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THE EMERGING ANTITRUST IMPLICATIONS OF MANDATORY BARGAINING

JEROME S. RUBENSTEIN*

The courts have, for some seventy-odd years, sought to harmonize the conflicting policies of collective bargaining and competition. But the conflict is so irreconcilable that, apart from entirely subordinating one to the other, the regulatory distinctions employed must be largely arbitrary—there are no general principles by which these policies can be harmonized. And since the courts generally must rely on principle in the exercise of the judicial function, their record is not a happy one.¹

I.

Perhaps the most remarkable thing about the supposed conflict between the antitrust laws and the labor laws² is the diction employed to describe the forms of conduct regulated under each. What constitutes unlawful conduct by businessmen is sketched somewhat hazily;³ but unlawful conduct by unions is depicted with intricate—and sometimes exasperating—detail.⁴ Nothing has been added to the slender catalogue of proscribed business practices contained in the Sherman Act in the seventy-six years since its passage;⁵ but Congress seems forever to be tinkering with the itemization of union unfair labor practices in section 8(b) of the National Labor Relations Act⁶ and with the descriptions of

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³ The substantive evils with which the Sherman Act is concerned are depicted in §§ 1 and 2 (15 U.S.C. §§ 1 and 2). Declared illegal by § 1 is "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." Section 2 makes it a misdemeanor to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. . . ."

⁴ See §§ (b) of the Taft-Hartley version of the National Labor Relations Act, 29 U.S.C. § 158(b) (1964).

⁵ Two provisos added to § 1 in 1937 validate a contract to prescribe minimum resale prices for a product which bears "the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others. . . ."

⁶ The original National Labor Relations Act proscribed only certain employer practices. The Taft-Hartley Act amended the National Labor Relations Act, inter alia, to define and proscribe under § 8(b) certain union unfair labor
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conduct outlawed under other provisions of the Labor Management Relations Act of 1947. If we may assume that the draftsmen of legislation know what they are doing, the conclusion follows that Congress had good reason for the use of sweeping generalities in the definition of unlawful business conduct and equally good reason for the precision with which unlawful union conduct is described. The omission from the Sherman Act of readily applied norms of conduct or of meaningful definitions of the nature of the proscribed activities, particularly in the context of the procedural aspects of that statute, impels the conclusion that what was

practices. Section 8(b) was amended in a variety of respects by the Landrum-Griffin Act, 73 Stat. 525 (1959), which also added a new union-employer unfair labor practice under §8(e). See text accompanying notes 59-61.

7 Section 302, 29 U.S.C. §186 (1964), prohibits the making of certain kinds of payments to union representatives but declares lawful, upon compliance with the section's provisions, the checking off of union dues and the payment of welfare and pension fund contributions; §303, 29 U.S.C. §187 (1964), confers a private right of action upon "whoever shall be injured" by secondary conduct declared an unfair labor practice by §8(b)(4); and §304, 18 U.S.C. §610 (1964), makes permanent the temporary war-time prohibition (former 50 App. U.S.C. §1509) against unions' contributing to the campaign funds of candidates for national office. Sections 302 and 303 were both amended by the Landrum-Griffin Act.

8 Consider §4 of the U.S. Arbitration Act, 43 Stat. 883 (1925), 9 U.S.C. §4 (1964). Under that statute, any issue as to the "making of the arbitration agreement or the failure, neglect, or refusal to perform" it may be tried before a jury. The draftsman of the statute had testified that there is a constitutional right to a jury trial of such an issue, Hearings Before Joint Judiciary Committee (68th Cong., 1st Session, 1923-1924) 17. In so doing, he failed to consider the historical distinction between law and equity, and has been criticized on that score by a variety of commentators. See, e.g., 5 Moore's FEDERAL PRACTICE (2d ed. 1951) 129.


