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LABOR-ANTITRUST: THE PROBLEMS OF *CONNELL* AND A REMEDY THAT FOLLOWS NATURALLY

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Since the passage of the Sherman Act,[1] the Supreme Court has struggled to formulate a test governing labor's exemption from the antitrust laws. Resolution of this issue has required the Court to reconcile two competing and at times diametrically opposed congressional directives without subordinating one to the other.[2] On one hand, the antitrust laws are designed primarily to insure that economic power is diffused among competitors. It is generally believed that the public will benefit, in terms of lower prices and better products, from increased competition in the production and marketing of goods and services and

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Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965) [hereinafter cited as Meltzer].

1. Ch. 647, §§ 1-7, 26 Stat. 209 (current version at 15 U.S.C. §§ 1-7 (1976)).

2. The Court's attempts at reconciliation have been the subject of incisive academic scrutiny. After careful analysis of the Court's rulings in this area, one commentator concluded that the conflict between antitrust and labor policies was "so irreconcilable that . . . the regulatory distinctions employed must be largely arbitrary—there are no general principles by which these policies can be harmonized." Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 16-17 (1963). *See also* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254-55 (1955); Meltzer 659; St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976).

from decreased concentration of capital and other economic resources.[3] The federal labor laws, on the other hand, encourage economic concentration by recognizing and protecting the rights of employees to organize within appropriate units and to bargain collectively regarding their wages, hours, and other working conditions.[4] The principal theory underlying the labor laws, as embodied in the National Labor Relations Act,[5] is that peaceful settlement of labor-management disputes can be achieved through the mediatory influence of collective bargaining.[6]

Friction develops between these two policies where, for example, a union attempts to organize along a particular service or product line. If successful, the union creates a sizeable pocket of economic concentration, eliminating competition among its employers in one substantial component of production costs—the price of labor.[7] Further, direct market restraints often result from collective bargaining agreements designed to protect union members' wages or other working conditions. An agreement that requires an employer to refrain from dealing with nonunion companies paying a lower wage scale may insure better wages and job security, but the resulting restraints on the product market cannot otherwise be justified under section 1 of the Sherman Act.[8]

The Supreme Court's most recent pronouncement on this sensitive issue involved a union's efforts to organize the employees of mechanical subcontractors in the Dallas, Texas area. In *Connell Construction Co. v. Plumbers Local 100*,[9] the Court ruled in a 5-4 decision that a union forfeits its exemption from the antitrust laws where it seeks to impose direct market restraints through an agreement with a nonlabor

3. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 17-18 (1978).

4. *See, e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). *See generally* Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

5. 29 U.S.C. §§ 141-187 (1976).

6. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964). In the Wagner Act, 29 U.S.C. §§ 151-158, 159-166 (1976), Congress declared that "[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . ." *Id.* § 151.

7. Under traditional antitrust notions, an agreement fixing such a significant element of the final price would constitute a per se antitrust offense. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); *see* Di Cola, *Labor Antitrust*: Pennington, Jewel Tea *and Subsequent Meandering*, 33 U. PITT. L. REV. 705, 706-07 (1972).

8. 15 U.S.C. § 1 (1976); *see, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). *See also* Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 914-18 (1976); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 NW. U.L. REV. 818, 822-23 (1977).

9. 421 U.S. 616 (1975).

party outside the collective bargaining context, with resultant anticompetitive effects that do not "follow naturally from the elimination of competition over wages and working conditions."[10] Although the *Connell* holding seems to be straightforward, its application has generated a great deal of academic criticism[11] and robust judicial debate.[12] Most of this controversy relates to two legal issues: first, the degree, if any, to which compliance with the labor laws affects or controls the availability of the labor exemption; and second, if no exemption is found, whether traditional principles of antitrust law, such as the per se rule of illegality, should be applied to the labor conduct in question.

The purpose of this Article is to demonstrate that the *Connell* approach cannot provide satisfactory answers to these two questions. The analysis begins with a brief discussion of pertinent pre-*Connell* cases in Part I and proceeds to a critique of the *Connell* decision in Part II, with special attention given to the Court's newly created "follow naturally" test. In Part III we examine the lower court decisions in which the *Connell* test has been applied, and we conclude that *Connell* provides inadequate guidance on the scope of the labor exemption and on the correct application of antitrust principles to nonexempt conduct. In Part IV we suggest a more practical approach that would eliminate the ambiguities of the *Connell* decision on both of these issues.

I. BACKGROUND OF THE LABOR EXEMPTION

Although there were serious doubts whether Congress originally intended the Sherman Act to apply to union conduct at all,[13] the courts,

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10. *Id.* at 625.

11. *See, e.g.*, Monaghan, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 234-45 (1975); St. Antoine, *supra* note 2; Note, *Antitrust Liability of Labor Unions*, 17 B.C. INDUS. AND COM. L. REV. 217 (1976); Comment, Connell: *Broadening Labor's Antitrust Liability While Narrowing its Construction Industry Proviso Protection*, 27 CATH. U.L. REV. 305 (1978). While there is considerable disagreement about the interpretation and potential impact of *Connell*, there appears to be unanimity regarding its failure to provide any meaningful guidance to the lower courts: "In evaluating *Connell*'s new consensus, the result reached by the majority can be viewed as another *sui generis* response to a particular problem in a specific industry rather than the exposition of a governing principle that might guide lower courts and litigants in future cases." F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 190 (1977).

12. See notes 120-80 *infra* and accompanying text for an analysis of the conflicting lower court opinions arising from the *Connell* holding. One district court openly questioned the wisdom of the Court's *Connell* holding, which allows union conduct that is unlawful under the labor laws to be subject to antitrust attack as well. *See* Signatory Negotiating Comm. v. Local 9, Int'l Union of Operating Eng'rs, 447 F. Supp. 1384, 1390 (D. Colo. 1978).

13. *See, e.g.*, E. BERMAN, LABOR AND THE SHERMAN ACT (1930). "It thus appears that the courts, in deciding that Congress intended that the Anti-trust Law should reach labor unions, came to a conclusion which cannot be supported by a careful and thoroughgoing examination of

beginning principally with *Loewe v. Lawlor (Danbury Hatters)*[14] in 1908 and continuing until the passage of the Wagner Act[15] and the Norris-LaGuardia Act[16] in the 1930s, consistently found union-induced strikes,[17] secondary boycotts and picketing,[18] and other union activities[19] to be antitrust violations. To reach these results, the courts applied an "objectives test," which allowed the courts to determine the lawfulness of the unions' conduct on the basis of the propriety of their immediate goals.[20] After the enactment of the Norris-LaGuardia Act and the Wagner Act, the Court reevaluated its antitrust-labor analysis in four decisions that formed the general framework for labor's immunity during the two decades that followed.

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the most substantial evidence available, the Congressional Record." *Id.* 53. *See also* St. Antoine, *supra* note 2, at 604 & n.7.

Congress, however, has always been reluctant to define the proper bounds of the labor exemption, and where it has acted, its pronouncements have been ambiguous. Congress first sought to extricate union activities from the antitrust laws by enacting the Clayton Act in 1914 to provide that the "labor of a human being [was] not a commodity or article of commerce," and that certain union activities such as strikes and boycotts were not antitrust violations. Clayton Act, ch. 323, §§ 6, 20, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 17 (1976), 29 U.S.C. § 52 (1976)). Although the Clayton Act was initially hailed as "the foundation upon which the workers can establish greater liberty," 51 CONG. REC. 16,340 (1914) (remarks of Rep. Buchanan), the euphoria was short-lived. The courts narrowly construed the terms "lawfully" and "legitimate" in the Act as a congressional reaffirmation and codification of prior rulings striking down union activities as restraints of trade. For a discussion of these cases, see United States v. Hutcheson, 312 U.S. 219, 235-36 (1941); Winter, *supra* note 2, at 32-38.

The courts' narrow construction of the Clayton Act later prompted Congress to enact the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1935) (current version at 29 U.S.C. §§ 101-115 (1976)), which was intended to deprive federal district courts of jurisdiction to issue injunctions in cases "involving or growing out of a labor dispute," with certain limited exceptions. 29 U.S.C. §§ 101, 104, 107, 113 (1976). Although the *Hutcheson* Court used the Norris-LaGuardia Act, coupled with a reexamination of the Clayton Act, to shield most forms of unilateral union conduct, the courts continued to apply the antitrust laws to union activities, prompting commentators to urge Congress to act again. *See* Cox, *supra* note 2, at 283-84; Meltzer 704-06; Comment, *Labor's Antitrust Exemption after* Pennington *and* Jewel Tea, 66 COLUM. L. REV. 742, 762-63 (1966). Congress has remained silent, however, except to declare certain secondary activities to be unfair labor practices under the NLRA. Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. § 158(e) (1976)); Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 158(b)(4) (1976)).

14. 208 U.S. 274 (1908).

15. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-158, 159-166 (1976)).

16. Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)).

17. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

18. Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927); United States v. Brims, 272 U.S. 549 (1926).

19. Williams v. United States, 295 F. 302 (5th Cir. 1923) (sabotaging locomotive engines), *cert. denied*, 265 U.S. 591 (1924).

20. Cox, *supra* note 2, at 269. *See generally* Cox, *The Role of Law in Labor Disputes*, 39 CORNELL L.Q. 592 (1954).

The first case of this quartet, *Apex Hosiery Co. v. Leader*,[21] involved the application of the Sherman Act to a violent sitdown strike conducted by a union to obtain a closed shop agreement from its employer. Because the employer's goods in *Apex Hosiery* were effectively prevented from entering interstate commerce, the labor activities involved in *Apex* undoubtedly would have constituted an antitrust violation under prior case law.[22] After an exhaustive review of this case law, however, the Court chose to direct its antitrust approach away from a literal reading of "restraint of trade"[23] and to focus instead on the impact of the union activity in the commercial market. Under this analysis, the Court held the strike exempt from antitrust prosecution, concluding that "some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations, or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price."[24] This ruling formed the basis for the Court's dictum that "elimination of price competition based on differences in labor standards . . . has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."[25]

Although one step removed from prior case law holding that virtually all interferences with interstate commerce were unlawful restraints of trade, the *Apex Hosiery* ruling was still based solely on antitrust considerations.[26] The Court did not directly address the applicability of the Wagner and Norris-LaGuardia Acts in determining the labor exemption issue. Those statutes, however, were destined to assume a more prominent role in determining labor's antitrust exposure in the second of the four cases, *United States v. Hutcheson*.[27]

In *Hutcheson* the Court considered the lawfulness of a union's sec-

21. 310 U.S. 469 (1940).

22. *Id.* at 483.

23. *See* 15 U.S.C. § 1 (1976).

24. 310 U.S. at 500 (footnote omitted).

25. *Id.* at 503-04.

26. Because the issue was not briefed, the Court declined to consider whether the rule of reason as announced in Standard Oil Co. v. United States, 221 U.S. 1 (1911), was applicable to the union's conduct. 310 U.S. at 507 n.25.

27. 312 U.S. 219 (1941). *Hutcheson* was one of five criminal and civil suits brought by the United States Attorney General against unions about this time. *See* United States v. American Fed'n of Musicians, 318 U.S. 741 (1943) (per curiam); United States v. Building & Constr. Trades Council, 313 U.S. 539 (1941) (per curiam); United States v. United Bhd. of Carpenters & Joiners, 313 U.S. 539 (1941) (per curiam); United States v. Internatioual Hod Carriers & Common Laborers' Dist. Council, 313 U.S. 539 (1941) (per curiam). These prosecutions are noteworthy because they illustrate the Justice Department's ad hoc judgment regarding the undesirability of the unions' couduct, notwithstanding the legislative intent of the Norris-LaGuardia Act. Winter, *supra* note 2, at 44.

ondary boycott and picketing in a dispute over work jurisdiction.[28] The Court easily could have applied the *Apex Hosiery* "commercial market" doctrine to dispose of the antitrust allegations, but it opted instead to read the Sherman,[29] Clayton,[30] and Norris-LaGuardia Acts[31] together as a "harmonizing text of outlawry of labor conduct."[32] In holding that the union's activities were protected under section 20 of the Clayton Act,[33] the Court set a standard that would shield almost every form of unilateral union activity. Justice Frankfurter, speaking for the court, stated:

> So long as a union acts in its self-interest and does not combine with non-labor groups, . . . the licit and the illicit . . . 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.[34]

With this language, the Court apparently signalled an end to an objectives test and substituted a two-part approach allowing the exemption where the labor union acts in its self-interest and does not combine with nonlabor groups.

The Court's analysis in *Hutcheson* left open the possibility that union activity carried out in combination with nonlabor groups could be exempt in some circumstances. The Court dealt with this possibility four years later when it decided the two remaining cases of the quartet, *Allen Bradley v. Local 3, International Brotherhood of Electrical Workers*[35] and *Hunt v. Crumboch*.[36]

In *Allen Bradley* the Supreme Court was faced with an ingenious and highly successful scheme in which New York City electrical contractors agreed to purchase their equipment exclusively from those manufacturers having a collective bargaining agreement with the union. The manufacturers, in turn, agreed to sell only to those contractors employing the union's members, and the union vigorously enforced the agreements by striking or boycotting offenders.[37] Gradually, this scheme expanded and gave way to price fixing, market control, and

28. 312 U.S. at 227-28.
29. 15 U.S.C. §§ 1-7 (1976).
30. 29 U.S.C. § 52 (1976).
31. *Id.* §§ 101-115.
32. 312 U.S. at 231.
33. 29 U.S.C. § 52 (1976).
34. 312 U.S. at 232 (footnote omitted).
35. 325 U.S. 797 (1945).
36. 325 U.S. 821 (1945).
37. 325 U.S. at 799. Such contracts are commonly referred to as "hot-cargo" agreements. Subsequent to the *Allen Bradley* decision, Congress amended the National Labor Relations Act to prohibit certain types of hot-cargo agreements and union activity undertaken to induce the signing of or to enforce such agreements. Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959)

bid rigging.[38]

The Court defined the issue in *Allen Bradley* narrowly: did the "labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they [aided] and [abetted] business men to do the precise things which [the] Act prohibits?"[39] After finding that the conspirators had achieved a virtual monopoly over a segment of the industry in New York City, the Court held the labor exemption unavailable. Despite this holding, however, the majority assumed that the union agreements with the manufacturers and contractors, absent price fixing, market control, and bid rigging, would have been exempt.[40]

This interpretation of the labor exemption was confirmed in the *Hunt* opinion, rendered the same day. The union in *Hunt* had been able to force a freight carrier out of business by signing and enforcing closed-shop agreements with the carrier's principal sources of hauling work and then refusing to negotiate with the carrier or to admit its employees to membership. As a result, the signatories of the closed-shop agreements cancelled their contracts with the carrier. It appears that the sole reason for the union's refusal to deal was its belief that one of the carrier's employees had murdered a union member.[41]

The Court held, over a vigorous dissent,[42] that the union conduct

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(current version at 29 U.S.C. § 158(e) (1976)); Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 158(b)(4) (1976)).

