence, if any, would rebut the prima facie case.

⁹⁴ 381 U.S. 676 (1965).

⁹⁵ Unlike *Pennington*, in which Justice White delivered the "Opinion of the Court," see note 74 *supra*, in *Jewel Tea* there is no opinion of the Court, and the division among the Justices is fundamental.

⁹⁶ 381 U.S. at 679-80.

group of the retailers had favored the clause and had conspired with the union to have it imposed upon other retailers. After trial, the district court⁹⁷ ruled that no evidence supported Jewel Tea's allegation that employers in the multiemployer group had conspired with the union to impose the marketing-hours restriction on Jewel Tea. The trial court also found that a removal of the marketing-hours limitation would lead either to longer hours and night work for butchers or the loss of butchers' work to other employees. The court held that the challenged bargaining agreement clause fell within the labor immunity to the antitrust laws and dismissed the complaint. The United States Court of Appeals for the Seventh Circuit reversed,⁹⁸ and the Supreme Court granted certiorari on the issue of whether the marketing-hours restraint deserved the immunity.⁹⁹

Before examining the opinions of the Supreme Court, it is useful to define the issues in terms of the analytical framework developed in *Apex* and *Hutcheson*. The threshold issue—was the union acting alone—is easily decided. Whether the union's agreement with the multiemployer group or its agreement with Jewel Tea is the focus, the union had not acted alone, even though it had concededly acted in its self-interest. Whether the challenged clause restrained commercial competition is a more difficult question. The product market in the sales of meat to consumers includes the price of the meat, where it is sold, and when it is sold. The form of the agreement, therefore, was cast in terms of the product market.¹⁰⁰ It should be contrasted with a clause guaranteeing that no

⁹⁷ *Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters*, 215 F. Supp. 839 (N.D. Ill. 1963), *rev'd sub nom. Jewel Tea Co. v. Associated Food Retailers*, 331 F.2d 547 (7th Cir. 1964), *rev'd sub nom. Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters*, 381 U.S. 676 (1965).

⁹⁸ *Jewel Tea Co. v. Associated Food Retailers*, 331 F.2d 547 (7th Cir. 1964), *rev'd sub nom. Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters*, 381 U.S. 676 (1965).

⁹⁹ 381 U.S. at 684 n.3. The Court also granted certiorari on the question whether a Sherman Act claim falling within the regulatory scope of the National Labor Relations Act was within the NLRB's primary jurisdiction. *Id.*

¹⁰⁰ A marketing-hours clause between a union and a *single* firm would not present the same antitrust issues. If the union represents only one firm's employees, the union and the firm constitute a single economic unit. Certain kinds of practices engaged in by a single economic unit, such as tying or discriminatory pricing, may violate the antitrust laws, but not because they result from a forbidden agreement within the firm. *See generally* L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 323-29 (1977). An agreement between a firm's president and its sales manager to set product prices does not violate the Sherman Act. A

union butchers would work in the evening hours and that no other employees would perform butchers' work, a clause that might have prevented the stores from marketing meat in the evening, but that would have been cast in terms of the labor market. While the latter is a labor-market restraint, the former appears to be a restraint on commercial competition.

A consideration that complicates the question whether the challenged clause in *Jewel Tea* was a restraint on commercial competition is whether the firms—Jewel Tea or those in the multiemployer group—received a benefit from the clause. One possibility is that some firms in the multiemployer group would have found it financially difficult to automate meat sales and compete in the evening hours. A bar to all meat sales would result in some customers switching to other products, such as restaurant meals. Many customers, however, would assume the inconvenience of meat shopping during the day. The nonautomated firms might have concluded that, rather than have purchasers patronize their automated competitors in the evening, they preferred to bear their proportional share of the overall reduction in demand. Preventing night sales by automated competitors is not related to union demands in the labor market. Thus the interest of the nonautomated firms in preventing night meat sales by their competitors would result from the interaction of the butchers' refusal to work at night and the firms' own inability to automate. This is distinguishable from a firm's interest in seeing that a wage increase forced upon it is also forced on its competitors.¹⁰¹

Justice White's analysis in *Jewel Tea* departed considerably from conventional analysis. He opened his opinion on the immu-

different situation would be presented, however, were the sales manager to fill that position for several firms simultaneously. Similarly, it is the multiplicity of employers in *Jewel Tea* that raises the antitrust issues. As the discussion of *Allen Bradley* illustrates, a union may be the actuating and enforcing party to an agreement between businessmen fixing prices or, for that matter, operating hours. The suspect agreements in *Jewel Tea* should have been the agreement with the multiemployer group and the parallel agreement forced on Jewel Tea. For these purposes, whether Jewel Tea was a formal member of the multiemployer group when it signed the agreement would be insignificant.

¹⁰¹ The unions might have been sympathetic to the situation of the nonautomated firms. While a transfer of sales from nonautomated to automated stores might not change the total number of butchers employed, it would require union members to change employers—a dislocation they might wish to avoid.

nity issue¹⁰² by emphasizing "that this case comes to us stripped of any claim of union-employer conspiracy."¹⁰³ The unions' agreement with Jewel Tea came "not as a result of a bargain between the unions and some employers directed against other employers."¹⁰⁴ Distinguishing sharply between the issue of loss of the immunity and the issue of Sherman Act liability, Justice White set the framework for the immunity discussion: "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy."¹⁰⁵ Contrasting a bargaining agreement setting wages, hours, and working conditions with a hypothetical agreement establishing a schedule of product prices (and noting that the latter was a nonmandatory subject of bargaining under the National Labor Relations Act), he stated that

if the unions had made such a demand [to establish a price schedule and] Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be.¹⁰⁶

Having set up the wage and prices dichotomy, he stated the issue on which the exemption turned:

Thus, the issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor 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.¹⁰⁷

The accompanying footnote reads in part: "The crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but

¹⁰² Justice White first disposed of the argument that the doctrine of primary jurisdiction requires the federal courts to abstain in favor of the National Labor Relations Board in such a case. See 381 U.S. at 684-88. The Court unanimously rejected that argument.