In addition to establishing new procedures, the Clayton Act added several new proscriptions. Section 2 (38 Stat. 730 [1914], as amended, 15 U.S.C. §13 [1964]) makes it unlawful to discriminate among customers with respect to prices, services, or facilities; §3 (38 Stat. 731 [1914], 15 U.S.C. §14 [1964]) declares unlawful agreements of lease or sale under which the lessee or purchaser is prohibited from using or dealing in "the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller"; §6 (38 Stat. 731 [1914], 15 U.S.C. §17 [1964]), by declaring that "the labor of a human being is not a commodity or article of commerce," insulates ordinary union activity from liability under §§2 and 3; §7 (38 Stat. 731 [1914], as amended, 15 U.S.C. §18 [1964]) prohibits the acquisition of the stock of one corporation by another, if the
contemplated was the adumbration, by the federal judiciary, of a "common law" of business regulation. (In *Textile Workers v. Lincoln Mills*\(^ {10} \) the Supreme Court held that §301 of the Labor Management Relations Act of 1947\(^ {11} \) is a mandate to the judiciary to elaborate a new federal common law of the collective bargaining agreement;\(^ {12} \) but there has never been, to the author's knowledge,\(^ {13} \) a similar pronouncement with respect to the function of the judiciary in enforcing the policies expressed in the antitrust laws.) The reasons for this are obvious: any attempt by Congress to enumerate exhaustively the forms of business combination sought to be made illegal would doubtless prove an exercise in futility because of the talent of lawyers and businessmen for inventing new types of structures to avoid statutory proscriptions; and, more importantly, there is no basis for saying that all combinations in restraint of trade are necessarily harmful to society and therefore worthy of destruction. In certain forms of business—public utilities, common carriers, radio wave communications systems—completely "open" competition is either undesirable or impossible. In still other industries, an economist's determination must be made as to how much restraint of

effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"; and §8 (38 Stat. 732 [1914], as amended, 15 U.S.C. §19 [1964]) prohibits interlocking of directorates and officers among banks subject to federal regulation.

Since it is obvious that no labor organization—acting as such, rather than as entrepreneur in some hypothetical business—can be found guilty of a Clayton Act violation, the present discussion of antitrust regulation is concerned only with the substantive prohibitions of the Sherman Act, enforcement of which is now available under the variety of procedures scattered throughout both statutes.

\(^{10}\) 353 U.S. 448 (1957).


\(^{12}\) Said Mr. Justice Douglas:

We conclude that the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.


\(^{13}\) It may be that the Supreme Court has somewhere characterized the antitrust laws in a manner similar to its statement about §301, but if so, the writer is not aware of any such utterance. Any "common law" of antitrust would be so clogged with economic assumptions and so affected by the views, at a given time, of what is necessary or permissible governmental or judicial interference with the dealings among themselves of businessmen that the precedential value of decisions would of necessity be slight, when compared with the precedential value of decisions construing and enforcing a special class of contractual obligations like the collective bargaining agreement.
trade is socially acceptable; and it is from this determination, oddly, that the conclusion of legality or illegality is made to flow.\textsuperscript{13a}

Although the Sherman Act speaks of "every" contract, combination, or conspiracy in restraint of trade, it is beyond question that the general prohibition has never been taken seriously. What is outlawed are those combinations which the Justice Department and the courts, at a given time, find detrimental to society in general. A significant quirk of the antitrust laws is the extent—the whole area of private litigation—to which responsibility for the development of national economic policy is left to dialogue between private litigants and the judiciary.

Although, to be sure, certain doctrinal approaches have emerged and developed in the years since the passage of the Sherman Act, the impression one often gets is that the result in an antitrust case is more likely to be affected by the court's views of the economic pattern underlying a particular cause of action than by those economic facts which are actually recited as the basis for judicial determination. In the litigation which brought about the divesture by DuPont and Christiana Securities of their enormous holdings of General Motors stock, Mr. Justice Brennan speaks of the evil as being the possibility that DuPont and Christiana might exercise their voting power so as to compel General Motors, willy-nilly, to purchase only DuPont paint.\textsuperscript{14} If this issue were really what troubled the Department of Justice and the Supreme Court, the problem could readily have been disposed of by an appropriate injunctive order.\textsuperscript{15} The required divestiture one would suppose, was designed to remedy a far different and certainly more important problem: the concentration of the combined economic powers of DuPont and General Motors in the hands of a very small group of persons.

The decisional history of the antitrust laws shows, over the years, a significant broadening of the scope of conduct regulated (or sought to be regulated) thereunder. Combinations which at one time may have been perfectly unobjectionable have subsequently been held violative of the Sherman Act, in part because of the courts' expanding views of their duties and powers, in part because of altered economic situations. Similarly, the acceptance or rejection of certain assumptions about practical economics doubtless plays a significant role—how significant one can only guess—in determining how a given sort of business conduct will, at a given time, be treated under the antitrust laws.