38. 325 U.S. at 799-800. *See generally* Bernhardt, *The* Allen Bradley *Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094, 1096-97 (1962).

39. 325 U.S. at 801. Framing the issue in this manner was odd because the monopoly was created exclusively by the IBEW. The employers engaged in price fixing and market control only after the monopoly was formed. *See* Meltzer 670 n.45. Indeed, it appears from the Second Circuit's opinion in *Allen Bradley* that the IBEW refrained from "aiding and abetting" and may have disapproved of the contractors' price-fixing scheme. 145 F.2d 215, 218 (2d Cir.), *rev'd*, 325 U.S. 797 (1945).

40. Justice Black commented that "had there been no union-contractor-manufacturer combination the Union's actions here . . . would not have been violations of the Sherman Act." 325 U.S. at 807; *see id.* at 809, 810. *But see* Bernhardt, *supra* note 38, at 1099 (the Court took a "most extreme pro-union position . . . [which] ignores the facts of the *Allen Bradley* case").

41. 325 U.S. at 824.

42. Justice Roberts dissented on the ground that the underlying dispute in *Hunt* was not a "labor dispute," but rather an "off-shoot" of one, and that the union's conduct amounted to taking part in a conspiracy to drive a competitor out of business. *Id.* at 826-28 (Roberts, J., dissenting). Accordingly, he would have ruled that the labor exemption was inapplicable and that the union's activities violated the Sherman Act. *Id.* at 828.

Justice Jackson, in a longer dissent, also relied on the union's "purpose" in holding that the union's activities in *Hunt* did not fall within the protection of the Clayton and Norris-LaGuardia Acts. *Id.* at 828 (Jackson, J., dissenting). He distinguished between strikes designed to compel employers to yield to union demands, which did not come within the antitrust laws, and union activities adversely affecting employers after they had acceded to union demands, which could run afoul of the antitrust laws. *Id.* at 831. In this context, Justice Jackson stated that a "union cannot consistently with the Sherman Act refuse to enjoy the fruits of its victory and deny peace terms to

was within the exemption. While recognizing that the union was able to effect such a boycott only through closed-shop agreements with third parties, Justice Black, speaking for the majority, found that "[t]he only combination here . . . was one of workers alone and what they refused to sell [to the freight carrier] was their labor."[43] Thus, a common thread through the *Hunt* and *Allen Bradley* cases is that a collective bargaining agreement between a union and an employer, standing alone, is insufficient to form an illegal combination unless the agreement is a part of a larger employer conspiracy involving monopolization and price fixing.[44]

During the twenty years that followed the *Hunt* and *Allen Bradley* decisions, the Supreme Court was rarely called upon to examine the labor exemption question. Where the Court addressed the issue, its holdings were consistent with the general precepts announced in the *Apex* through *Hunt* quartet.[45] Given the substantial growth and sophistication of the labor movement during those two decades, however, it was natural, if not inevitable, that the antitrust focus would eventually shift from labor activities at the factory plant gate where union recognition was achieved to activities at the bargaining table where union gains were pressed. Consequently, the Supreme Court found it necessary to reassess labor's immunity from the antitrust laws in the context of collective bargaining agreements.

Two cases, *United Mine Workers v. Pennington*[46] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[47] were crucial to this reassessment process. In *Pennington* plaintiffs alleged an illegal conspiracy between the United Mine Workers Union and a number of the larger coal concerns. This charge was based on the union's agreement to impose high wage scales on smaller mining operators through a protective wage clause in a collective bargaining agreement. The alleged purpose

an employer who has unconditionally surrendered." *Id.* Both Justices were of the view that some form of an "objectives" test was appropriate in determining the exemption issue.

43. *Id.* at 824. Justice Black thus distinguished *Allen Bradley* on the ground that the union in *Hunt* did not aid and abet a combination of business competitors. Interestingly, the Justice placed no significance on the fact that it was only through employer cooperation, in accordance with the union's closed-shop agreements, that Hunt was deprived of work.

44. *But see* Bernhardt, *supra* note 38, at 1097-1101 (suggesting that there are at least five different ways of interpreting the *Allen Bradley* combination doctrine, each of which has been followed by various lower courts in ostensible harmony).

45. *See, e.g.*, Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94 (1962); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949); *cf.* Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960) (Norris-LaGuardia Act deprives federal district court of jurisdiction to enjoin union from peacefully picketing a foreign ship).

46. 381 U.S. 657 (1965).

47. 381 U.S. 676 (1965).

of the conspiracy was to force the small operators out of business.[48] In *Jewel Tea*, plaintiffs charged that the union had conspired with Jewel Tea's less efficient competitors to restrict the sale of fresh meat after 6:00 p.m., again through a collective bargaining agreement. While a clear majority view did not emerge on the exact rule to be applied to the exemption question, the principles offered in these two cases implied at least a partial retreat from the doctrines announced in the *Apex* through *Hunt* quartet and a return to some form of an objectives test.

Justice White, joined by Chief Justice Warren and Justice Brennan, wrote the opinion of the Court in both cases. In *Pennington*, the Court held that the union forfeited its exemption because it conspired with a nonlabor group to impose a market restraint.[49] There was, to be sure, precedent supporting this ruling. If the allegations in *Pennington* were true, the United Mine Workers were aiding and abetting an employer conspiracy to interfere with the market. Under this approach, the alleged conspiracy would have been similar to that condemned by the Court in *Allen Bradley*.

There are, however, two substantial differences between the agreements at issue in *Pennington* and in *Allen Bradley*. First, the union in *Pennington* was participating in the alleged conspiracy through a wage clause—a mandatory subject of collective bargaining, traditionally thought to be exempt under *Apex*—as opposed to the hot-cargo agreements involved in *Allen Bradley*. Second, the conduct held unlawful in *Allen Bradley* was treated as separate from the collective bargaining agreements,[50] while the conspiracy in *Pennington* was based directly on such an agreement.[51] On both these points, however, Justice White emphasized that

> [u]nilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. . . . Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act.[52]

By this limitation, Justice White was probably attempting to quell any fears that industrywide wage demands alone could become subject to antitrust scrutiny. No such scrutiny would be required, even where the uniform wage demands were "not [geared] . . . to wages which the

48. 381 U.S. at 665-66.
49. *Id.* at 665.
50. See text accompanying note 40 *supra*.
51. *See* 381 U.S. at 662.
52. *Id.* at 665 n.2.

weakest units in the industry [could] afford to pay."[53]

The conspiracy element in *Pennington* was not the only reason for the United Mine Workers' potential antitrust liability. Justice White also found that the union's breach of its duty to bargain unit-by-unit was in derogation of national labor policy.[54] He stated that "[t]he union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation . . . without begin straitjacketed by some prior agreement . . . ."[55] By interlacing this labor law element with the alleged conspiracy, the Justices were evidently moving toward balancing the objectives of labor and antitrust policy in determining the parameters of the exemption.[56]

In *Jewel Tea* the same members of the Court again relied on this balancing test and, in so doing, may have created more confusion than clarity. In essence, they held that even where there is no allegation of conspiracy between a union and a nonlabor group, the union still might forfeit its antitrust immunity if it imposed, through a collective bargaining agreement, a direct restraint that was not "intimately related to" its wages, hours, or other working conditions.[57] To clarify this standard, they noted 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."[58] Thus, in theory,

53. *Id.*

54. *Id.* at 665-66. Justice White later noted in *Pennington* that the union's agreement with one group of employers to set uniform labor standards for all employers offended the antitrust laws as well. *Id.* at 668. He stated that when a union "surrenders its freedom of action" vis-a-vis other employers, it violates the antitrust laws by restricting the "freedom of economic units to act according to their own choice and discretion . . . ." *Id.*

55. *Id.* at 666.

56. Although this approach should certainly be considered salutory on its face, one can question the method by which Justice White attempted to balance these policies. His statement that the members of the union would have been better served had the United Mine Workers bargained unit-by-unit implied that the judiciary was empowered and equipped to determine the better approach to be taken in collective bargaining negotiations. Justice White apparently anticipated criticism along these lines and sought to strengthen his position by referring to a number of National Labor Relations Board decisions holding that an employer could not condition his signing of a collective bargaining agreement on the union's securing a similar agreement from his competitors. *Id.* at 666-67. The cases, however, provide only limited support for his view, as they deal with the narrower question of whether an employer can refuse to recognize a union or sign an agreement until the union has organized the employer's competitors. *Id.* at 725 n.25 (Goldberg, J., dissenting). Moreover, as Professor Meltzer has noted, reliance on these cases was also misplaced "because demands that the NLRA forbids . . . may, nevertheless, be . . . voluntarily accepted by the other party, without any violation of that statute." Meltzer 717.

57. 381 U.S. at 689-90.

58. *Id.* at 690 n.5. Under this criterion it is difficult if not impossible to view the union's conduct in *Hunt* as nonexempt. The "relative impact" on the market in *Hunt* was immediate: a competitor was eliminated from the market entirely. In addition, this restraint was not in any way "intimately related" to the union's wages, hours, or other working conditions. Rather, it was

they proposed that courts weigh the benefits that the union receives from the specific agreement against the detrimental impact on competition in the marketplace. As this test was applied to the facts in *Jewel Tea*, however, these Justices considered only the union's interest in the marketing restriction clause and concluded that the union's conduct was exempt. The Court did not determine, or for that matter even discuss in any detail, the impact of the clause on the market.[59]

Notwithstanding this inconsistency, the more important aspect of the Court's analysis is that Justices White, Warren, and Brennan were willing to allow lower courts to weigh union concerns against resulting market restraints. This approach, as Professor Cox has aptly noted, would permit the judiciary to "revert to a practice from which they were ousted by the Norris-LaGuardia Act—that of weighing the social desirability or undesirability of the union objectives."[60]

Justice Douglas, joined by Justices Black and Clark, concurred with the Court's opinion in *Pennington* but dissented from it in *Jewel Tea*. The premise of both of Justice Douglas's opinions was that the Court had a duty to protect the free enterprise system under the antitrust laws "until the Congress delegates to big business and big labor the power to remold [the] economy"[61] through the medium of collective bargaining agreements. In *Pennington* Douglas, Black, and Clark interpreted the opinion of the Court to hold that an industrywide collective bargaining agreement, which fixed a wage scale above the financial ability of the smaller competitors, was prima facie evidence of an illegal antitrust conspiracy.[62] In *Jewel Tea*, however, they argued that no exemption should be allowed to the union because there was "nothing procompetitive" about the marketing hours restriction.[63] Thus, these members of the Court were inclined to read the *Allen Bradley* doctrine as encompassing all union activities that resulted in a mar-

related to the unions' vengeance against Hunt for the death of one of its members. See text accompanying note 41 *supra*.

59. Justice White found that the effect of the marketing hours restriction was apparent and real and that it was an obvious restraint on the product market, 381 U.S. at 691-92, but these findings stand in sharp contrast to the analysis of the anticompetitive effects considered in *Pennington*. Furthermore, no consideration was given to the most favored nations clause contained in the Jewel Tea collective bargaining agreement. *See* Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 215 F. Supp. 839, 842 (N.D. Ill. 1963). It may be, as the Court found, that there was no conspiracy between the unions and the smaller grocery stores, but this clause could have been viewed as creating a sheltered market for those stores that would not market fresh meats after 6:00 p.m. without the services of union butchers.

60. Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea,* 46 B.U.L. REV. 317, 326 (1966).

61. 381 U.S. at 675 (Douglas, J., concurring).

62. *Id.* at 673 (Douglas, J., concurring).

63. 381 U.S. at 736 (Douglas, J., dissenting).

ket restraint, regardless of whether the restraint was imposed directly or indirectly and whether it was induced by the employer or by the union. Such an approach, although apparently sound in terms of antitrust analysis, clearly ignores the recognized and congressionally accepted anticompetitive nature of labor unions in general and the unique characteristics of collective bargaining in particular.

While Justice Douglas's opinions fashioned the labor exemption principle solely on antitrust concepts, the remaining members of the Court—Justices Goldberg, Harlan, and Stewart—based their opinions more on labor policy and congressional intent. The nub of their reasoning in both cases was that activities concerning mandatory subjects of collective bargaining should be beyond the reach of the Sherman Act.[64] With this rule, they argued, the Court would encourage free and fruitful collective bargaining, while at the same time extracting itself from the process of determining "what public policy in regard to the industrial struggle demands."[65] They severely criticized Justice White's balancing formula as "a throwback to past days"[66] when courts answered the question of labor's status under the antitrust laws on the basis of what was "socially or economically objectionable."[67] Under their approach, they would have held exempt the union activities in both *Jewel Tea* and *Pennington* without examining the unions' aims or the resulting effects on the markets. Although their approach suffers from a rather elementary problem—defining mandatory subjects of collective bargaining for the purpose of antitrust litigation—it is a consistent rationale that accurately reflects the legislative and judicial complexities associated with the exemption question.[68]

It is virtually impossible to glean one intellectually consistent rule on the labor exemption from the Court's disparate handling of the *Pennington* and *Jewel Tea* cases. Justices White, Warren, and Brennan appeared willing to adopt a balancing test that would allow weighing the union's interests and methods against the resultant harm to competition in the product market. The test proposed in the Goldberg opinion, however, differed substantially from White's approach in the weight accorded to labor concerns: the White group required that the union demand be unilateral and intimately related to union objectives, while the Goldberg group required that the union demand be a

64. *Id.* at 710 (Goldberg, J., concurring).