¹⁰³ *Id.* at 688.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 689.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 689-90.

its relative impact on the product market and the interests of union members."¹⁰⁸

Having thus established both his test for the immunity and the legitimate interest of employees in particular hours of work, Justice White turned to the clause attacked by *Jewel Tea*. *Jewel Tea* argued that the bargaining agreement clause prohibiting night sales of meat was more restrictive than was necessary to protect employees from encroachment on their work jurisdiction by other employees and from the increase in daytime workload that night-time meat sales would entail. Those interests, argued *Jewel Tea*, could be protected by clauses directly regulating work jurisdiction and workload; they did not require that night meat sales be banned. Justice White accepted the argument but rejected its factual premises. He held that a union fashioning a restraint to protect its legitimate interest, but which also affects the product market, must adopt the restraint that is the least restrictive in the product market. Otherwise, the immunity is lost. Since the trial court had found that night operations without butchers and without impairment of butchers' interests were not feasible, the unions in this case had adopted the least restrictive alternative restraint and were entitled to immunity from the antitrust laws.¹⁰⁹

Justice White's analysis was a troubling departure from the traditional framework of Supreme Court labor antitrust analysis. Emphasizing that *Jewel Tea* comes "stripped of any claim of union-employer conspiracy" probably means only that *Jewel Tea* is not a *Pennington* case—a case in which the union explicitly agreed with one set of employers to impose a restriction on another employer. That interpretation is somewhat undercut, however, by

¹⁰⁸ *Id.* at 690 n.5.

¹⁰⁹ If it were true that self-service markets could actually operate without butchers, at least for a few hours after 6 p.m., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased, *Jewel's* position would have considerable merit. For then the obvious restraint on the product market—the exclusion of self-service stores from the evening market for meat—would stand alone, unmitigated and unjustified by the vital interests of union butchers which are relied upon in this case. In such event the limitation imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether there would be a violation of §§ 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved.

Id. at 692-93.

the statement that an agreement between a single employer and a union representing his employees is not necessarily immune from the antitrust laws. This should not be taken at face value, for a union representing the employees of a single employer should not be subject to antitrust liability irrespective of the content of the bargaining agreement. Although it was the multiplicity of employers in *Jewel Tea* that gave rise to the antitrust issue, the opinion focused exclusively on the agreement between Jewel Tea and the unions as the arguable reason for lifting the unions' immunity. Because Jewel Tea was an unwilling signatory to the clause, one whose competitive position in the product market was damaged by the agreement, and the plaintiff in the Sherman Act suit, this focus is difficult to understand.

The district court found that the evidence at trial did not show a conspiracy between the unions and the multiemployer group to force the clause on Jewel Tea.¹¹⁰ Justice White altered his analysis accordingly. It is questionable, however, whether direct evidence of such an agreement should have been required. Once the multiemployer group had accepted the marketing-hours clause, mere protection of their product-market position from disproportionate labor costs required that they be vitally interested in whether Jewel Tea was to be the only firm in Chicago to sell meat after six p.m. This interest, together with the content of the clause, makes it reasonable to infer an intent to restrain commercial competition by preventing night sales by automated competitors.

Justice White's opinion stated that if self-service markets could sell meat after six p.m. without encroaching on butchers' work, "then the obvious restraint on the product market . . . would stand alone [and] might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another."¹¹¹ This suggests that the marketing-hours clause is justified as a device to police the actual restraint, the protection of butchers' hours and work jurisdiction. Such a device seems unnecessary, however. If the unions' factual assertion was correct, the sales of meat by a store after six p.m. would signal to the union that the store was violating the butchers'-hours or work-jurisdiction clauses of the collective bargaining agreement. The costs of

¹¹⁰ See 215 F. Supp. at 845.

¹¹¹ 381 U.S. at 692-93.

enforcing working-hours and work-jurisdiction clauses would not be substantially greater than enforcing a marketing-hours clause.¹¹² In view of the danger in *Jewel Tea* that the clause actually imposed was being used to restrain commercial competition, the Court should have approved only the narrower, labor-market restraint.

Moreover, even were it clear that a clause of the breadth of a marketing-hours restraint was necessary to protect the butchers' labor-market interests, the clause should not be immunized, because there is no principled way of limiting the scope of a necessity doctrine. Price competition in the product market, for instance, may effectively put a ceiling on employee wages. The logic of a necessity doctrine suggests that, in such a case, a union could enter into a price-fixing agreement so as to increase profits that could be passed through to the workers in the form of increased wages.¹¹³

¹¹² In the case of the working-hours and work-jurisdiction clauses, when the union found a store selling meat in the evening it would then have to discover which butcher was working in violation of the working-hours clause or which other employee was doing butcher's work.

¹¹³ In *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968), Justice White dissented on the grounds that *Jewel Tea* was being used improperly to justify union-imposed price fixing. See *id.* at 117-22. In *Carroll*, the musicians' union required that bandleaders who hired union members for one-time engagements charge the purchasers of the performance a minimum price set out in a "price list." See *id.* at 104. The minimum price was composed of the total of the minimum wage scale for the musicians, a "leader's fee," and an additional eight percent to cover social security, unemployment insurance, and other expenses. See *id.* Citing Justice White's statement in *Jewel Tea* that "[t]he crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members," the *Carroll* majority reasoned that it was not dispositive that the restraint was in form a price fix. See *id.* at 107. Rather, the Court stated that "[t]he critical inquiry is whether the [minimum price] in actuality operates to protect the wages" of the musicians. *Id.* at 108. The Court held that it did because the minimum price insured that the union wage rate would not be undercut by "the job and wage competition of the leaders." *Id.* at 111. Although the form was a price fix, the minimum price included only the musicians' wage set by the bargaining agreement plus "the fair value of [the leader's] labor services." *Id.* at 110 n.10. The Court suggested that the result might have been different if the minimum price had included "entrepreneurial profits." *Id.*

The holding in *Carroll* appears to have been at least partially dependent on the peculiar nature of the club-date music industry, see *id.* at 102-05, but it is a disturbing precedent nonetheless. As Justice White stated:

Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs, a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages. On the other hand, price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide

National labor policy, however, does not guarantee that a union's goals will be attained. Rather, it permits a union to fashion labor-market restraints through the use of bargaining and economic weapons such as strikes and picketing. If these tools are insufficient, nothing in national labor policy justifies price fixing or other product-market manipulations.

Justice White's opinion is also troubling in that it attempted to balance labor and antitrust policies by gauging the relative labor-market and product-market impact of restraints on competition. A balancing test tends to lead to unprincipled and inconsistent decisionmaking. Justice White's opinion tells courts to balance the importance of a particular restraint to union members against the magnitude of its anticompetitive effect. It seems unlikely that these interests can be quantified with a reasonable degree of accuracy, nor is it clear that they can be balanced against each other in a principled manner. *Jewel Tea* illustrates this point. Accepting the district court's finding as correct, a court has to balance the butchers' interest in not working after 6 p.m. against the consumers' interest in being able to buy meat after 6 p.m. Neither interest is quantifiable, nor is it obvious that one is particularly stronger than the other. Judges are left with nothing but their own opinions of the relative importance of unions and free markets as a principle of decision. Moreover, a balancing test leads to uncertainty. *Jewel Tea* is again illustrative. Until a court has ruled, neither management nor labor will know whether a particular marketing-hours clause is (a) the least restrictive means by which a union can achieve its legitimate goal and (b) not outweighed by antitrust policy.