65. *Id.* (Goldberg, J., concurring) (quoting Duplex Co. v. Deering, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting)).

66. 381 U.S. at 700 (Goldberg, J., concurring).

67. *Id.*

68. *See* Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233, 238 (1971). *But see* Meltzer 730-32; Comment, *supra* note 13, at 761-62.

mandatory subject of collective bargaining.

In 1975 the Supreme Court was called upon to determine which approach should control labor's liability under the antitrust laws. The Court's opinion in *Connell Construction Co. v. Plumbers Local 100*[69] tipped the scale decidedly in favor of the White group's balancing approach. An analysis of the case, however, strongly suggests that the Court abandoned the "intimately related" test embodied in Justice White's *Jewel Tea* opinion and replaced it with a more rigorous test focusing on the anticompetitive consequences of union activity and leaving the legitimacy of union concerns as an afterthought.

II. THE *CONNELL* CASE

The question before the Court in *Connell* was whether the activities of the Plumbers and Steamfitters Local Union No. 100 in securing and enforcing a hot-cargo agreement with a general construction contractor were exempt from the Sherman Act.[70] The hot-cargo provision in the disputed contract directed the contractor, Connell, to subcontract specific work "only to firms that are parties to an executed, current collective bargaining agreement"[71] with the union. Connell, which had previously subcontracted work to both union and nonunion firms on the basis of competitive bids, refused to sign the agreement. Local 100 responded by stationing a single picket at one of Connell's construction sites. As a result of this activity, all work was halted. The union admit-

69. 421 U.S. 616 (1975).

70. This dispute appeared to be just one battle of a larger war being waged between the construction trade unions and general contractors in the Dallas, Texas area. The Dallas Building and Construction Trades Council had been attempting to secure similar hot-cargo agreements from the general contractors in Dallas since at least 1966. These activities were examined by the District of Columbia Circuit in Dallas Bldg. & Constr. Trades Council v. NLRB, 396 F.2d 677 (D.C. Cir. 1968), and were held violative of section 8(b)(7)(A) of the NLRA, 29 U.S.C. § 158(b)(7)(A) (1976), which prohibits picketing an employer to compel recognition of a labor organization in locations where another union is already lawfully recognized. The Council then attempted to secure hot-cargo agreements from general contractors who had no employees of their own in an effort to avoid the recognitional problems of section 8(b)(7)(A). These general contractors sought relief from the NLRB. Their petitions to the NLRB failed, however, because the General Counsel of the NLRB declined to review a regional office's refusal to issue a complaint. *See* Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1157-58 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (1975).

71. The specific clause at issue provided:

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

421 U.S. at 620.

ted that the sole purpose of the picketing was to force Connell to sign the proposed agreement.[72]

Connell then sued Local 100 in state court seeking both injunctive and declaratory relief under the Texas antitrust laws. The state court granted a temporary restraining order to halt the union's picketing, but Local 100 successfully removed the case to the United States District Court for the Northern District of Texas, and the state court injunction was vacated. Connell then signed the agreement under protest and amended its complaint to allege a federal as well as a state antitrust claim.

The district court denied Connell the declaratory and injunctive relief it sought, holding that the construction industry proviso to section 8(e) of the National Labor Relations Act[73] insulated the union's conduct from antitrust attack.[74] The Court of Appeals for the Fifth Circuit affirmed, but on a narrower ground. The court ruled that, because plaintiff had shown no conspiracy between the union and an employer group, the principal question was whether Local 100 was acting in pursuit of a legitimate labor objective. After noting that the union was apparently seeking to eliminate only competition based on differences in wages and other labor standards, Judge Morgan held the union's conduct exempt.[75]

The Supreme Court granted certiorari and reversed. Justice Powell, writing for the 5-4 majority, held that the agreement between Local

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72. *Id.* at 631.

73. 29 U.S.C. § 158(e) (1976). Section 8(e) provides that

> [i]t 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 unenforcible [*sic*] and void . . . .

The construction industry proviso to this subsection, however, exempts from its operation any agreement "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ." *Id.*

74. 78 L.R.R.M. 3012, 3014 (N.D. Tex. 1971).

75. 483 F.2d 1154, 1171 (5th Cir. 1973). Referring to the union's argument that the construction industry proviso to section 8(e) insulated the hot-cargo contract from antitrust attack, Judge Moran ruled that the legitimacy of union conduct for antitrust purposes was not controlled by whether it violated the ground rules of the NLRA. *Id.* at 1170. He accordingly found no reason for determining whether the proviso was applicable.

Judge Clark, who dissented from the Fifth Circuit's opinion in *Connell*, would have reached the section 8(e) proviso issue and would have ruled that the union's contract was unprotected. *Id.* at 1180-82 (Clark, J., dissenting). He also stated that the union conduct clearly restrained trade within the meaning of the Sherman Act, for it required Connell to boycott certain plumbing subcontractors. *Id.* at 1176, 1178 n.9.

100 and Connell, which was neither within the context of a collective bargaining relationship nor restricted to a particular jobsite, was subject to antitrust scrutiny. After finding that the agreement in question created a direct market restraint with both actual and potential anticompetitive effects, the Court held that the exemption was unavailable because these effects did not "follow naturally" from the elimination of competition over wages and working conditions.[76]

Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented on the ground that the union's conduct was regulated solely by the National Labor Relations Act and was therefore immune from both federal and state antitrust prosecution.[77] Relying on "considerable evidence in the legislative materials" related to the passage of the secondary activity and hot-cargo provisions of the Act, he concluded that Congress intended the labor laws to provide the exclusive remedies for the unlawful conduct alleged by Connell.[78] Justice Douglas emphasized in a separate dissent that the key defect in Connell's complaint was the failure to allege or prove any conspiracy between the union and the other unionized subcontractors. He reasoned that this infirmity in the complaint placed the union's conduct under the exclusive purview of the labor laws.[79]

A close analysis of Justice Powell's majority opinion in *Connell* reveals two subtle yet significant changes in the Court's approach to the labor exemption issue. First, the Court bifurcated the labor exemption into "statutory" and "nonstatutory" categories; second, it created a new "follow naturally" test, which places a great deal of emphasis on the market effects of union conduct. Each of these changes in labor exemption analysis raises novel problems.

A. *Bifurcation of the Labor Exemption.*

The Court began its discussion of the labor-antitrust issue by dividing labor's exemption into statutory and nonstatutory categories.

76. 421 U.S. at 625.

77. *Id.* at 639 (Stewart, J., dissenting).

78. *Id.* at 650 (Stewart, J., dissenting). Both the majority opinion and the dissent in *Connell* apparently agreed that Congress rejected the use of antitrust sanctions to curb secondary union activities when it considered revising the NLRA in 1947. *Compare id.* at 634 & n.15 (Powell, J.) *with id.* at 641 (Stewart, J., dissenting). Justice Powell found that this legislative choice had no relevance to the issue whether Congress intended to preclude antitrust attack on hot-cargo agreements, which were later forbidden as unfair labor practices under the Landrum-Griffin amendments to the NLRA enacted in 1959. Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519 (current version at 29 U.S.C. § 158(e) (1976)). *See* 421 U.S. at 634. For an analysis of the weaknesses in Justice Powell's construction of the legislative history surrounding this issue, see St. Antoine, *supra* note 2, at 626-28; Comment, *supra* note 11, at 324-25.

79. 421 U.S. at 638 (Douglas, J., dissenting).

The statutory exemption, according to the Court, is controlled by pertinent provisions of the Clayton[80] and Norris-LaGuardia Acts,[81] which protect activities undertaken by a union in its own self-interest and not in combination with a nonlabor group.[82] The nonstatutory exemption, on the other hand, was developed by the courts to accommodate "the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets . . . ."[83] The nonstatutory exemption thus gives a measure of protection to agreements between unions and employers resulting from the collective bargaining process. The *Connell* Court carefully limited the nonstatutory exemption, however, noting that the exemption did not offer protection "when a union and a nonlabor party agree to restrain competition in a business market."[84] Although this bifurcation is sound on its face, attempts to fit the facts of prior labor-antitrust cases within its framework yield some troubling inconsistencies.

For example, Justice Powell referred to *American Federation of Musicians v. Carroll*[85] as a statutory exemption case.[86] In *Carroll* the Court had ruled that certain pricing provisions imposed by a musicians union were exempt from the Sherman Act.[87] The provisions were not contained in a collective bargaining agreement, nor were they imposed on anyone other than the complaining orchestra leaders, who were themselves members of the musicians union. Accordingly, the unilateral nature of the union activities would have placed them under the rubric of the statutory exemption. These activities, however, which the Court implied were tantamount to fixing the price of musical entertainment,[88] surely could not be characterized as any of the activities specifically protected by the Clayton or Norris-LaGuardia Acts.[89]

80. 15 U.S.C. § 17 (1976).

81. 29 U.S.C. §§ 101-115 (1976).

82. See text accompanying notes 28-34 *supra*.

83. 421 U.S. at 622.

84. *Id.* at 622-23 (citations omitted).

85. 391 U.S. 99 (1968).

86. 421 U.S. at 622-23.

87. 391 U.S. at 102. The pricing provisions in question, which were contained in a "Price List Booklet" and were not a part of a collective bargaining agreement, required orchestra leaders to charge purchasers of music entertainment the sum of (1) the minimum wage for "sidemen" (*i.e.*, instrumentalists); (2) a leader's fee, which was equal to twice the amount paid to a sideman; and (3) an additional eight percent to cover other expenses. *Id.* at 104.

88. *Id.* at 112-13.

89. Although the *Carroll* Court ultimately found that the union's activities represented a labor dispute within the meaning of the Norris-LaGuardia Act, it did not attempt to specify which if any of the specific provisions of that Act was applicable. Rather, the Court relied on the *Jewel Tea* "intimately related" test to find that the price-fixing provisions were actually a protection of the union's wages. *Id.* at 112. Thus, it would appear that the Court in *Carroll* relied on a nonstat-

Nevertheless, the *Connell* Court implied that the facts in *Carroll* epitomized a statutory exemption case, despite the absence of any strikes, boycotts, or related activity.[90]

Problems also spring from the Court's nonstatutory exemption. As mentioned previously, Justice Powell found that the purpose of the nonstatutory exemption was to accommodate the policies of the collective bargaining process and the antitrust laws.[91] This reasoning suggests that the nonstatutory exemption was designed exclusively to consider union activity arising from the collective bargaining process, such as the union conduct reviewed in the *Allen Bradley*, *Pennington*, and *Jewel Tea* cases. If this suggestion is correct, however, a rather glaring void is created between the coverage of the statutory and nonstatutory exemptions in cases dealing with union conduct that is neither exclusively unilateral nor connected with a collective bargaining relationship.[92]

The challenged conduct in *Connell* itself is difficult to place within this analytic framework. Local 100 admitted, and the Court acknowledged, that the union did not wish to represent Connell's employees or to bargain with Connell on their behalf.[93] Thus, Local 100's activities cannot be tied directly to the collective bargaining process. Moreover, the subcontractors with whom Local 100 had collective bargaining relationships were not involved with Local 100's organizational activities in any manner, and the record contained "no evidence that the union's

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utory exemption case (*Jewel Tea*) to find that the union's conduct was exempt under the statutory criterion.

90. One could also question whether the union conduct examined in Teamsters Union v. Oliver, 358 U.S. 283 (1959), would fall under the statutory or nonstatutory exemption created by the Court in *Connell*. *Oliver* involved a collective bargaining agreement between the Teamsters and a group of interstate motor carriers, which provided for the imposition of a minimum rental fee on nonunion drivers who owned and drove their own trucks. Although a collective bargaining agreement was implicated, the Teamsters' unilateral conduct and the types of restraints considered by the Court were strikingly similar to those considered in *Carroll*.

91. See text accompanying note 83 *supra*.

92. The *Hunt* case could be viewed as involving only unilateral union conduct, and the Court's opinion could be read to support such a view. *See* 325 U.S. at 824 (the combination in *Hunt* "was one of workers alone and what they refused to sell [to Hunt] was their labor"). The union in *Hunt*, however, was able to force the employer out of business only by resorting to the closed-shop agreements that it held with its other employers and by directing those employers to refrain from dealing with Hunt. The union's directive could have violated the hot-cargo provisions of the National Labor Relations Act, had section 8(e) been in effect at the time the activities in *Hunt* occurred. Thus, although the Court chose to examine the union's conduct as separate from an employer combination, it was only through the closed-shop agreements and the nonlabor group's acquiescence to the union's demands that the boycott of Hunt was achieved. See text accompanying notes 41-44 *supra*. It is, therefore, unrealistic to characterize the union activity in *Hunt* as unilateral.

93. 421 U.S. at 619.

goal was anything other than organizing as many subcontractors as possible."[94] These findings, coupled with Connell's obvious unwillingness to sign or to abide by the agreement in question, tend to underscore the unilateral nature of Local 100's conduct and suggest that the union's activities should be analyzed under the statutory exemption. Yet, despite these findings and without any discussion whatever, the Court examined Local 100's activities under the *nonstatutory* exemption.

Concern over the Court's handling of the statutory-nonstatutory dichotomy involves much more than academic curiosity. If the nonstatutory exemption were defined as broadly as the majority in *Connell* suggested—to cover agreements imposed on employers by union activity outside the collective bargaining process— it would encompass almost every form of union conduct vulnerable to antitrust attack. Consequently, application of the statutory exemption would be limited to very atypical circumstances.[95] This construction would require that most union conduct be scrutinized under the more rigorous nonstatutory standard, which, unlike its statutory counterpart, does not afford antitrust protection where a market restraint is involved.

B. *The "Follow Naturally" Test.*

Applying the nonstatutory exemption to the union conduct in *Connell*, the Court ruled that although Local 100's objective was legal, the methods selected by the union to reach its goal were not. In this context the majority declared that Local 100 had forfeited its antitrust immunity by imposing restraints on the product market having "substantial anticompetitive effects, both actual and potential, that [did] not *follow naturally* from the elimination of competition over wages and working conditions."[96] The actual restraints found by the Court were the union's indiscriminate exclusion of nonunion subcontractors from the market[97] and the union's elimination of competition

94. *Id.* at 625.

95. *See* Leslie, *supra* note 8. "As a practical matter, therefore, the statutory exemption is no longer a significant factor in labor antitrust cases." *Id.* 915. *But see* California Dump Truck Owners Ass'n v. Associated Gen. Contractors of America, 562 F.2d 607 (9th Cir. 1977). In *Truck Owners* the court considered the antitrust implications of certain provisions contained in a collective bargaining agreement under both the statutory and nonstatutory exemptions. The court apparently assumed, without in-depth analysis, that the nonstatutory exemption was applicable to determine whether a union combination with unidentified coconspirators was protected, but that the statutory exemption was applicable to protect the collective bargaining agreement itself. *Id.* at 611.

96. 421 U.S. at 625 (emphasis added).

97. The Court found that Local 100 had excluded subcontractors from the market without regard to whether their competitive advantages were derived from more efficient operating meth-

among its organized subcontractors on subjects other than wages and working conditions through a most favored nations clause.[98] The potential effect on competition was the possibility of the union's creating a geographical enclave for its subcontractors, similar to one found unlawful in *Allen Bradley*.[99] Finally, the majority ruled that because Local 100 had no interest in representing Connell's employees, the congressional policy promoting collective bargaining and peaceful resolution of labor disputes could offer no shelter to the union's conduct.[100]

The Court's analysis in *Connell* is curious in light of the labor-antitrust precedent. The first restraint condemned by the *Connell* Court, the indiscriminate exclusion of nonunion subcontractors, was identical in effect to the market restriction allowed in *Jewel Tea*. The butchers unions in *Jewel Tea* prohibited their employers from selling meats after 6:00 p.m. Thus, as in *Connell*, the unions in *Jewel Tea* placed a direct restraint on the product market by eliminating *all* competition among the employer grocery stores during the evening hours.[101] It is not possible to distinguish *Jewel Tea* and *Connell* on the ground that Local 100's restraint excluded subcontractors even though their competitive advantages may have been based on more efficient operating methods rather than on substandard labor conditions. Jewel Tea and other grocery stores were able to prepackage meats with ex-

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ods. *Id.* at 623. The Court made this finding by assuming that there were *in fact* nonunion subcontractors in the Dallas area whose competitive edge had no relation to wages or other labor standards. There is no indication in any of the Court's opinions that this assumption was correct.

Had the union been able to prove that the nonunion subcontractors in *Connell* were able to underbid union contractors only on the basis of lower wages or differences in other labor standards, then a significantly different question would have been presented; namely, whether the *Apex* rule, see text accompanying notes 22-25 *supra*, would have provided an exemption for the union's conduct. Given the overall tenor of the Court's *Connell* opinion, however, it is doubtful that such a distinction would have made any difference in the resnlt.

98. The Court did not refer to the precise terms of the clause, but its scope covered *only* wages and other labor concerns. Article XIX of the Master Collective Bargaining Agreement between Local 100 and the unionized contractors provided:

> The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with any other employer which provides for any wages less than stipnlated in this Agreement as the minimum wages or for work under any more favorable terms or conditions to the employer than are expressed or implied in this Agreement for less than the rate of wages indicated in this Agreement.

Brief for Petitioner at 12 n.3, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975) (emphasis omitted) (quoting Art. XIX of the Master Collective Bargaining Agreement (A. 118)).

99. 421 U.S. at 625.

100. *Id.* at 626. The Court emphasized, however, that there was "no argument in [*Connell*], whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26.

101. See discussion in text accompanying notes 57-59 *supra*.

pensive machinery and were therefore able to sell those meats through self-service operations without significantly infringing on the butchers' work jurisdiction or hours.[102] Indeed, a fair reading of the *Jewel Tea* opinions strongly suggests that the unions' primary concern was protecting the working hours in the smaller shops that could not afford the prepackaging machinery, and that the unions imposed across-the-board marketing hours restrictions only to keep peace among employers, if not to keep the smaller concerns in business.[103] Thus, the unions in *Jewel Tea*, like the union in *Connell*, indiscriminately excluded certain companies from the market even though their operations would not have interfered with the unions' hours and work jurisdiction.

The second anticompetitive effect found by the majority in *Connell*—the creation of a sheltered market—is also questionable. The Court premised its finding on the most favored nations clause of the union's collective bargaining agreement with its subcontractors.[104] Such a clause, however, is not anticompetitive per se.[105] Indeed, the *Jewel Tea* collective bargaining agreements contained such clauses.[106] The Court in *Pennington* predicated antitrust liability on a most favored nations clause, but only because the clause was linked to an alleged employer conspiracy aimed at excluding smaller competitors from the coal market.[107] As Justice Douglas indicated in his separate dissent, the clause in *Connell* did not appear to assume this conspiratorial feature.[108] The majority admitted as much by noting that the clause guaranteed the members of the Contractors Association, with whom Local 100 had collective bargaining contracts, only that the union would not undercut their competitive positions by offering more favorable terms on wages and working conditions to nonmembers.[109]

Despite the *Jewel Tea* and *Pennington* cases, however, the *Connell* majority asserted that the restriction on subcontracting illegally enhanced a sheltered market because it eliminated competition on all subjects covered by the multiemployer agreement between Local 100 and the Association, "even on subjects unrelated to wages, hours and

102. 381 U.S. at 738 (Douglas, J., dissenting).

103. *See* Cox, *supra* note 60, at 324.

104. 421 U.S. at 623.

105. *E.g.*, Associated Milk Dealers, Inc. v. Milk Drivers Union Local 753, 422 F.2d 546, 552-54 (7th Cir. 1970). The NLRB has ruled that such clauses are mandatory subjects of collective bargaining when no predatory purpose is involved. *See, e.g.*, Dolly Madison Indus., Inc., 182 N.L.R.B. 1037 (1970).

106. See note 59 *supra*.

107. 381 U.S. at 665-66.

108. 421 U.S. at 638.

109. *Id.* at 623 n.1.

working conditions."[110] This conclusion was valid in that competition would have been eliminated by the exclusion of nonunion firms. Nevertheless, this exclusion was accomplished by the hot-cargo agreement, not by the most favored nations clause. The only possible relevance that the latter clause had to the elimination of competition was that it indirectly identified the beneficiaries of the market exclusion. In any case, the most favored nations clause was not probative on the issue of the means employed to effect such an exclusion.

The majority's analysis of the potential anticompetitive effects of the *Connell* agreement is also troublesome. The Court reasoned that because Local 100 had a well-defined geographical jurisdiction, it could have created a geographical enclave for itself and the members of the Association by refusing to sign collective bargaining contracts with the latter's travelling competitors.[111] The possibility of similar union abuses existed in *Jewel Tea*, however, since the unions in that case represented "virtually all butchers in the Chicago area."[112] The majority highlighted the dangers of this enclave by comparing it to the "closed market in *Allen Bradley*,"[113] but missing from such a comparison were the price fixing, bid rigging, and territorial allocation present in *Allen Bradley*, which contributed to the Court's refusal to allow the exemption. Also absent was any reference to the separate, yet pervasive, employer conspiracy that the union in *Allen Bradley* aided and abetted. Finally, Justice Black's observation in *Allen Bradley* that the union's agreement "standing alone would not have violated the Sherman Act"[114] underscores the dissimilarities of the Court's approach in the two cases.

Another problem with the majority's approach in *Connell* was its unwillingness to test the legitimacy of the union's conduct in terms of traditional labor interests in organizing. The Court's perfunctory handling of this issue contrasts strongly with Justice White's opinion in *Jewel Tea*. For example, in *Jewel Tea*, Justice White placed great reliance on the union's vital interests by examining the butchers' resistance to overtime work, the connection between working hours and the store operating hours, the feasibility of protecting the butchers' concerns by less restrictive means, and the history of the collective bargaining negotiations between the union and the stores.[115] Similarly, the majority in

110. *Id.* at 624.
111. *Id.* at 625.
112. 381 U.S. at 680.
113. 421 U.S. at 625.
114. 325 U.S. at 809.
115. 381 U.S. at 694-97.

Connell might have considered, as the Fifth Circuit did below, factors such as the ambulatory nature of the construction industry, the particular difficulties encountered by Local 100 in its organizational drive, and the relationship, if any, between its need to unionize all subcontractors and its concerns over job preservation and wage security.[116] The majority, however, declined to consider these factors without any explanation. Indeed, the only reference to labor policy in the Court's discussion of the labor exemption issue[117] was its remark that since Local 100 had no interest in representing Connell's employees, federal policy favoring collective bargaining was not involved.[118]

The Court's "follow naturally" test strongly suggests, therefore, that a union's interests and the means available to protect those interests are irrelevant to the labor exemption question if it is shown that anticompetitive effects are present in the product market. In practical terms, the test requires an assessment of the merits of the antitrust allegations prior to and in place of an examination of the labor exemption issue.[119] This approach, in turn, apparently requires that the courts judge union conduct through a subjective determination of whether the conduct is socially or economically objectionable, a rule that is both unsound and imprecise.

As our analysis of *Connell* demonstrates, the Court apparently has raised more questions about labor's immunity from the antitrust laws than it has answered. The *Connell* rule has not been consistently interpreted by the lower courts and has led to conflicting results. Yet, despite the uncertainty engendered by the *Connell* holding, its severe limitation on the scope of the statutory exemption as applied to atypical union conduct and its emphasis on the anticompetitive harms of such

116. Connell Constr. Co. v. Plumbers Union Local 100, 483 F.2d 1154, 1167-69 (5th Cir. 1973), *rev'd*, 421 U.S. 616 (1975).

117. The majority addressed the issue of whether Local 100's hot-cargo contract with Connell was within the section 8(e) proviso, which allows the use of some hot-cargo agreements in the construction industry, see note 73 *supra*, but it is clear that this analysis was conducted apart from the discussion of the labor exemption issue. Thus, it is fair to say that the Court would have found the exemption inapplicable regardless of the 8(e) proviso issue. *See* Signatory Negotiating Comm. v. Local 9, Int'l Union of Operating Eng'rs, 447 F. Supp. 1384, 1391 (D. Colo. 1978). *But see In re* Bullard Contracting Corp., 464 F. Supp. 312 (W.D.N.Y. 1979).

118. 421 U.S. at 626.

119. The Court apparently attempted to dispel the notion that it was deciding both the antitrust and the labor exemption issues in *Connell* by remanding the case for reconsideration of whether Local 100's agreement had restrained trade "within the meaning of the Sherman Act." *Id.* at 637. Although the Court did not address whether the rule of reason or the stricter per se standard should be applied on remand, its strong reliance on the market effects of the restraint and its disregard of the union's purpose strongly implied that the per se rule was applicable. The district court was not required to pass on Local 100's liability under the Sherman Act because the case was later settled out of court.

union conduct are unmistakable. In effect, this approach renders antitrust and labor exemption questions inseparable.

III. APPLICATION OF *CONNELL*

The lower courts have applied *Connell* in a variety of circumstances,[120] and these cases demonstrate disagreement over the extent to which anticompetitive market effects control the exemption issue under the Court's "follow naturally" test, and the role, if any, that established labor law principles should have in determining that issue. Another question, which the *Connell* Court opted to bypass, has generated an equal amount of controversy among the lower courts: whether the per se rule of illegality under the Sherman Act is applicable to union conduct where the labor exemption is found to be inapplicable.

A. *Market Effects and Labor Law Principles.*

The Third Circuit's treatment of the exemption issue in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*[121] is perhaps the best illustration of the problems associated with the Court's "follow naturally" test. Muko alleged that Long John Silver's, Inc., a national fast-food restaurant chain, violated the Sherman Act by agreeing with two union construction trade coun-

120. *See, e.g., In re* Bullard Contracting Corp., 464 F. Supp. 312 (W.D.N.Y. 1979) (antitrust allegation lodged against union to stay arbitration proceeding); Furriers Joint Council v. Ben Wirtzbaum Furs, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,443 (S.D.N.Y. 1978) (former employer raised antitrust allegation as defense to union's suit to compel arbitration); Frito-Lay, Inc. v. Retail Clerks Union Local 7, 452 F. Supp. 1381 (D. Colo. 1978) (antitrust suit against two unions that imposed ban on food suppliers using route salesmen and delivery drivers to shelve and price products in their stores).

Perhaps the most significant issue now beginning to surface in the lower courts as a result of *Connell* is the extent to which the labor injunction may be on the rebound, an issue not addressed in this Article. The majority in *Connell* touched on the issue in dicta by noting cryptically that there was no occasion for it to consider whether the Norris-LaGuardia Act forbids an injunction "where the specific agreement sought by the union is illegal, or to determine whether, within the meaning of the Norris-LaGuardia Act, there was a 'labor dispute' between [the] parties." 421 U.S. at 637 n.19. At least one litigant has argued that *Connell* left open the possibility of issuing an injunction against union picketing, but the court declined to hold that *Connell* should be read so broadly. *See* Utilities Servs. Eng'r, Inc. v. Colorado Bldg. & Constr. Trades Council, 549 F.2d 173, 178 (10th Cir. 1977). *See also* Marriott Corp. v. Great American Serv. Trades Council, 552 F.2d 176, 179-80 (7th Cir. 1977) (Lanham Trademark Act suit against a union). *But cf.* Suburban Beverages, Inc. v. Pabst Brewing Co., 462 F. Supp. 1301 (E.D. Wis. 1978) (denying a preliminary injunction without considering whether a "labor dispute" within the meaning of the Norris-LaGuardia Act was involved). For an excellent comparative analysis of whether the term "labor dispute" should be narrowed for purposes of the antitrust laws, compare ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 298-300 (1955), with Cox, *supra* note 2, at 267-70.