Perhaps more significant than the outcome in *Jewel Tea* was

unions were free to dictate uniform prices through agreements with employers. I have always thought that strong policy outweighed the legitimate union interest in the prices at which employers sell, and until today I had thought that the Court agreed. *Id.* at 119 (White, J., dissenting).

The majority's reasoning in *Carroll* was that, because the minimum price did not include "entrepreneurial profits," it would not produce supracompetitive profits. It is not clear, however, how the Court determined that the price only assured the leaders the "fair value of [their] labor services." Fair value could be determined only by observing the earnings for leaders that would be produced under competitive conditions. The Court also reasoned that *Carroll* was indistinguishable from *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959). See 391 U.S. at 111. *Oliver* involved a restraint on an input factor of production, however, not a price fix. See notes 179-82 *infra* and accompanying text.

where it left the *Hutcheson* and *Apex* tests for labor antitrust immunity and substantive liability.¹¹⁴ Neither case suggests that the immunity turns on a balance of labor and antitrust policies. *Jewel Tea* diverged from the relatively clear line of demarcation that had been drawn by prior decisions.

III. THE CURRENT STANDARD

A. Connell Construction Co.

In *Connell Construction Co. v. Plumbers Local 100*,¹¹⁵ Local 100, representing plumbers and mechanical tradesmen in the Dallas area, sought to force a general contractor, Connell, to stop subcontracting construction industry work within the union's trade to nonunion subcontractors. Connell initially refused to sign a com-

¹¹⁴ One source of difficulty is that while Justice White's opinion has been influential, see note 113 *supra*, it did not carry a majority of the Court. Justice Douglas, joined by Justices Black and Clark, dissented on the ground that the collective bargaining agreement between the unions and the multiemployer group, which contained the marketing-hours restriction, clearly evidenced an *Allen Bradley* conspiracy. 381 U.S. at 737-38 (Douglas, J., dissenting).

Justice Goldberg, joined by Justices Harlan and Stewart, wrote a single opinion for both *Pennington* and *Jewel Tea*. Its length makes summation risky, but its core is easily stated: Congress intended that "collective bargaining activity on mandatory subjects of bargaining under the Labor Act not be subject to the antitrust laws." *Id.* at 732 (Goldberg, J., dissenting). Justice Goldberg found no violation in *Pennington* because "collective bargaining inevitably involves and requires discussion of the impact of the wage agreement reached with a particular employer or group of employers upon competing employers [and] the effect of the Court's decision will be to bar a basic element of collective bargaining from the conference room." *Id.* at 714. Moreover, inferring the existence of an agreement to impose a wage rate on another employer gives judges and juries too much latitude in determining the motive and purpose of bargaining activities. In Justice Goldberg's view, Congress precluded judges and juries from making economic judgments about collective bargaining in the guise of discovering intent. Justice Goldberg would have approved the marketing-hours provision in *Jewel Tea* because it involved a mandatory subject of bargaining. Moreover, Justice Goldberg would have allowed the union to impose the restriction even if large retailers could sell meat at night without butchers and without either encroaching on the butchers' work jurisdiction or increasing their workload. Because small retailers could not sell meat at night without using butchers or substitute employees, the union could only protect its members working for small retailers by preserving their right not to do night work. At the same time, the union had to protect the competitive position of the smaller retailers in the product market. The marketing-hours restraint on the large retailers was thus a necessary and proper device for protecting the job security of butchers working at small retail markets. Moreover, "[t]he 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 employees." *Id.* at 728-29 (Goldberg, J., dissenting).

¹¹⁵ 421 U.S. 616 (1975).

mitment to subcontract only to firms who had a bargaining agreement with Local 100. Connell signed the agreement, however, after a Local 100 picket succeeded in shutting down the jobsite. Because the General Counsel of the National Labor Relations Board took the position that neither the picketing nor the agreement violated the National Labor Relations Act, Connell refrained from filing unfair labor practice charges and instead sued to have the agreement declared a violation of the Sherman Act.¹¹⁶ The United States Court of Appeals for the Fifth Circuit held that Local 100's goal of organizing nonunion subcontractors was lawful and that the union was protected by the antitrust immunity. The Supreme Court agreed that the union's goal was lawful, but reversed on the immunity issue.

Since Connell did not employ workers in Local 100's trade, the union's purpose was neither to organize Connell's employees nor to bargain with Connell in the conventional sense. The precise nature of the union's tactical objective was unknown, although it certainly involved an attack on the product-market competitors of unionized firms. Whether Local 100 was thus restraining commercial competition depends on further facts.

Justice Powell's majority opinion in *Connell*¹¹⁷ does not explicitly discuss the issue of the union's substantive liability under the antitrust laws, holding only that the union enjoyed no immunity. Justice Powell identified two immunities, now labeled "exemptions." The first, the "statutory exemption," derives from *Hutcheson*. Based on the antitrust statutes, it declares both that unions are not unlawful restraints of trade and that certain union conduct, such as secondary picketing, is free from antitrust scrutiny.¹¹⁸ This exemption does not attach when, as in this case, there is an agreement between the union and an employer. The second, the "nonstatutory exemption," derives from *Pennington* and *Jewel Tea*. Based on the national labor policy favoring collective bargain-

¹¹⁶ Connell originally brought suit in Texas state court alleging a violation of the state's antitrust laws. *Id.* at 620. After the union removed the case to federal court, Connell signed the union's agreement and amended its complaint to state a Sherman Act violation. *Id.* at 620-21. The Supreme Court held that the state antitrust law was preempted. *Id.* at 621.

¹¹⁷ In dissenting, Justice Stewart focused on whether federal secondary boycott statutes precluded the application of antitrust sanctions. *See id.* at 646-55 (Stewart, J., dissenting). He did not address the broader labor antitrust issues.