121. 1978-2 Trade Cas. ¶ 62,184, at 75,292 (3d Cir. 1978), *rev'd en banc*, 609 F.2d 1368 (3d Cir. 1979).

cils to refuse to give Muko construction contracts in the Pittsburgh area solely because Muko was nonunion. This agreement, which the unions apparently obtained as a result of handbilling at a Silver's restaurant,[122] was set out in a letter reflecting Silver's acquiescence to the unions' demand that it use only union contractors in future construction of its restaurants. Prior to this agreement, Silver's had awarded construction contracts on the basis of the lowest bids regardless of union affiliation. It had awarded two such contracts to Muko. After signing this letter, Silver's invited Muko to employ union labor to qualify to bid on future contracts. Muko declined, and Silver's accordingly refused to allow Muko to bid on the available work. In response to Muko's antitrust claims, the defendant Trades Council argued that the labor exemption protected the conduct in question. A three-judge panel initially held that the exemption was applicable (*Muko I*),[123] but the Third Circuit, sitting en banc, reversed after a rehearing, holding that the unions' activities were nonexempt under the *Connell* rule (*Muko II*).[124]

Although recognizing that *Connell* was applicable in determining whether Silver's and the unions were exempt from antitrust prosecution, Judge Aldisert, writing for the majority of the three-judge panel in *Muko I*, found that the facts in *Muko* differed markedly from those in *Connell*. The judge first noted that the unions in *Muko* required Silver's to use contractors certified by the unions.[125] The court distinguished this certification requirement from the restraint imposed in *Connell*, in which the union demanded that Connell use only those contractors with which it had collective bargaining agreements.[126] The court also noted plaintiff's failure to show that the multiemployer agreement contained a most favored nations clause.[127] In sum, the union activity under consideration in *Muko*, as opposed to that in *Connell*, was "low-key and narrow in scope; an activity 'intimately related to wages, hours and working conditions,' . . . ; an activity not accompanied by efforts to subject an entire industry to its demands, with the resultant substantial restraint in the product market."[128] Based on these factual distinctions, the court in *Muko I* held that the unions' activities were exempt.

This decision and its rationale raise several very basic problems.

122. 1978-2 Trade Cas. at 75,297.
123. 1978-2 Trade Cas. ¶ 62,184 (3d Cir. 1978).
124. 609 F.2d 1368 (3d Cir. 1979) (en banc).
125. 1978-2 Trade Cas. at 75,297.
126. *Id. See* 421 U.S. at 624.
127. 1978-2 Trade Cas. at 75,297.
128. *Id.*

Notwithstanding the other differences between the union conduct in *Connell* and that in *Muko*, the fundamental reason for the Third Circuit's ruling was that the market effects in *Muko* were "low key" rather than "widespread" in character.[129] This ruling may have rested on undisputed facts, but the majority in *Muko I* provided little guidance for determining the point at which union conduct crosses the forbidden line. Further, the majority's failure to discuss the possibility that the unions' conduct constituted a violation of section 8(e)—a factor given considerable weight by the dissenting judge[130]—is suspect. The majority examined section 8(b)(4) of the National Labor Relations Act[131] in a cursory fashion, but even that discussion is infirm since the court ignored the landmark decision in the area of consumer handbilling, *NLRB v. Servette*,[132] a holding that arguably supports the majority's conclusion. In failing to mention *Servette*, the majority overlooked the significance of labor principles in resolving the exemption question and relied on the merits of the antitrust claim in the resolution of this issue. Thus, although the court tacitly acknowledged that the apparent legitimacy of the unions' conduct under prevailing labor precedent exempted it from antitrust scrutiny, the express language of the opinion predicated the labor exemption determination on antitrust grounds.

In any event, the "low key" test that the court applied in the context of its market restraint analysis suffered a quick demise when the

129. *Id.*

130. *Id.* at 75,301-02 (Gibbons, J., dissenting). See note 73 *supra*.

131. 29 U.S.C. § 158(b)(4) (1976). The court cited the publicity proviso of this subsection, which reads as follows:

> *Provided further*, That for purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution . . . .

1978-2 Trade Cas. at 75,298. The court concluded that "it would seriously undercut the protection offered by the publicity proviso to hold that, without more, concessions granted through legitimate handbilling under our labor laws could be subject to the antitrust laws." *Id.* at 75,297-98.

132. 377 U.S. 46 (1964). In *Servette* the Court considered whether a union violated section 8(b)(4)(i) and (ii) of the NLRA, 29 U.S.C. § 158(b)(4)(i), (ii) (1976), by urging the managers of several retail food stores to refrain from handling the merchandise supplied by the union's employer. The union had threatened to distribute handbills at those food stores, asking consumers to boycott Servette's products. The union hoped to gain the cooperation of the stores in this way. 377 U.S. at 49. The Court ruled that the conduct was not proscribed because the union had asked the store officials only to exercise managerial discretion in refraining from handling Servette's products. *Id.* at 51. Further, the union's activity was deemed to be protected by section 8(b)(4)'s handbilling proviso. *Id.* at 54-55.

Third Circuit reversed *Muko I* en banc.[133] The court's opinion in *Muko II* reflected its narrow interpretation of the labor exemption under *Connell*. The court found that, like the union activity in *Connell*, the agreement between Silver's and the union councils prevented Muko from competing for a portion of the available work in the Pittsburgh area.[134] The court also noted that a jury could find that the agreement to use only certified contractors would significantly increase the total costs of building restaurants.[135] Finally, the court concluded that the agreement itself had a potential for restraining competition because it excluded nonunion firms without regard to whether their competitive advantages had any relation to wages or working conditions.[136] The court then held that these direct market restraints, imposed by an agreement between a union and a business orgnization outside a collective bargaining relationship, were not exempt under the *Connell* test: the anticompetitive effects did not follow naturally from the elimination of competition over wages and working conditions.[137]

The court's analysis in *Muko II*, however, is again seriously flawed. There is a fundamental question whether any difference exists between the actual and the potential anticompetitive effects found by the court. Both restraints were essentially the same form of conduct with the same effect: market foreclosure. In addition, the court simply overlooked several important labor policy considerations in its opinion. The court did not mention that the unions' drive was aimed only at a nonindustry party rather than at all general contractors in the area. The Court in *Connell* had found this point important because, with all the general contractors involved, Local 100 could have created a geographical enclave to protect its local contractors.[138] Further, although the *Muko II* court discussed the unions' conduct in the context of section 8(e),[139] it failed to consider the unions' legitimate objective of preserving Silver's construction work. Finally, the court made only cursory reference to *Servette* and made no mention of the possibility that *Servette*'s interpretation of section 8(b)(4) might insulate the unions' handbilling activity from reprisal under the labor laws.[140]

133. 609 F.2d 1368 (3d Cir. 1979) (en banc).

134. *Id.* at 1373-74 (quoting Connell Constr. Co. v. Plumbers Local 100, 421 U.S. at 625).

135. 609 F.2d at 1372.

136. *Id.*

137. *Id.* at 1373-74.

138. 421 U.S. at 625.

139. The court held that the unions' activities in fact violated section 8(e). 609 F.2d at 1374-75.

140. Another point of contrast between the Third Circuit's two *Muko* opinions is the treatment each gave to the unions' picketing or handbilling activity. In *Muko I* the Court acknowledged that picketing occurred but failed to discuss the significance of this conduct in assessing the

Admittedly, *Muko II* addressed only the narrow issue whether the directed verdict granted in *Muko I* was appropriate. Nonetheless, the *Muko II* decision shows the court's inability to set an appropriate standard for determining the applicability of the labor exemption. A comparison of the *Muko* opinions illustrates the difficulties of resolving the labor exemption issue on an ill-conceived and poorly defined market-effects analysis, which gives little deference to appropriate labor law principles. If the Third Circuit's *Muko II* rationale were extended to its logical extreme, a court could find union conduct that is lawful under the labor laws to be the basis of an antitrust violation.

The district court's decision in *Barabas v. Prudential Lines, Inc.*,[141] came precariously close to reaching such a result. The issue in *Barabas* was whether a union and its individual members were entitled to a preliminary injunction against the sale of thirteen ocean vessels by Prudential to Delta Steamship Lines, Inc. The union based its injunction claim on a clause in its collective bargaining agreement with Prudential. Prudential sought to prevent the injunction on the ground that enforcement of the clause violated section 8(e) of the National Labor Relations Act and section 1 of the Sherman Act.

The clause in question required Prudential to insure by written agreement that any purchaser or transferee of its vessels would hire the complement of union employees who were or would be assigned to duty on such vessels, and that the transferee would comply with all other terms and provisions of Prudential's collective bargaining agreement.[142] During the sales negotiations, Delta refused to agree to such commitments because its workers were represented by a rival union. Accordingly, the sales contract for the vessels executed by Prudential and Delta contained a provision expressly disavowing the assumption of "any obligations resulting from any collective bargaining agreement

availability of the labor exemption. Conversely, the panel in *Muko II* discussed the validity of both the picketing and handbilling under the NLRA in an attempt to resolve this issue. *Compare* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council (Muko I), 1978-2 Trade Cas. at 75,297, *with* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council (Muko II), 609 F.2d at 1375. The question is important, for the proviso to section 8(b)(4) protects "publicity, *other than picketing*, for the purpose of truthfully advising the public . . . ." 29 U.S.C. § 158(b)(4) (1976) (emphasis added). *See, e.g.*, Local 54, Sheet Metal Workers Int'l Ass'n, 179 N.L.R.B. 362 (1969). Of course, the majority in *Muko II* rendered this issue academic by finding that the arguable legitimacy of the conduct begetting the agreement was irrelevant to the exemption issue if the agreement itself was illegal under section 8(e). The court, however, implied that handbilling intended to compel a section 8(e) agreement is not protected by the publicity proviso to section 8(b)(4).

141. 451 F. Supp. 765 (S.D.N.Y.), *aff'd per curiam*, 557 F.2d 184 (2d Cir. 1978).

142. *Id.* at 768.

or other understanding . . . ,"[143] including the restraint-on-transfer clause.

The union sought to enforce the restraint-on-transfer clause through arbitration. Subsequently, an arbitrator issued a decision requiring Prudential to abide by the terms of the clause.[144] In a related unfair labor practice proceeding between Prudential and the union, the Regional Director of the National Labor Relations Board approved a settlement agreement between the parties.[145] The agreement provided that, although the restraint-on-transfer clause was on its face violative of section 8(e) of the National Labor Relations Act, enforcement of the arbitrator's award "would not constitute unlawful conduct within the meaning of Section 8(e) of the Act."[146]

Examining the union's request for a preliminary injunction under standard criteria,[147] the court ruled that the union had shown a probability of success on the merits as against Prudential's defense that the clause violated section 8(e). It based this ruling on the National Labor Relations Board Regional Director's approval of the settlement agreement, which allowed enforcement of the restraint-on-transfer clause. The court added, however, that even though the clause may have been lawful under the labor laws, Prudential had shown a substantial probability of prevailing on its second claim that the nonstatutory labor exemption was inapplicable and that the union had violated the antitrust laws by seeking to enforce the restraint-on-transfer clause. The court reasoned that the nonstatutory exemption may have been unavailable to the union because the clause directly restricted Prudential's ability to sell or transfer its vessels,[148] and that enforcement of the

143. *Id.*

144. *Id.*

145. *Id.* at 768-69.

146. *Id.* at 769. There was no explanation or discussion of this unusual approval in the court's opinion. *Contra*, NLRB v. National Maritime Union, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

One possible explanation for the Regional Director's approval is that the arbitrator read the clause in question only to protect the jobs of the employees who were currently employed by the vessel owner, rather than to protect union jobs in general. Such a reading would have saved the clause, which on its face constituted an unlawful secondary activity. *Cf.* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 635 (1967) (holding that section 8(e) does not prohibit agreements made and maintained for the purpose of pressuring employers to preserve work traditionally done by union employees).

147. The court recognized that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1976), were implicated but asserted that it was "unnecessary" to determine whether they were applicable because the injunctive relief was denied in any event. 451 F. Supp. at 769 n.2.

148. *Id.* at 771. The court curiously premised this finding on the dissenting opinion of Judge Lumbard in Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793 (2d Cir.), *cert.*

clause was probably an antitrust violation because it would reduce the efficiency of the domestic maritime industry and would result in the loss of employment opportunities for other American union seamen.[149] Thus, the court intimated that the union conduct could violate the antitrust laws, notwithstanding its apparent lawfulness under the labor laws.

The Second Circuit's decision in *Commerce Tankers Corp. v. National Maritime Union*[150] involved similar facts, and that court's handling of the exemption and antitrust problems is equally disquieting. In *Commerce*, plaintiff's claim was virtually identical to the claim in *Barabas*: Commerce argued that because the National Maritime Union's restraint-on-transfer clause violated the labor laws, the union's activities in attempting to enforce the clause were unprotected by the nonstatutory exemption. Consequently, enforcement of the clause would constitute an antitrust violation.[151] One significant difference between Commerce's claim and plaintiff's claim in *Barabas* was that, in the former case, the National Labor Relations Board had already held that the National Maritime Union's clause was a violation of section 8(e), and this ruling had been affirmed by the Second Circuit.[152]

The majority in *Commerce* avoided answering Commerce's exemption arguments directly, holding that this issue should first be determined in the district court after further findings and briefs from both parties.[153] The court noted in dicta, however, that its prior holding on the section 8(e) issue did not necessarily determine the labor exemption issue; it merely lent support to Commerce's claim that the nonstatutory exemption was unavailable.[154]

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denied, 434 U.S. 923 (1977), which involved a similar restraint-on-tranfer clause in another collective bargaining agreement. See discussion in text accompanying notes 150-58 *infra*.