¹¹⁸ 421 U.S. at 621-22.

ing, the nonstatutory exemption requires an accommodation between that policy and the congressional policy favoring free competition in business markets.¹¹⁹

In *Connell*, the Court held that the agreement did not fall within the nonstatutory exemption because the "union and nonlabor party [had agreed] to restrain competition in a business market."¹²⁰ Justice Powell identified three specific restraints on the business market. First, the agreement prohibited subcontracting to any firm that did not have an agreement with Local 100, not just to firms that failed to observe the wages, hours, and working conditions set out in Local 100's agreement with unionized subcontractors. Some subcontractors might pay the competitive wage but gain a competitive advantage "from more efficient operating methods."¹²¹ These more efficient contractors would nonetheless be excluded from the Dallas market by the union's agreement with general contractors like *Connell*. Second, Local 100's bargaining agreement with unionized subcontractors had a most-favored-nation clause that its business agent construed as precluding him from offering any other bargaining agreement to a newly organized subcontractor.¹²² Thus "the restriction of subcontracting would eliminate competition on all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours, and working conditions."¹²³ Third, the union might exclude even those subcontractors willing to sign the collective bargaining agreement. It might do this in order to have "fewer subcontractors competing for the available work"¹²⁴ or to bar "traveling" subcontractors and thus "create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley*."¹²⁵ In sum, the agreement

¹¹⁹ *Id.* at 622.

¹²⁰ *Id.* at 622-23. The Court cited *Allen Bradley* and two law review articles for this proposition. The articles—Cox, *Labor and the Antitrust Laws - A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); and Meltzer, *supra* note 4—were cited generally and thus do not indicate how the Court intends to make a principled distinction between permitted restraints and restraints on "competition in a business market."

¹²¹ 421 U.S. at 623.

¹²² *Id.* at 623 n.1. A most-favored-nation clause is a contractual commitment to a unionized firm that if terms less favorable to the union are extended to a competitor of the firm, those terms will also be extended to the firm.

¹²³ *Id.* at 624.

¹²⁴ *Id.* at 625 (citing *UMW v. Pennington*, 381 U.S. 657 (1965)).

¹²⁵ *Id.* at 625.

forced on Connell "would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by national labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws."¹²⁶ Moreover, because Local 100 did not represent any of Connell's employees, the labor policy favoring collective bargaining did not shield the agreement.¹²⁷

Justice Powell correctly identified the potential anticompetitive effects of Local 100's agreement with Connell.¹²⁸ The agreement could have been part of a plan to limit the Dallas market to firms

¹²⁶ *Id.*

¹²⁷ *Id.* at 626.

¹²⁸ Justice Powell's discussion of the potential anticompetitive effects has several troubling implications. Two stem from the sentence: "This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. Although this sentence suggests that the restraint was not the least restrictive means of accomplishing Local 100's legitimate goal, that goal has been too narrowly described. The agreement forced on Connell was not the least restrictive restraint necessary to remove wages from competition; presumably, an agreement obligating general contractors to subcontract only to firms observing union standards in wages, hours, and working conditions could accomplish that goal. The restraint was, however, the least restrictive restraint on a general contractor that would fully promote the union's organizing goal. Moreover, the clause's only actual, as opposed to potential, anticompetitive effect was that it would exclude nonunion subcontractors who refused to unionize and who were more efficient than unionized subcontractors in matters unrelated to wages, hours, and working conditions. In the absence of proof to the contrary, however, one must assume that the union was willing to offer its collective bargaining agreement to these employers and that the agreement contained only labor-market terms. Thus, their exclusion was as much their own doing as it was Local 100's.

Finally, in evaluating Local 100's goal, Justice Powell suggested that a different labor policy might come into play had Local 100 represented Connell's employees, so that the restriction was embodied in a collective bargaining agreement. He did not explain the precise differences in labor policy that such a case would present, nor did he explain why those policies would be more powerful than those supporting union organizing efforts. One difference is that a clause in the representational context would protect Local 100 members from having to work alongside nonunion workers at a Connell jobsite. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) (Douglas, J., dissenting) ("The employment of union and nonunion men on the same job is a basic protest in trade union history."). Second, the clause might protect Local 100's bargained-for wage rate with Connell from being avoided by a Connell subcontract, although it would not satisfy the least restrictive restraint requirement. The least restrictive restraint removing Connell's motive for such an avoidance would be a clause prohibiting subcontracting to any other employer not observing the wages, hours, and working conditions in Local 100's agreement with Connell—in labor terminology, a "union standards clause." Third, the clause would then be the product of bargaining and a representational relationship between Connell and his employees. The significance of the latter standing alone is not clear.

already organized by Local 100 or to administer a price-fixing or market-allocating cartel; however, neither of these restraints was shown to have occurred. Rather than remanding for additional factfinding, the Court held that the nonstatutory exemption was lost.

Justice Powell did not discuss the substantive liability test to be applied on remand.¹²⁹ Perhaps standard antitrust doctrine would provide the test for substantive liability. Two recent decisions by the United States Court of Appeals for the Third Circuit¹³⁰ suggest that either a per se group boycott condemnation of union-imposed restraints typified by *Connell* or a rule-of-reason analysis provides the appropriate test. The first approach, group boycott per se analysis, has only superficial plausibility. Firms organize group boycotts to set prices, restrict output, allocate markets, or drive out competitors, but the facts of *Connell* do not indicate such a conspiracy. *Connell* was the only firm to sign the restrictive clause.¹³¹ More important, *Connell's* competitive position could only be disadvantaged by agreeing to Local 100's demand.¹³² The union loses its statutory exemption when its contract with an unwilling firm is

¹²⁹ The case was remanded to determine whether the agreement reached by *Connell* and Local 100, if subject to the antitrust laws, would constitute a restraint of trade in violation of the Sherman Act. 421 U.S. at 637.

¹³⁰ *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. Trades Council*, 609 F.2d 1368 (3d Cir. 1979); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded mem.*, 100 S. Ct. 3040 (1980).

¹³¹ The union, however, might have secured similar agreements from other general contractors, for it would have had an incentive to do so. Otherwise, the clause forced on *Connell* would have left him competitively disadvantaged with respect to general contractors not similarly committed, possibly driving him from the market.

¹³² If Local 100's agreement had been with several general contractors, restricting the right of each to subcontract to nonunion subcontractors, the agreement would have disadvantaged the general contractors, for they would have been precluded from using potentially cheaper nonunion subcontractors. Each general contractor upon whom the restriction was imposed would have an interest in seeing that all his competitors were similarly bound. This interest, however, hardly converts the restraint into a forbidden conspiracy; each general contractor would prefer no restriction. A different case would be presented if a general contractor sought both to be free of the restriction and to have the union impose the restriction on other general contractors.

A union-imposed restriction does not always disadvantage the contracting firms. In *Jewel Tea*, for example, the multiemployer bargaining group may have contained firms for which evening-hours marketing of meat was impossible because of size or technological considerations. Fearing a loss of daytime meat sales if other stores sold at night, those stores benefited from the prohibition of night meat sales imposed on all stores. See text accompanying notes 100-01 *supra*.

treated as forbidden "combination," but that does not warrant the fiction that a group boycott is presented.