149. 451 F. Supp. at 771. The court's analysis on this point is equally curious. In considering whether the clause unreasonably restrained trade, the court claimed that it had to balance "the public interest in a competitive domestic maritime industry against the *public interest* sought to be protected by the labor laws." *Id.* (emphasis added). One could certainly question why the court did not balance those interests in determining the exemption question, as *Jewel Tea* directs, rather than in determining the substantive antitrust violation. Moreover, the court did not weigh the possible job preservation interests of the union, as it considered only the supposed "loss of employment opportunities for American union seamen" in general. *Id.* In ignoring the union's work preservation motive, the court in *Barabas* has implicitly abandoned the *Jewel Tea* "intimately related" test. Because the court totally disregarded the union's interest in work preservation, it was clearly unnecessary to cousider whether the challenged union activity was "intimately related" to this legitimate union objective.

150. 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

151. 553 F.2d at 798.

152. NLRB v. National Maritime Union, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

153. 553 F.2d at 802.

154. *Id.* The majority relied on *Connell* and intimated that because the restraint-on-transfer

Judge Lumbard dissented in part in *Commerce*, arguing that the case should be remanded to the district court for the limited purposes of assessing damages and entering judgment.[155] He asserted that the court's prior finding of illegality under section 8(e), coupled with the prevention of Commerce's selling its ship, was sufficient to strip the National Maritime Union of its nonstatutory exemption under the *Connell* "follow naturally" standard.[156] He also stated that there was sufficient evidence to support the finding of an antitrust violation against the National Maritime Union under either the per se or the rule of reason approach.[157] Thus, Judge Lumbard read *Connell* to require automatic denial of the labor exemption once a violation of the labor laws was found. This approach would foreclose all analysis of the actual or potential market effects of the union's conduct. In Judge Lumbard's view, the prior ruling on the section 8(e) violation created an inference that the restraint-on-transfer clause might eliminate competition in ways that did not follow naturally from the union's concern over wages and working conditions.[158]

The Third Circuit adopted Judge Lumbard's view of the labor exemption question in *Consolidated Express, Inc. v. New York Shipping Association.*[159] The *Consolidated* decision involved the lawfulness of the union's attempts to enforce certain provisions contained in a collective bargaining agreement and a supplemental accord executed by the New York Shipping Association and the International Longshoremen's Association. In ruling that the union's conduct violated the antitrust laws, the Third Circuit pushed the *Connell* "follow naturally" test to its logical extreme and fashioned perhaps the most novel application of the labor exemption to date.

The contract provisions at issue in *Consolidated* stemmed from a labor dispute dating back to 1958 between the New York Shipping Association and the International Longshoremen's Association.[160] This dispute concerned the practice of "containerization," the packing and

clause was contained in a collective bargaining agreement, it might be sheltered from antitrust attack. *Id.* at 801. This issue, however, was left open in *Connell.* Justice Powell stated ony that no argument could be made that Local 100's hot-cargo agreement was protected, because there was no collective bargaining agreement at issue in *Connell.* 421 U.S. at 625-26.

155. 553 F.2d at 803 (Lumbard, J., dissenting in part).

156. *Id.* at 803-04 (Lumbard, J., dissenting in part).

157. *Id.* at 804.

158. *Id.*

159. 602 F.2d 494 (3d Cir. 1979).

160. For an extended discussion of the controversy, see 602 F.2d at 498-501. *See also* Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 888 (2d Cir. 1970); Consolidated Express, Inc. v. New York Shipping Ass'n, 452 F. Supp. 1024, 1026-31, 1042 (D.N.J. 1978), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979).

unpacking of ocean cargo in large containers away from the docks. Consolidated and other containerization firms had gradually reduced the amount of work available for longshoremen, who historically had performed the packing and unpacking at the docks.[161] The New York Shipping Association and the International Longshoremen's Association had attempted to preserve the longshoremen's work by executing the Rules on Containers and the Dublin Supplement,[162] which imposed heavy fines on vessel owners who supplied containers to firms like Consolidated.

Prior to filing its antitrust action against the unions, Consolidated had lodged an unfair labor practice charge against the International Longshoremen's Association, asserting that the agreements in question and the union's enforcement efforts constituted violations of section 8(e)[163] and section 8(b)(4)(ii)(B)[164] of the National Labor Relations Act. The National Labor Relations Board upheld Consolidated's charges, concluding that the International Longshoremen's Association's activities were unrelated to job preservation and consequently had an unlawful secondary objective.[165] The Board's ruling was subsequently affirmed by the Second Circuit.[166]

The labor exemption issue before the Third Circuit in *Consolidated*, therefore, was whether a National Labor Relations Board finding of illegality was in and of itself sufficient to oust the union's conduct from the protection of the nonstatutory exemption. After an exhaustive

161. 602 F.2d at 498.

162. The terms of both agreements are noted in the district court's opinion, 452 F. Supp. at 1027-28 n.3.

163. 29 U.S.C. § 158(e) (1976). See note 73 *supra*.

164. 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

165. International Longshoremen's Ass'n, 221 N.L.R.B. 956 (1975).

166. International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). The Second Circuit distinguished its prior decision, International Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970), in which it held that the union's conduct was directed toward job preservation, by stating that it arose in the context of an antitrust violation. 537 F.2d at 708 n.1. In International Longshoremen's Ass'n v. NLRB, 560 F.2d 439 (1st Cir. 1977), the First Circuit held a strikingly similar agreement, which involved the Rules on Containers, to be a violation of section 8(b)(4)(ii)(B). The Fourth Circuit reached essentially the same conclusion in vacating a district court's denial of a temporary injunction against the Rules requested by the NLRB's Regional Director. Humphrey v. International Longshoremen's Ass'n, 548 F.2d 494 (4th Cir. 1977).

Despite these nearly uniform rulings, the District of Columbia Circuit, in International Longshoremen's Ass'n v. NLRB, 613 F.2d 890 (D.C. Cir. 1979), *cert. granted*, 100 S. Ct. 727 (1980), held that the ILA's Rules on Containers were related to job preservation rather than work acquisition, and that they were therefore lawful under the NLRA. The court reasoned that the NLRB erred by failing to examine "all the surrounding circumstances" to determine whether the ILA's activities were related to job preservation. 613 F.2d at 909. The court held that this sort of extensive analysis was required by the holding in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). 613 F.2d at 910.

review of labor exemption precedent, the court drew a distinction between an action under section 16 of the Clayton Act seeking injunctive relief and an action under section 4 seeking treble damages.[167] The court concluded that conduct found to be an unfair labor practice could derive no protection from the nonstatutory exemption in suits for injunctive relief.[168] Indeed, the Third Circuit's ruling implied that a finding of illegality under section 8(e) not only removed the exemption but also proved that the challenged conduct violated the antitrust laws.[169] On the other hand, the same conduct might still be immune from antitrust prosecution in treble-damage suits.

The court's distinction between injunctive and treble-damage antitrust actions was based on two premises: a reluctance to disturb the collective bargaining process and the peaceful, voluntary adjustment of labor disputes, and a concern that the defendants in *Consolidated* might have "reasonably believed that their agreement was directly related to the lawful goal of work preservation."[170] There were several reasons for this second concern. Prior to the National Labor Relations Board's disposition of the matter, the Second Circuit had ruled in *Intercontinental Container Transport Corp. v. New York Shipping Association*[171] that the Rules on Containers were immune from antitrust attack, because their objective was "the preservation of work traditionally performed by longshoremen covered by the agreement"[172] and that the union had acted solely in its own self-interest in demanding that the Rules be enforced.[173] Moreover, it appears from the district court's decision in *Consolidated* that a presidentially appointed mediator not only encouraged but also participated in the negotiations between the New York Shipping Association and the International Longshoremen's Association leading up to the adoption of the Rules.[174] As the district court aptly noted in *Consolidated*: "the Rules were put into effect during a period when all official indications suggested that they were legiti-

167. 602 F.2d at 520-21.

168. *Id.* at 521.

169. *Id.* at 519. The court held that enforcement of the Rules on Containers and the Dublin Supplement was not exempt under the Sherman Act and that it could be enjoined under the *Jewel Tea* and *Connell* tests. *Id.* at 516-19. Without any further analysis of the substantive antitrust allegations, the court concluded: "If this were an action for injunctive relief brought pursuant to § 16 of the Clayton Act, an injunction . . . plainly would be required." *Id.* at 519. The court's reliance on the *Jewel Tea* and *Connell* rulings in this context is odd; both cases dealt only with the exemption question and not with the antitrust issues.

170. *Id.* at 520.

171. 426 F.2d 884 (2d Cir. 1970).

172. *Id.* at 887.

173. *Id.* at 888.

174. Consolidated Express, Inc. v. New York Shipping Ass'n, 452 F. Supp. 1024, 1042 (D.N.J. 1978), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979).

mate."[175]

In apparent reliance upon these unusual circumstances, the Third Circuit devised a new labor exemption, which it referred to as the section 4 exemption defense.[176] In order to make a prima facie showing against antitrust immunity in section 4 cases, a plaintiff must show only that the challenged activity is illegal under federal labor law. Even if this element is proved, however, the parties to the collective bargaining agreement may still avail themselves of the exemption if they can show that the restraint on the secondary market was "intimately related" to an object of collective bargaining thought to be legitimate at the time of the agreement and that the restraint went no further than was necessary to accomplish that object.[177] As a caveat, the court admonished that the section 4 exemption defense would be unavailable if predatory intent were involved in the restraint.[178]

The Third Circuit's opinion in *Consolidated* is bewildering in a number of respects. First, the court did not explain its holding that a violation of section 8(e) may automatically constitute an antitrust violation in actions for injunctive relief. As Judge Weis suggested in his dissent, every court that has considered the labor exemption issue has recognized the need to separate the exemption inquiry from the antitrust liability inquiry.[179] Second, the majority in *Consolidated* did not consider the impact that the Norris-LaGuardia Act would have upon a district court's authority to enter an injunction in cases involving labor disputes. The court may have taken the view that the union's conduct in *Consolidated* was unlawful and that it could not be characterized as a labor dispute within the meaning of the Norris-LaGuardia Act, but it is not at all clear that the court even entertained such an interpretation of the Act's terms.[180] Finally, the *Consolidated* decision makes labor's exemption turn on the opinion of those involved in collective bargaining negotiations on the lawfulness of the agreement under the labor laws. The thought that a judge or jury might later pry into the subtle nuances of the collective bargaining process long after a conclusion of negotiations may temper union demands to some extent, but such an

175. *Id.*

176. 602 F.2d at 521.

177. *Id.*

178. *Id.*

179. *Id.* at 528 (Weis, J., dissenting). In practice, however, these two inquiries have frequently been combined, and this problem has been perpetuated by the *Connell* "follow naturally" test. See text accompanying note 119 *supra*.

180. The court probably ignored the issue because of the cease and desist order that had been issued by the NLRB and enforced by the Second Circuit. The parties certainly had no reason to brief the issue since the only remedy Consolidated sought was treble damages.

intrusion may well do more to unsettle the fragile balance sought to be achieved in that process.

The court's holding in *Consolidated* again points up the ambiguity of the *Connell* "follow naturally" test. In fact, this ambiguity has arisen in a variety of court opinions holding that conduct arguably lawful under the labor laws may nevertheless be subject to antitrust attack; that a violation of the labor laws does not necessarily determine whether the labor exemption is available; and that a violation of section 8(e) not only renders the labor exemption inapplicable but also establishes an antitrust violation in actions seeking only injunctive relief.

B. *Rule of Reason or Per Se Approach.*

Once the court has found that the union-employer conduct is nonexempt from antitrust prosecution, it must then ascertain whether to apply the rule of reason or the per se rule of illegality under the Sherman Act. Although the Supreme Court has never addressed this issue directly,[181] the need for some precise direction in this area is pressing. Application of the per se rule pretermits consideration of the resulting market effects, the characteristics of the industry involved, and the purpose of or motivations behind the restraints imposed, while all of these factors are relevant under the more extensive rule of reason approach.[182] Accordingly, if plaintiffs prove the elements of typical per se

181. The Court has hinted in dicta that the per se rule may be applicable to union-employer conduct. In *Apex Hosiery*, for example, the Court stated that the Sherman Act "makes no distinctions between labor and nonlabor cases," 310 U.S. at 512, and that it should be applied impartially to the activities of industry and labor alike. *Id.* The various opinions in both *Jewel Tea* and *Pennington* also indicate the Court's belief that settled antitrust principles are appropriate and applicable in resolving substantive antitrust claims against union-employer combinations. *See* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. at 693 n.6 (plurality opinion); *id.* at 736-37 (Douglas, J., dissenting); UMW v. Pennington, 381 U.S. at 673 (Douglas, J., concurring).

These opinions, however, are far from conclusive on whether the per se rule is applicable. In *Apex* Justice Stone specifically declined to rule on the issue, 310 U.S. at 507 n.25, and the Court later interpreted *Apex* as drawing a distinction between "combinations having commercial objectives" and "labor unions, which normally have other objectives," Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959); *accord*, Note, *supra* note 8, at 831.

Justice Douglas apparently viewed the restraint in *Jewel Tea* as a form of a group boycott, *see* 381 U.S. at 737 (citing Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941)), but Justice White considered the restraint a limitation on business hours and apparently would have applied a rule of reason analysis. *See* 381 U.S. at 693 n.6 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)). Moreover, the courts that considered the restraint in *Pennington* on remand did not apply the per se rule. *See, e.g.*, South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970), *cert denied*, 402 U.S. 983 (1971). *See also* Ramsey v. UMW, 401 U.S. 302 (1971).

182. *Compare* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (the oft-quoted rule of reason case), *with* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any

restraints such as price fixing or group boycotts, then the courts will presume adverse market effects and the absence of any justification for the restraint.[183]

The lack of guidance from the Supreme Court on this issue has generated as much debate and confusion among the lower courts as has the proper application of the Court's "follow naturally" test. The Second Circuit, for example, avoided deciding this issue in *Commerce*, noting only that there was a substantial question whether a per se approach should be utilized to judge nonexempt labor conduct.[184] Similarly, in *Muko II* the court refused to commit itself regarding the application of the per se rule and rule of reason approaches, although its reservation stemmed from its inability to characterize the unions' conduct as either a group boycott or some lesser restraint.[185] In dictum, however, the court suggested that evidence of a classic group boycott adduced on remand would warrant application of the per se rule.[186]

Only the Third, Eighth, and Ninth Circuits have confronted this question directly. Regrettably, the results these courts have reached are far from harmonious. In *Ackerman-Chillingworth, Inc. v. Pacific Electrical Contractors Association*,[187] the Ninth Circuit considered the appropriateness of applying the per se rule to a collective bargaining agreement requiring all employers to use only one insurance firm for their workmen's compensation coverage. The court ruled that the record did not support a finding that the union and its employer group had committed a per se violation of the Sherman Act. The court based its decision on two key factors: the lack of harm to the plaintiffs as a result of the plan, and the absence of coercion on the part of the trade association's representative who was responsible for soliciting the insurance contracts from the signatory contractors.[188] The court apparently relied on these factors alone, failing to consider either the union's interests in the plan or the policy underlying peaceful collective bargaining. The court observed only that the union-employer group did

redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"). *See generally* Von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569 (1964).

183. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350 (1967) (division of markets); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (boycotts); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (tying arrangements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing).

184. 553 F.2d at 802.

185. 609 F.2d at 1375-76.

186. *Id.* at 1376.

187. 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

188. 579 F.2d at 490.

not share any of the characteristics of the groups generally condemned as unlawful per se.[189]

The unique characteristics of the group charged with violating the antitrust laws also led the Eighth Circuit to refuse to apply the per se rule in *Mackey v. National Football League*.[190] At issue in *Mackey* was the "Rozelle Rule," which allowed the Commissioner of the National Football League to compensate a club for the loss of a player who had become a free agent and had signed a contract with another league team.[191] The National Football League Players' Association alleged that the Rozelle Rule denied them the right to contract freely for their services, and that its enforcement constituted a concerted refusal to deal, illegal per se under the Sherman Act.[192] Relying on the unique nature of the league—which the court observed had some of the characteristics of a joint venture[193]— on the lack of complete elimination of competition for the players' services, and on the district court's exhaustive inquiry into the operation of the league, the Eighth Circuit concluded that the Rozelle Rule did not warrant per se treatment.[194] As in *Ackerman-Chillingworth*, the court did not weigh the union's interest or lack of interest in the restraint resulting from the Rozelle Rule or the

189. *Id.* at 490 n.7.

190. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). For a discussion of *Mackey* and of whether the per se rule should be applied to the arguably unique professional sports industry, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 5.07, at 608-13, 617-21 (1979).

191. 543 F.2d at 610-11.

192. *Id.* at 609. Before addressing the substantive antitrust claim, the Eighth Circuit considered whether the labor exemption was applicable to shield the Rozelle Rule from antitrust attack. The court devised an elaborate test, which it deduced from labor-antitrust cases:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the anti-trust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted contains a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 614 (citations omitted). Although the court found that the Rozelle Rule was a mandatory subject of collective bargaining, *id.* at 615, it held the exemption inapplicable because there had been no bona fide arm's-length bargaining between the NFL Players Association and the league. *Id.* at 616. This ruling was based on the district court's finding that there was no quid pro quo for including the Rule in the collective bargaining agreement in terms of increased pension benefits or other labor gains. *Id.*

The *Mackey* court's "arm's length" criterion sets a dangerous precedent. It allows courts to reopen the collective bargaining process for the purpose of weighing the many varied and intricate bargaining positions taken by the respective parties, and it effectively requires courts to determine whether the provisions agreed upon are fair or beneficial to the parties. The courts are particularly unsuited to assume such a role. *See* Cox, *supra* note 60, at 326.

193. 543 F.2d at 619.

194. *Id.* at 619-20.

collective bargaining process itself in arriving at this conclusion. Nor did the court deem it relevant that the restraint was in the labor rather than the product market.[195]

While the Third Circuit also deemed these considerations irrelevant in the *Consolidated* case, it held that the per se rule was applicable, basing its decision on three grounds. First, unlike the courts in *Ackerman-Chillingworth* and *Mackey*, the Third Circuit had no difficulty in finding that the union-employer combination had "horizontal, vertical and coercive aspects," all of which were present in the business combinations previously subjected to the per se rule.[196] The conspiracy had horizontal anticompetitive effects in precluding Consolidated and the other boycott victims from rendering services identical to those provided by some of the members of the combination.[197] The vertical element was apparently supplied by the vessel owners' participation in the combination, because they supplied the containers that the boycott victims needed to operate.[198] The combination was also coercive in that the boycott victims were required to change their methods of operation to allow the International Longshoremen's Association labor to do the packing and unpacking.[199] Second, the majority in *Consolidated* found that the Supreme Court opinions in both *Jewel Tea* and *Pennington* supported, rather than prevented, the application of the per se rule to conduct arising from collective bargaining agreements. Relying on the dissenting opinions of Justices Goldberg and Douglas, the majority opined that settled antitrust principles such as the per se rule were appropriate and applicable to nonexempt union-employer activities.[200] Finally, the court rejected the notion that labor's legitimate interests in the collective bargaining process were adequate justification for applying the rule of reason. Noting that these interests merited attention in determining whether the section 4 exemption defense was available to the union-employer's conduct in the first place, the court reasoned that it would be redundant to weigh those interests again in deciding the antitrust liability question.[201]

In sum, the lower courts either have dodged the issue of whether

195. As noted above, however, the Eighth Circuit apparently took both these considerations into account in determining whether to apply the labor exemption. See note 192 *supra*.

196. 602 F.2d at 522. It is interesting to note that the court found a second union, the Teamsters, to be the excluded horizontal competitor of the International Longshoremen's Association. *Id.*

197. *Id.*

198. *See id.*

199. *Id.*

200. *Id.* at 523. For a discussion of the problems in relying on those cases to support application of the per se rule, see note 181 *supra*.

201. 602 F.2d at 523-24.

the per se rule should be applied or have applied it in conflicting ways. Most of the problems associated with applying the per se rule to collective bargaining conduct lie in characterizing the union-employer combination as one of the horizontal or vertical combinations that the courts consider in the context of classic commercial restraints. Equally troublesome—with the exception of *Consolidated*—are the courts' failures to consider the collective bargaining process or to distinguish between labor and business-oriented restraints in determining the appropriateness of the rule of reason approach.

IV. A More Practical Approach

The *Connell* "follow naturally" test and the reasons given by the lower courts for applying either the rule of reason or the per se rule to union-employer conduct are wholly unacceptable principles upon which to decide the sensitive issues of antitrust-labor policies. As shown in the preceding section, the *Connell* "follow naturally" test in general is devoid of any bright-line rules for determining the circumstances in which the labor exemption should be applied. In particular, the test does not establish the types of adverse market effects, if any, that should or should not be permitted when juxtaposed with labor policies. Nor does the test give any guidance on the role that traditional labor law principles should play in protecting anticompetitive union-employer conduct. The rule of reason-per se rule controversy is equally devoid of precedential guidance. The courts' choice between these two rules is controlled exclusively by the courts' ability to match the configuration or conduct of a union-employer combination with one of the various models created by the courts in considering purely commercial conduct. This matching process either ignores collective bargaining policies or relegates them to a subordinate position.

There is an approach to the problem that will avoid many, if not all, of the pitfalls created by the "follow naturally" test and by the courts' handling of the rule of reason-per se rule controversy. This approach may require a significant change in the manner and order in which the labor-antitrust policies are considered, but it requires no more analysis than the courts have applied to the problem in the past. In essence, our approach requires that the labor exemption and antitrust questions be answered separately, and that resolution of the former question turn exclusively on labor law principles, while resolution of the latter turn exclusively on antitrust law principles. Under this approach, conduct resulting from collective bargaining on mandatory subjects or from lawful organizational activity would be immune from

antitrust attack.[202] Further, if the court determines that the conduct in question is unprotected by labor law principles or unrelated to mandatory subjects of bargaining, then the court should apply the more flexible rule of reason analysis.

In separating the exemption question from the antitrust liability question and relying exclusively on labor law principles to determine whether the labor exemption should be applied, our approach is an acceptable compromise between the labor and antitrust laws. It protects arguably lawful union conduct and injects some consistency into resolution of the problem. If the market effects of the restraint were removed from consideration, the courts would not have to use a nebulous balancing test in deciding the exemption issue. The courts, however, would still consider the purpose and the gravity of the anticompetitive effects in the rule of reason analysis if the exemption is found inapplicable. In addition to its consistency, our approach would protect the collective bargaining process and would lessen unfairness to employers. Employers would not be subject to per se antitrust liability where their participation in the restraint was anything less than willing.[203]

A. *The Labor Exemption.*

Under our proposed approach to the labor exemption problem, *Connell*'s artificial distinction between the statutory and nonstatutory

202. Logically, conduct that is deemed lawful under the labor laws should be within the labor exemption to the antitrust laws. To be sure, union organizational activity and other concerted efforts not proscribed by Congress should be immune from antitrust scrutiny. With respect to the mandatory-nonmandatory dichotomy, limiting the exemption to mandatory subjects of bargaining insures that those areas of the employer-union relationship involving mandatory subjects of bargaining will not be subject to antitrust regulation. The NLRB has delineated precise guidelines on mandatory bargaining subjects in an effort to promote meaningful negotiation between employers and their employees' representatives with due regard for the business exigencies attending such negotiation. The antitrust laws should not be invoked to disturb these guidelines, which reflect the experience and expertise of the NLRB.

Those areas of bargaining that are nonmandatory, *i.e.*, that are permissive or illegal, cannot be immune from antitrust scrutiny. Such areas of bargaining often embrace the very type of conduct that the antitrust laws attempt to prohibit. Conduct such as negotiating an agreement fixing the prices of employers' goods or the geographical markets for such goods should be subject to prosecution under the antitrust laws, even though the activity may be related to an appropriate, albeit nonmandatory, subject of bargaining. Because the NLRB has specifically found that price fixing and geographical market division are not mandatory subjects of bargaining, the impact of judicial intrusion into this area would be minimal.

203. Our approach is in some ways similar to the approaches suggested by Justice Goldberg in his dissenting opinion in *Pennington* and his concurring opinion in *Jewel Tea* and by Professor Handler in his analysis of the labor exemption issue, published prior to the *Connell* opinion. *See* Handler, *supra* note 68, at 238-40. Differences between our approach and Professor Handler's are explained in notes 207 & 215 *infra*.

exemptions would be eliminated. As stated earlier,[204] the distinction is anomalous where applied to the facts of the labor-antitrust cases decided prior to *Connell*. Further, it gives too broad a scope to the nonstatutory exemption. Indeed, if our approach were characterized under the statutory-nonstatutory dichotomy, it should be considered statutory, since the labor exemption issue would be determined solely under the Clayton, Norris-LaGuardia, and National Labor Relations Acts.

A second aspect of our approach is that the market effects of the union-employer conduct would be deemed irrelevant to the exemption issue.[205] Accordingly, if the challenged conduct is protected by relevant labor legislation or if the conduct results from agreement on a mandatory subject of collective bargaining and is free from other labor policy problems, the labor exemption should be applied and any further analysis should be foreclosed. If neither of these two conditions is met, however, the exemption should not be applied, even though the conduct may have followed naturally from, or may have been intimately related to, the protection of legitimate labor concerns.

Our suggested approach to the labor exemption is not without flaws. First, relying exclusively on labor law principles to decide the exemption issue may result in district courts' usurping or preempting the National Labor Relations Board's role in determining significant or difficult labor law issues. Second, Board and court decisions that classify terms of collective bargaining agreements as either mandatory or nonmandatory do not generally consider the adverse market effects that may result. Our approach might therefore lead to the subordination of antitrust policies to labor policies.[206] Finally, one could question the wisdom of allowing any antitrust analysis of union conduct proscribed by the labor laws, since Congress may have intended the remedies provided by the labor laws to be exclusive.[207]

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204. See notes 85-92 *supra* and accompanying text.

205. This rule would apply unless consideration of such effects was necessary under applicable labor law principles. *See, e.g.*, Dolly Madison Indus., Inc., 182 N.L.R.B. 1037 (1970) (requiring a finding that no predatory purpose is involved in demanding that a most favored nations clause be included in a collective bargaining agreement). *See generally* Comment, *Antitrust Law—Most Favored Nation Clause and Labor's Antitrust Exemption*, 19 J. PUB. L. 399 (1970).

206. *See* Meltzer 697, 731-32.

207. *See* Handler, *supra* note 68, at 239 n.20 ("Antitrust should have no application to what the Labor Act specifically prohibits; otherwise the forbidden conduct would be subject to dual proceedings and double punishment"). Professor Handler's dual proceeding problem, however, can be alleviated as it was in *Consolidated*: by requiring charging parties to bring both a section 301 claim under the NLRA and either a section 1 or a section 2 claim under the Sherman Act in one suit. His dual punishment problem can be avoided by requiring charging parties to elect their remedies after the substantive labor and antitrust findings are made. *Cf.* Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d at 524-25 (complaint seeking Shipping Act reparations

However valid these criticisms may be, they do not outweigh the benefits of requiring the labor exemption to turn exclusively on labor law principles. Although the National Labor Relations Board preemption problem is particularly troublesome, the Supreme Court has already considered and resolved the issue. In both *Jewel Tea* and *Connell*, the Court rejected the argument that the Board has exclusive jurisdiction to determine labor matters where they are presented as collateral issues.[208] Thus, requiring the courts to apply only labor law principles in determining the exemption question would probably not aggravate the preemption problem significantly. Further, our approach would prevent incorrect treatment or total disregard of critical labor issues. There would be no chance that the conduct permitted by the labor laws would be declared unlawful under the antitrust laws. As we have pointed out, this is a distinct possibility under the Court's present exemption test.[209]

There are, admittedly, certain questions of labor law that are difficult to resolve and that may require an extremely sophisticated analysis purely in terms of labor law tenets. The work preservation analysis under sections 8(e) and 8(b)(4), as well as complex issues surrounding the good faith bargaining requirements, certainly epitomizes such problems. Yet the ample National Labor Relations Board precedent in these areas should give the courts sufficient guidance to resolve the difficult labor-related issues. Sections 301 and 303 of the National Labor Relations Act, moreover, confer jurisdiction upon district courts to decide difficult labor issues on first impression.[210] Indeed, the courts have

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filed with Federal Maritime Commission, later voluntarily withdrawn, held not an irrevocable election of remedies and thus no bar to subsequent Clayton Act claim).