Similarly, the rule of reason is not an appropriate test. The rule of reason prohibits agreements that do not produce net efficiencies.¹³³ Although a union-imposed restraint of the kind found in *Connell* may not fix prices or allocate markets, neither will it produce a net efficiency. Indeed, successful union actions rarely produce a net efficiency, with the possible exception of correcting a firm's monopsony power. If the rule of reason were applied, almost all union-imposed restraints would violate the antitrust laws.¹³⁴ Such a result is not consistent with the congressional decision to limit the application of the antitrust laws to labor unions. In determining whether the argument in *Connell* was protected by the nonstatutory exemption, Justice Powell looked only at the potential anticompetitive effects. Surely Justice Powell did not mean to imply that a union can lose its antitrust exemption because its restraint *might* cut too deep, and subsequently can be found liable for a substantive violation without a determination whether the restraint *did* cut too deep. This result would follow, however, were the rule of reason applied.

This analysis suggests that the appropriate standard is the substantive liability principle of *Apex*: union-imposed restrictions are unlawful only if they involve price-fixing, output-restricting, or market-sharing arrangements. This standard, consistent with the legislative scheme, limits the application of the antitrust laws to restraints on commercial competition.¹³⁵ Moreover, the *Apex* standard does not make the inquiry into the nonstatutory exemption redundant. Many of the same considerations that directed the outcome of the exemption issue must be considered in determining substantive liability. Applying the *Apex* standard means that the test for the nonstatutory exemption searches for potential restraints on commercial competition while the test for substantive liability searches for actual restraints on commercial compe-

¹³³ See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978). See also Jacobs & Winters, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 21 n.46 (1971).

¹³⁴ This assumes the traditionally accepted model of the economics of labor unions. There are some theories that net efficiencies may result from unionization, but they would not aid the union in this context.

¹³⁵ See notes 49-51 *supra* and accompanying text.

tion.¹³⁶ Determining whether the challenged agreement gives rise to *actual* anticompetitive effects may require an expensive trial that can be avoided if the union deserves the nonstatutory exemption after consideration of the *potential* anticompetitive effects. In sum, the nonstatutory exemption would sift out cases not deserving full factual inquiry.

B. Accommodating Antitrust and NLRA Secondary Boycott Prohibitions

The dissenting Justices in *Connell* found it unnecessary to consider the labor exemptions to the antitrust laws.¹³⁷ Instead, they concluded that on the facts of *Connell* the secondary boycott provisions of the NLRA precluded application of the antitrust laws.

Before the Landrum-Griffin Act of 1959,¹³⁸ a union could lawfully negotiate a bargaining agreement clause requiring one employer to cease doing business with another, although the union could not enforce it through concerted action.¹³⁹ Concerted action to enforce the clause, such as a strike or a refusal to handle goods,

¹³⁶ There are additional reasons for rejecting an argument that *Apex* has been assimilated into the nonstatutory exemption. Although Justice Powell's discussion of the nonstatutory exemption sounds like *Apex* when it refers to "a tolerance for the lessening of business competition based on differences in wages and working conditions," 421 U.S. at 622, it does not cite *Apex*. *Apex* turned not on an exemption, but on substantive liability. See Meltzer, *supra* note 4, at 666; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606 (1976) ("The *Apex Hosiery* approach was not a matter of a statutory union exemption . . ."). But see *id.* at 618 n.64. Although not strong evidence, the single citation to *Apex* in *Connell* supports the view taken in the text. In his discussion of the preemptive effect of federal labor antitrust law, Justice Powell said:

In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization *not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.*

421 U.S. at 636 (emphasis added) (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)). This passage suggests that Justice Powell distinguishes between the exemptions and the scope of the antitrust remedies and that *Apex* states the boundaries of the latter.

¹³⁷ Only Justice Douglas addressed the labor antitrust issue apart from NLRA considerations. He would have found that the union had lost its antitrust exemption if, but only if, a conspiracy between Local 100 and unionized subcontractors to exclude nonunion subcontractors from the market were shown. 421 U.S. at 638 (Douglas, J., dissenting).

¹³⁸ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, § 704, 73 Stat. 519 (codified at 29 U.S.C. §§ 153, 158-160, 186-187, 401-531 (1976)).

¹³⁹ *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

violated section 8(b)(4) of the National Labor Relations Act¹⁴⁰ and occasioned several remedies: an injunction in federal district court at the request of the National Labor Relations Board's General Counsel pursuant to section 10(1) of the statute,¹⁴¹ a cease and desist order from the Board,¹⁴² and a damage action in federal district court by an injured private party pursuant to section 303 of the Labor-Management Relations Act.¹⁴³ The cases suggested, however, that such a clause could be peacefully enforced through grievance arbitration or a breach of contract suit.¹⁴⁴

To prohibit both peaceful enforcement of such a clause and an employer's voluntary compliance with it, the Congress in 1959 added section 8(e) to the NLRA. That section makes entering into an agreement with such a clause an unfair labor practice and declares these clauses "unenforceable and void."¹⁴⁵ Persuaded that two industries warranted special treatment, the 1959 Congress added two exceptions, or "provisos," in section 8(e). One excepted the apparel and clothing industry, and the one relevant to the *Connell* case declared section 8(e) inapplicable to construction industry clauses covering the subcontracting of jobsite work.¹⁴⁶ At the same time, section 10(1) of the NLRA was amended to provide for injunctive relief against section 8(e) clauses on the General Counsel's petition,¹⁴⁷ and section 8(b)(4) was amended to make it an unfair labor practice to use coercion to obtain a clause unlawful under section

¹⁴⁰ 29 U.S.C. § 158(b)(4) (1958) (amended 1959).

¹⁴¹ *Id.* § 160(l) (amended 1959).

¹⁴² *Id.* § 160(c).

¹⁴³ *Id.* § 187 (amended 1959).

¹⁴⁴ 357 U.S. at 108.

¹⁴⁵ Section 8(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work

29 U.S.C. § 158(e) (1976).

¹⁴⁶ *Id.*

¹⁴⁷ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, § 704(d), 73 Stat. 519 (codified at 29 U.S.C. § 160(l) (1976)).

8(e).¹⁴⁸ Section 303 of the LMRA, however, was not amended to include damage actions for section 8(e) violations.

In *Connell*, Local 100 argued that its agreement with Connell was either expressly permitted by the construction industry proviso to section 8(e), and thus saved from antitrust liability, or condemned by section 8(e). If the clause violated section 8(e), the union argued, NLRA remedies were exclusive.¹⁴⁹ A majority of the Court rejected both conclusions. First, Justice Powell held that the clause fell outside the construction industry proviso because Congress had not intended the proviso to give construction industry unions a weapon for "top-down organizing," at least when the union represented none of the signatory firm's employees and when the clause would apply to jobsites where no union members were working.¹⁵⁰ Second, he held that the secondary boycott remedies under the labor statutes did not preclude the application of antitrust remedies.¹⁵¹ Justice Stewart's dissent focused on the latter holding.

Quoting from the legislative history of the 1947 NLRA amendments, which enacted sections 8(b)(4), 10(1), and 303, Justice Stewart demonstrated that Congress had explicitly refused to expand the coverage of the antitrust laws to secondary boycotts and thus to subject them to treble damages, attorneys' fees, and private injunctive actions.¹⁵² Although section 8(e) was not added until 1959, Justice Stewart reasoned that the earlier legislative history was relevant because section 8(e) was added to these 1947 secondary boycott remedies in order to close "technical loopholes."¹⁵³ The labor acts, he concluded, provided a "fully effective" remedy for an employer like Connell.¹⁵⁴ Justice Powell rejected the 1947 legislative history as irrelevant because the enactment critical to *Connell*, section 8(e), was passed in 1959¹⁵⁵ when no similar legisla-

¹⁴⁸ *Id.* § 704, 73 Stat. 519 (codified at 29 U.S.C. § 158 (b)(4) (1976)).

¹⁴⁹ 421 U.S. at 626-34.

¹⁵⁰ *Id.* at 626-33.

¹⁵¹ *Id.* at 633-34.

¹⁵² *Id.* at 641-46 (Stewart, J., dissenting).

¹⁵³ *Id.* at 646.

¹⁵⁴ *Id.* at 647. Justice Stewart also relied on the fact that when passing the 1959 legislation Congress rebuffed an attempt to apply the antitrust laws to union secondary activity. *Id.* at 650-53. Justice Powell did not consider those rebuffs to be significant, because the 1959 proposals "were much broader than the issue in this case." *Id.* at 634-35 n.16.

¹⁵⁵ Justice Powell also noted that § 303 was not amended in 1959 to provide a damage

tive history argued for the exclusiveness of labor law remedies.¹⁵⁶

Neither Justice Powell nor Justice Stewart considered the more fundamental question whether the framework of the labor laws requires that secondary boycott remedies be exclusive even without the direction of express legislative history. If the antitrust laws and the secondary boycott provisions of the labor laws seek the same objectives,¹⁵⁷ the existence of labor laws describing the forbidden conduct with considerable specificity, and providing carefully thought-out remedies, might preclude application of the more generalized antitrust law with its quite different remedies.¹⁵⁸ The secondary boycott prohibitions and the antitrust laws, however, have different objectives. The secondary boycott laws are grounded in the argument that permitting the union to enlist the aid of a secondary employer in a dispute is unfair to the primary employer; that it is unfair to subject a secondary employer to union economic coercion merely because the secondary does business with the primary employer, whose labor policies the secondary does not control; and that secondary boycotts injure the public by needlessly proliferating primary disputes. By contrast, the antitrust laws seek to encourage economic efficiencies through reliance on the compet-

remedy for violations of § 8(e). See 421 U.S. at 634 n.16.

¹⁵⁶ *Id.* at 634. In 1947, Congress carefully fashioned cease and desist, injunctive, and damage remedies for secondary boycotts and made sharp distinctions between administrative and private enforcement. In 1959, Congress refined the existing framework. To ask whether Congress intended to supplant antitrust remedies when it passed the secondary boycott provision begs the question, for in both 1947 and 1959 the *Hutcheson* immunity stood largely intact, or to put it more precisely, the narrowness of the *Hutcheson* holding was not yet appreciated. Except in an *Allén Bradley* situation, few would have thought that the union could be liable under the antitrust laws for engaging in a secondary boycott or for exacting a hot cargo clause from an unwilling firm. In short, there were no antitrust remedies to supplant. The Court should have squarely faced these issues in *Connell* rather than relying on the fact that § 8(e) was passed in 1959, not 1947.

¹⁵⁷ The Third Circuit recently took this view:

[Sections] 8(b)(4) and 8(e) . . . are, like the Sherman Act, statutes reflecting the basic federal economic policy against restraints upon competition in the marketplace for goods and services as distinct from the labor market. Thus §§ 8(b)(4) and 8(e) reinforce rather than conflict with the basic policy of the antitrust laws

Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 513 (3d Cir. 1979), *vacated and remanded mem.*, 100 S. Ct. 3040 (1980).

¹⁵⁸ One suspects, for instance, that Justice Powell's view on the *Connell* facts would have been different if the 1959 Congress had amended § 303's damage provision to say "but not for a violation of § 8(e)." In effect, Congress did precisely that when it amended § 10(1) to provide for injunctions against § 8(e) clauses and amended § 303 to cover a strike to secure a § 8(e) clause, but not to provide for damages for the clause itself.

itive process.¹⁵⁹

These objectives may not conflict, but they are not identical. When a union participates in a business cartel that fixes prices, regulates output, or allocates markets, it has moved beyond the scope of national labor policy, for the labor statutes do not regulate union conduct so as to maintain a free market in the sale of goods and services. National labor policy is not harmed when union conduct is subjected to both labor and antitrust remedies, provided that the conduct violates both statutes.¹⁶⁰ For example, a union secondary boycott that enforces a cartel agreement fixing product prices should be found to violate both statutes.¹⁶¹ It is essential, however, that the union conduct violate the antitrust statutes as well as the labor statutes. The labor laws either prohibit many union actions—for example, recognitional picketing for more than thirty days without filing an election petition¹⁶²—or render them “unprotected”—for example, “quickie strikes.”¹⁶³ It would be capricious to subject these actions to antitrust scrutiny because they happen to violate one or another of the NLRA sections.¹⁶⁴

There is another reason why lower courts should resist the temp-

¹⁵⁹ Other policies may also underlie the antitrust statutes, but it is unnecessary to discuss that issue here. The other policies that have been suggested—for instance, the protection of small businesses—do not affect the point made in the text.

¹⁶⁰ If union conduct were found to violate the antitrust laws without a showing of a restraint on commercial competition, the argument for the exclusiveness of labor law remedies would be persuasive. A decision to condemn conduct by subjecting it to specified remedies is not the same as condemning it for any and all purposes; depending on the remedy provided, conduct is more or less prohibited. Supplementing the labor laws' remedies can be as great an interference with the fabric of national labor policy as condemning conduct that labor policy permits. The preemption cases establish that much. *See, e.g., Teamsters Local 20 v. Morton*, 377 U.S. 252, 259-60 (1963); *Garner v. Teamsters Local 776*, 346 U.S. 485, 498-99 (1953).