208. Connell Constr. Co. v. Plumbers Local 100, 421 U.S. at 626; Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. at 684-88 (plurality opinion); *id.* at 710 n.18 (Goldberg, J., concurring); *accord*, Meltzer 723.

209. See text accompanying notes 141-49 *supra*. Recently, the Ninth Circuit considered the applicability of labor's exemption from the antitrust laws by relying almost exclusively on traditional labor law principles. In Granddad Bread v. Continental Baking Co., 612 F.2d 1105 (9th Cir. 1980), the court ruled that a clause contained in a collective bargaining agreement, restricting the signatory bakers from allowing anyone other than union members to pick up and deliver the bakers' products, was immune from antitrust attack. The court reasoned that since this clause was related to job preservation and since the signatory bakers had the right to control the methods of delivery, the union's conduct was not prohibited secondary activity, which could be subject to the antitrust laws. *Id.* at 1110.

Note that after making this ruling, however, the court stated that there was no evidence showing that the union and signatory bakers "had either entered into [the agreement] or used it to control the wholesale bread market or to injure competitors." *Id.* Thus, although the court disposed of the exemption issue facilely on labor law grounds, it was still unable to rule on this question without referring unnecessarily to the absence of market effects, which the *Connell* "follow naturally" test unfortunately requires.

210. 29 U.S.C. §§ 185, 187 (1976).

set landmark precedent, significantly affecting employer-employee relations, without the guidance of National Labor Relations Board case law.[211] In the event that novel or complex labor law issues are raised in a particular case, however, the district courts may avail themselves of devices such as references to the Board[212] or requests that the Board participate as an amicus curiae.[213]

Second, as a general rule the National Labor Relations Board and the courts do not take antitrust policies into account in determining whether any given subject of bargaining is mandatory. As a consequence, if mandatory subjects under the National Labor Relations Act were held totally exempt from the Sherman Act, antitrust policies might in some ways be subordinated to labor law policies.[214] Some form of subordination, however, is inevitable in reconciling the antitrust and labor laws, and elevating mandatory subjects of collective bargaining above the Sherman Act would not be contrary to national interests as a whole, especially where failure to bargain in good faith over such subjects is expressly prohibited by the National Labor Relations Act. Indeed, regardless of any subordination of antitrust policy, it is paradoxical for unions and employers to be subject to injunctions, treble damages, and possibly even criminal prosecution under the antitrust laws for reaching agreement on employment terms that are mandatory subjects of collective bargaining under the labor laws.[215]

Finally, any criticism against allowing an antitrust charge to proceed after the union conduct has been held to violate the labor laws is

211. *See e.g.*, Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

212. *Cf.* Tenneco Oil Co. v. Federal Energy Regulatory Comm'n, 580 F.2d 722, 724 (5th Cir. 1978) (decision on appeal of dismissal of petition for declaratory relief withheld pending decision by Federal Energy Regulatory Commission in related administrative proceeding).

213. *See, e.g.*, Burco, Inc. v. Whitworth, 81 F.2d 721 (4th Cir.), *cert. denied*, 297 U.S. 724 (1936); Alexander v. Hall, 64 F.R.D. 152 (D.S.C. 1974); Hubert v. Saucier, 347 F. Supp. 152, 154 (N.D. Ga. 1972). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 24.02, at 33-34 & n.9 (2d ed. 1979).

214. *See* Meltzer 698-99, 734.

215. *Accord*, Cox, *supra* note 2, at 271. *See also* St. Antoine, *supra* note 2, at 614.

Under Professor Handler's approach, nonmandatory subjects of collective bargaining could still be exempted by expanding the exemption on a case-by-case basis. *See* Handler, *supra* note 68, at 239 n.20. We disagree with this expansion process for three reasons. First, there is no significant labor policy to be protected by including nonmandatory subjects within the labor exemption. Employers and unions may resist demands for including nonmandatory subjects in a collective bargaining agreement without violating the NLRA, but they may not do so as to mandatory subjects. Second, any case-by-case analysis of the labor exemption for nonmandatory subjects would most likely lead to some form of balancing test, such as weighing competitive harm against union interests. A balancing test ought to be avoided for the reasons explained above. Finally, the types of subjects that usually fall within the nonmandatory category, such as restrictions on the way an employer does business, are precisely the types of restraints most likely to have substantial anticompetitive effects that cannot be tolerated under antitrust policies.

refutable. Unions have been subject to the Sherman Act since its enactment, and the Court in *Connell* rejected the argument that labor law remedies are exclusive.[216] Our suggested approach, moreover, is not limited solely to secondary union conduct, which is subject to third-party remedial provisions under the National Labor Relations Act,[217] but extends to all forms of union conduct, including anticompetitive provisions contained in collective bargaining agreements. As a matter of consistency, therefore, secondary activities should not be treated any differently from other forms of union conduct under the antitrust laws. Indeed, the treble-damage provision of the Sherman Act could act as a stronger deterrent to curb unlawful secondary conduct, thus promoting national labor policy.[218]

Applying our suggested approach to the Supreme Court cases that have involved the labor exemption issue would generally lead to the same results reached by the Court. The unions' conduct in both *Connell* and *Allen Bradley* would be nonexempt because of the unlawful hot-cargo provisions involved in those cases. Similarly, the union conduct considered in *Carroll* would be exempt because the restraint in that case involved wages, a mandatory subject of collective bargaining. Although the topic of wages was involved in *Pennington*, the United Mine Workers' activities would still be nonexempt under our suggested analysis. The union's refusal to bargain unit-by-unit was a violation of labor policy,[219] so that the exemption for conduct related to mandatory subjects would not be available under our approach. Our analysis would, of course, differ from the *Pennington* Court's: the exemption would not turn on the direct and immediate restraint in the product market or on the alleged conspiracy.

The only case in which our analysis might produce a contrary result is *Jewel Tea*. In our view, the grocery stores' hours of operation examined in that case could not be considered a mandatory subject of bargaining, despite the fiction created by the Court to tie those hours to the butchers' working hours under the "intimately related" test.[220] The union's conduct in *Jewel Tea*, therefore, would be nonexempt under our suggested rule. Nevertheless, the second element of our suggested

216. 421 U.S. at 634.

217. 29 U.S.C. § 187 (1976).

218. There is a valid criticism that Congress never intended the antitrust laws to apply to secondary union conduct, especially in light of the enactment of section 303 of the National Labor Relations Act. However valid that criticism may be, the Court in *Connell* specifically rejected the notion that an affected party's remedies were limited solely to those provided in section 303. 421 U.S. at 633-34.

219. 381 U.S. at 666 (plurality opinion).

220. 381 U.S. at 697.

approach, the rule of reason test, might lead to a finding that the union's conduct did not constitute an unreasonable restraint of trade under the Sherman Act. Indeed, the factors the *Jewel Tea* Court considered in concluding that the marketing hours restriction was intimately related to legitimate union aims and therefore exempt were the same as those that would be considered under a rule of reason analysis.

B. *Rule of Reason.*

As stated earlier, the Supreme Court has never ruled directly on whether the rule of reason or the more stringent per se rule of illegality should apply to union-employer conduct.[221] Under our approach the rule of reason is the more prudent standard for deciding labor-antitrust issues. The rationale behind the per se rule is largely invalid in the context of labor-employer restraints, and application of that rule would be both inimical to the collective bargaining process and unfair to the parties involved in that process.

The per se rule is premised on the theory that there are certain commercial practices that are so anticompetitive in effect and purpose that they are presumed to be unreasonable without an elaborate inquiry.[222] Although the per se premise is unquestionably valid in challenges to commercial practices such as price fixing, group boycotts, and tying agreements, it loses much of its force where applied to restraints imposed by union-employer combinations. That is not to say that such restraints can never be unreasonable within the meaning of the Sherman Act or that such restraints are procompetitive. To the contrary, virtually every form of union conduct and, indeed, many provisions contained in collective bargaining agreements are anticompetitive by design. The distinction that must be drawn, however, is that union objectives are more often than not directed at the labor market rather than at the commercial market. The Court noted this difference in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[223] one of the seminal antitrust cases applying the per se rule to condemn group boycotts. Distinguishing *Apex Hosiery*, the Court observed in *Klor's* "that the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."[224]

The facts in *Jewel Tea* illustrate this distinction. Standing alone and absent any in-depth inquiry, the marketing hours restraint in *Jewel*

221. See note 181 *supra* and accompanying text.

222. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

223. 359 U.S. 207 (1959).

224. *Id.* at 213 n.7; *see* Note, *supra* note 8, at 831.

Tea could be viewed as a group boycott imposed by the smaller grocery stores and the unions to force Jewel Tea and the larger stores out of the market of selling meat after 6:00 p.m. The restraint in effect sheltered the smaller concerns from competing with the larger firms that could sell meat after 6:00 p.m., without significantly infringing on the unions' work hours and jurisdiction. This view of the marketing hours restriction formed the gravamen of Jewel Tea's antitrust charge.[225]

After considering the history of the unions' collective bargaining negotiations, the purpose of the marketing hours restriction, and the effect of the restriction on the unions' working hours, the Court in *Jewel Tea* was able to determine that the unions' objectives were related more to preserving working hours (labor market restraint) than to sheltering smaller stores from competition (product market restraint), although the imposition of the restraint had both effects. The point is that without this elaborate inquiry into the unions' aims and the purpose of the restraint, which in fact amounted to a full-scale rule of reason analysis,[226] the restriction would have been held unlawful.

The labor market-product market distinction is important in other cases involving the labor exemption issue. In *Consolidated*, for example, there was no question that the International Longshoremen's Association was concerned with its members' job security. Regardless of whether this concern was categorized as work preservation or work acquisition—an issue undoubtedly relevant under the labor laws—the fact is that the union, like the unions in *Jewel Tea*, imposed the product market restraint to effect a labor market objective. Without a rule of reason analysis, however, that distinction would be overlooked.

Our analysis does not suggest that this distinction automatically separates lawful union-employer conduct from unlawful union-employer conduct. Rather, the distinction is made to underscore our view that some union-employer restraints cannot be presumed unreasonable per se. Had it been shown in either *Jewel Tea* or *Consolidated* that the unions' objective was exclusively to eliminate competition for the benefit of their employers, then an antitrust charge could have been sustained quite easily. The unions' activities, however, apparently were not directed toward solely anticompetitive goals in either *Jewel Tea* or *Consolidated*. Consequently, a different question was presented: whether the unions' concerns over working conditions immunized an otherwise unreasonable restraint of trade. Under the per se approach

225. 381 U.S. at 692-93.

226. *Accord*, Handler, *supra* note 68, at 239-40.

this issue would be irrelevant because anticompetitive effect and purpose are presumed.[227]

Moreover, if the effect and purpose of a union-employer restraint were ignored through use of the per se rule, employers engaged in the collective bargaining process would be confronted with a Hobson's choice. If they resisted union demands to incorporate product market restrictions in collective bargaining agreements, then they undoubtedly would run the risk of incurring union strikes until they agreed to the restriction. If, on the other hand, they agreed to such restrictions rather than face strikes, they could later be confronted with treble-damage actions based on their reluctant acquiescence.[228]

In sum, the rationale and presumptions underlying the per se rule are invalid as applied to union-employer conduct. As *Jewel Tea* illustrates, some union-employer restraints on the product market can be deemed reasonable within the meaning of the Sherman Act once the purpose and the effect of those restraints are examined. This examination cannot be made, however, unless a rule of reason analysis is utilized, since the stricter per se rule presumes that both the purpose and the effect of the restraint are unreasonable. Subjecting the employer to either a strike or the prospect of a treble-damage action under the per se rule would, moreover, be particularly unfair and possibly disruptive of the collective bargaining process. A rule of reason analysis of the union-employer restraint is required not only to preserve the delicate collective bargaining process, but also to protect employers from being subjected to liability for conduct that they may have had little power to resist.

V. CONCLUSIONS

Perhaps the greatest flaw in the Supreme Court's disposition of labor-antitrust cases is the failure to develop a consistent and intellectually sound principle by which the anticompetitive conduct of unions can be judged. A fair reading of the Court's opinions in this area suggests that it has dealt with the labor exemption on a case-by-case basis, fashioning a slightly different principle each time it is confronted with the problem. The Court's latest principle, the *Connell* "follow natu-

227. Admittedly, use of the rule of reason analysis would allow the courts again to test the lawfulness of union conduct under an objectives test, see text accompanying note 20 *supra*, but application of some form of this test is inevitable given the conflicting policies of the antitrust and labor laws. Further, some form of the objectives test is fairer and more prudent than use of the draconian per se rule, which would not take into account collective bargaining considerations.

228. The *Consolidated* case represents a classic example of the unfairness in this approach. A Taft-Hartley injunction and federally imposed mediation were required to force the members of the New York Shipping Association to agree to the Rules on Containers.

rally" test, is unsound, for it supplies a dangerous precedent for permitting conduct that is arguably lawful under the labor laws to be the subject of antitrust attack. The test, furthermore, unwisely blends the substantive antitrust allegations with labor policies, creating a market-effects analysis that is bereft of guidelines regarding the extent to which anticompetitive effects can be tolerated to accommodate union concerns.

Our suggested approach strikes a balance between the intricate and competing policies of the labor and antitrust laws. It also provides the courts with a uniform standard that protects union concerns and the collective bargaining process, while allowing room for the courts to strike down agreements or conspiracies between unions and employers that impair competition in the product markets. In short, our approach injects practical sense into an important and recurring problem that has remained unresolved for too long.