¹⁶¹ Even conduct that the labor statutes expressly authorize should, in a proper case, be subject to antitrust remedies. For example, suppose that a union's agreement with a general contractor falls within the express proviso to § 8(e) but the clause is used to enforce a cartel's market allocation plan. The agreement should be unlawful under the antitrust laws notwithstanding its sanctity as a matter of labor policy.

¹⁶² *See* 29 U.S.C. § 158(b)(7) (1976).

¹⁶³ *See id.* § 158(d). *But see* R. GORMAN, *BASIC TEXT IN LABOR* 318-21 (1976) (reporting some uncertainty in the cases).

¹⁶⁴ *Cf. Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1344 (1972) (improper to permit state law to condemn and remedy union conduct on sole ground that the NLRA also condemns the conduct). It makes even less sense to take the further step and hold that, when conduct violates the NLRA, both the nonstatutory exemption is unavailable and a substantive violation has been committed.

tation to read too much into the *Connell* majority's treatment of the relationship between the NLRA's secondary boycott provisions and the antitrust laws. The Court decided the issue of the nonstatutory exemption by comparing the national labor policy implications of the union's goals with the potential anticompetitive effects of the restraint, but nowhere in that discussion did the Court rely on the fact that it was prepared to hold in the next section of the opinion that Local 100's agreement with *Connell* violated section 8(e) of the NLRA. Therefore, the Court's opinion does not support the conclusion that the union loses its national labor policy protection if its action violates the NLRA and loses its nonstatutory exemption upon any showing of anticompetitive effect.¹⁶⁵ If the Court were prepared to make that argument, *Connell* was the obvious case in which to do it, because the Court had the section 8(e) issue squarely before it and resolved the issue against the union. Rather, as discussed above,¹⁶⁶ it is reasonable to conclude from Justice Powell's opinion that the *Apex* commercial competition test applies in determining whether a substantive violation has occurred. Under the *Apex* test, a violation of the NLRA would subject the union to antitrust liability only if the violation involved a restraint on commercial competition.¹⁶⁷

¹⁶⁵ See *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded mem.*, 100 S. Ct. 3040 (1980); *Commerce Tankers v. National Maritime Union*, 553 F.2d 793, 803 (2d Cir.) (Lumbard, J., dissenting in part), *cert. denied*, 434 U.S. 923 (1977).

¹⁶⁶ See note 136 *supra* and accompanying text.

¹⁶⁷ The secondary boycott standing alone does not restrain commercial competition. All secondary boycotts involve two or more firms, and a secondary boycott attempts to halt the sale of goods or services between the primary and secondary firms. A union secondary boycott is the exertion of economic pressure whose

sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

IBEW Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951). For example, a union that has organized a single firm (the primary employer) may persuade the employees of a supplier or customer of the primary employer to strike against their employer until it ceases to do business with the primary; this cessation of business continues until the primary capitulates to the union's wage demand.

A union-instigated secondary boycott is different in kind from a group boycott by business firms. The ultimate objective of the union's secondary boycott seldom is to remove a competitor, create monopoly power, or extract monopoly profits in the product market. Moreover, both the primary and secondary employers can extricate themselves at any time: the secondary by ceasing to do business with the primary; the primary by capitulating to the

C. Restraints on Input Factors of Production

Unions often resist efforts by firms to substitute machines or the services of subcontractors for unionized employees.¹⁶⁸ Union efforts to restrain the use of alternative input factors of production often result in agreements with firms that bar the use of the products or services of other firms, or regulate the terms on which they can be purchased. In a 1967 decision, *National Woodwork Manufacturers Association v. NLRB*,¹⁶⁹ the Supreme Court held that the effort by construction industry carpenters to preserve traditional jobsite tasks by preventing the importation of factory prefabricated doors was not an illegal secondary boycott.¹⁷⁰ The Court, however, reserved decision on whether work-preservation agreements violated the antitrust laws.¹⁷¹ Moreover, subsequent to *National Woodwork*, some members of the Court have suggested that work-acquisition efforts are illegal under the labor laws.¹⁷² After *Connell*, these cases raise the issues of whether work preservation efforts ever violate the antitrust laws and whether a union-employer work-acquisition agreement that is held to violate the labor statutes should then be subject to antitrust scrutiny. Two Third Circuit cases have held against the union on the latter issue.¹⁷³

Because agreements suppressing alternative input factors in order to preserve or acquire work for employees interfere with a manufacturer's or subcontractor's ability to sell his product or service, there is a temptation to call them restraints on the product market and thus antitrust violations. For instance, the Third Cir-

union's demands. The union uses the secondary boycott to create or increase its power to dictate terms in the labor market, and in a sense it uses the product market to do so; but in a typical strike, it also attempts to dictate labor-market terms by controlling an aspect of the product market—the primary employer's output. A secondary boycott does not necessarily attempt to suppress competition in the product market, either as an ultimate objective or as a shortrun economic weapon. A secondary boycott can be used to suppress competition, but it should be condemned for that reason and not because the secondary boycott standing alone raises anticompetitive problems.

¹⁶⁸ See notes 16-17 *supra* and accompanying text.

¹⁶⁹ 386 U.S. 612 (1967).

¹⁷⁰ *Id.* at 644-46.

¹⁷¹ *Id.* at 631 n.19.

¹⁷² See *Consolidated Express, Inc. v. New York Shipping Ass'n*, 100 S. Ct. 3040 (1980); *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 530 n.16 (1977).

¹⁷³ See *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. Trades Council*, 609 F.2d 1368 (3d Cir. 1979); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded mem.*, 100 S.Ct. 3040 (1980).

cuit has observed: “[R]estraints . . . which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.”¹⁷⁴ Restraints on input factors of production, however, are more properly classified as labor-market restraints. An input factor of production substitutes for an employee’s labor. Restraining the use of an alternative input factor is a natural outgrowth of labor supply monopolization. It falls within the sphere of national labor policy regulation, and the labor statutes have in fact been interpreted as limiting a union’s ability to fashion such restraints.¹⁷⁵ More important, union restraints on input factors of production differ from price-fixing, output-regulating, or market-allocating restraints because the former do not allow signatory firms to gain supracompetitive profits. On the contrary, firms employing unionized workers are benefited by retaining the freedom to substitute other input factors of production for employees.¹⁷⁶ Limits on this freedom prevent a firm

¹⁷⁴ *Consolidated Express, Inc. v. New York Shipping Ass’n*, 602 F.2d 494, 514 (3d Cir. 1979), *vacated and remanded mem.*, 100 S. Ct. 3040 (1980).

¹⁷⁵ See note 172 *supra*.

¹⁷⁶ Several years ago, I wrote that a union may attempt to secure a job task by cartelizing all area subcontractors who could perform a particular subcontracting specialty (for instance, pipefitting). So long as the union could also bar entry by noncartel subcontractors, general contractors would have no choice but to give to the subcontractors and their union employees the desired work—work that the factory would otherwise perform. Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 903 (1976). I also argued that the subcontractors would have an incentive to join the cartel because they could secure greater profits if their employees performed the work that the factory would otherwise perform. The latter point was incorrect, for the subcontractors could not be better off performing the work on the jobsite than ordering the work to be done for less cost at the factory. See R. POSNER, *supra* note 22, at 243-44. The subcontractors, however, would not have a great interest in resisting the union’s demand that they bar the factory goods, for absent further restraint on competition between subcontractors (for instance, price fixing), the cost savings from the use of factory goods would be passed on to the general contractor or building owner by lower bids from the subcontractors. In theory, the lower cost of pipefitting would increase consumer demand for buildings (and pipefitting), thus benefiting the subcontractors. In practice, however, pipefitting is a small component of building costs, and demand for buildings may be price inelastic within a substantial range. So long as subcontractors are assured of a bar to entry by subcontractors not subject to the restraint, they will have little incentive to resist the union’s demand. The general contractor may be in a different position, however. If subcontractors in many fields are all yielding to union work preservation efforts, the general contractor will “see” the total cost increase in the price of buildings and the ensuing reduction in demand for buildings. This analysis supports the point made in the article, that general contractors are more likely to resist work preservation than are subcontractors.

from producing its goods or services at the lowest cost.¹⁷⁷ Union-imposed regulation of the use of products or services can be a restraint on commercial competition, as when it is used to allocate markets and fix prices thereby allowing the suppliers to gain supracompetitive profits. For example, in *Allen Bradley*, the union and the contractors agreed that the contractors would purchase electrical equipment only from certain firms.¹⁷⁸ The agreement was not a labor-market restraint because the union was not seeking to have the equipment fabricated at the jobsite. Rather, the union's tactical objective was to combine this agreement with a price-fixing conspiracy in order to produce supracompetitive profits for the manufacturers.

The Supreme Court's decision in *Teamsters Local 24 v. Oliver*¹⁷⁹ illustrates these principles. In *Oliver*, a collective bargaining agreement between a multiemployer bargaining group of motor carriers and the union representing their truck drivers provided that when the carriers leased trucks from independent contractors who owned and operated their own vehicles, prescribed minimum wages and minimum truck rental charges must be paid. The union argued that the bargaining agreement clause was

necessary to prevent undermining of the negotiated drivers' wage scale [resulting] from a practice of carriers of leasing a vehicle from an owner-driver at a rental less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operation expenses of the rental he received.¹⁸⁰

The Court accepted this explanation of the clause and held that state antitrust condemnation was preempted because the clause did not "fix prices"; rather, it was a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement."¹⁸¹ The clause was held to be a mandatory subject of bargaining.

The union in *Oliver* was regulating an input factor (owner-opera-

¹⁷⁷ Of course, a firm subjected to an input-factor restraint has an interest in seeing that its competitors are subjected to the same restraint. The same is true, however, of a wage restraint.

¹⁷⁸ See note 63 *supra* and accompanying text.

¹⁷⁹ 358 U.S. 283 (1959).

¹⁸⁰ *Id.* at 289.

¹⁸¹ *Id.* at 294.

tor services) that would substitute for employee drivers at a cheaper price (cheaper by the discount on the leased trucks). Standing alone, such a restriction did not restrain commercial competition. The carriers did not benefit from the restriction. The owner-operators could benefit from the restriction only if the union, acting in their behalf, established an artificially high price and maintained a barrier to entry. The owner-operators could then compensate the union with a portion of the supracompetitive profits they earned. Nothing in *Oliver* indicated such an agreement between the owner-operators and the union or the necessary barrier to entry—the selection by the union of which owner-operators the carriers could use.¹⁸²

Oliver presents the most difficult case, because the union regulated the terms on which the input factor could be purchased rather than barring its use entirely. Many union job preservation efforts seek to bar alternative factors entirely—the suppression of the use of prefabricated doors is one example. When an input factor is entirely suppressed, there is no danger that the provider of the suppressed factor is earning supracompetitive profits.

IV. CONCLUSION

The thesis of this article is that labor antitrust liability should turn on qualitative, not quantitative, distinctions between union acts. This article has argued that the critical distinction is between restraints on the labor market and restraints accomplishing price, output, or market-share fixes in the product market. This distinction, the commercial competition test announced in *Apex Hosiery Co. v. Leader*,¹⁸³ accommodates labor and antitrust policies in a way consistent with the framework of the federal statutes. Unions are permitted to pursue labor-market goals subject to restrictions on union tactics set out in the comprehensive federal labor statutes. On the other hand, unions are not permitted to engage in the sorts of acts that firms engage in when they violate the anti-

¹⁸² That is, although a price above competitive levels would thus be set, no owner-operator could be sure of selection by the carriers. Thus, the owner-operators might be unwilling to compensate the union for securing the price. Moreover, the scheme would require direct money payments to union officials and subsequent distribution to union members; there is no less obvious mechanism by which the owner-operators could compensate the union.

¹⁸³ 310 U.S. 469 (1940).

trust laws. Moreover, accommodating these policies by a balancing test is not an appropriate alternative: there are no scales with which to weigh the magnitude of an anticompetitive union restraint or the force of national labor policy, nor any standard by which to compare the two.

Because union goals seldom, if ever, vary from those of bettering wages, hours, and working conditions, and increasing union membership, and because unions act only in limited ways—by striking, picketing, persuading others to boycott, and obtaining commitments from firms—qualitative distinctions can be drawn only between those intermediate tactical objectives that lie between the act of a union and the accomplishment of its goal. This article has identified four categories of union intermediate tactical objectives: monopolization of the supply of labor, attacks on product-market competitors of unionized firms, direct control of the product market to produce supracompetitive profits, and suppression of input factors of production.

Applying the commercial competition test to these categories requires careful appraisal of union acts that may be ambiguous. Two categories present the clearest outcomes. Union monopolization of the labor supply is not an antitrust violation, but price fixes, output restrictions, or market allocations should be antitrust violations notwithstanding any perceived necessity by the union to control the product market in order to obtain or police a labor-market restraint. Standing alone, union suppression of an input factor of production is not a restraint on commercial competition. Union attacks on product-market competitors of unionized firms can represent either an effort to remove wages from competition or to enhance the product-market position of unionized firms in ways not relating to wages. Because of this ambiguity, a court should look beyond the attack itself for further evidence of a restraint on commercial competition.