A familiar businessman's complaint is that he can never predict with


\textsuperscript{15} Four years after the Court rendered its first decision (United States v. E. I. DuPont de Nemours & Co., \textit{supra} note 14) it reversed the district court's order pursuant to which the defendants were to be enjoined from voting their General Motors stock, and ordered complete divestiture. United States v. E. I. DuPont de Nemours & Co., 366 U.S. 316 (1961).
confidence whether a projected corporate merger or a new marketing policy will bring down upon his head the calamity of an adverse holding in antitrust litigation. Although businessmen in general bemoan the administration of the antitrust laws for this reason, it may very well be that this seemingly “unprincipled”\textsuperscript{16} approach to the public regulation of business holds within it one of the conditions precedent for the flourishing of a dynamic business society.

Unlike statutes which closely regulate certain forms of business because by the very nature of those businesses chaos would reign in the absence of such regulation, the antitrust laws allow to the general business community almost limitless possibility of choice in the establishing and implementing of procedures. They are subject only to the \textit{caveat} that the particular conduct engaged in at a given time may, for reasons consonant with what is deemed to be public policy at that time, be held illegal. The regulatory scheme is designed not to promote competition in some abstract sense of the word, but to promote meaningful competition. Some restraints of trade, therefore, will not be held violative of the antitrust laws, while others will. Underlying the antitrust laws is the assumption that businessmen, for their own good and for the good of the nation’s economy, should be encouraged to exercise their ingenuity to the greatest possible extent short of performing actions which will either destroy actual competition in the pricing and marketing of products or which will effectively keep other businessmen from entering into or surviving in a given type of economic activity. The equally unhappy alternatives to the regulatory scheme posited by the antitrust laws are a planned economy or the sort of close regulation that is only, one would hope, permissible in those industries which by their very nature require regulation for survival.

\section*{II.}

It is a familiar of history that the early days of Sherman Act litigation were marked by anti-union judges who wantonly and repressively employed the injunctive remedy to frustrate the legitimate aims of organized labor;\textsuperscript{17} but what is forgotten, in one’s haste to condemn the judges of the past, is that the notion of such a thing as “organized labor” was to them wholly novel and doubtless incomprehensible. Of course an individual was guaranteed the right to quit his employment—in effect, to strike—in an effort to induce his employer to pay him

\textsuperscript{16} Winter, \textit{supra} note 1 uses the term “unprincipled” to refer to decisions that cannot be explained by the ordinary application of stare decisis or by the extension of holdings in prior litigation. He seems to believe that only when dealing with union activity does the courts’ decisional approach to the antitrust laws betray this quality. It is the assumption of this paper, however, that decisions in the field of antitrust are equally susceptible of being considered “unprincipled” whether concerned solely with businessmen or with unions, acting alone or in conjunction with businessmen.

\textsuperscript{17} See generally F. FRANKFURTER & W. GREENE, \textit{The Labor Injunction} (1930).
higher wages, but a considerable leap of the imagination was required to go from the Thirteenth Amendment prohibition against involuntary servitude to the conclusion that a number of individuals could lawfully do concertedly what each of their number might properly do by himself. Although the earliest cases speak of concerted activity in terms of the law of "conspiracy" (whatever that is), it was not very long before jurists and legislators began to wonder whether there might not indeed be some forms of concerted union activity which were not inherently illegal. By 1914, when it passed the Clayton Anti-Trust Act, Congress had developed some notion of what forms of union conduct are lawful; section 20 specifically prohibits the issuance of injunctions against a variety of forms of "lawful" union conduct, "lawfully" performed.

Organized labor, with characteristic inattention to grammatical detail, greeted the Clayton Act as an "Industrial Magna Charta." But the Supreme Court in *Duplex v. Deering* was quick to seize upon the fishhook in the Clayton Act and to hold that secondary activity, earlier held violative of the Sherman Act, was not exempted from the taint of illegality by the newer statute because such conduct does not fall within the "normal and legitimate objects" of labor unions.

*Duplex v. Deering*, a widely condemned and ultimately scrapped decision, was perhaps the last major attempt by the Supreme Court to define, under the antitrust laws, the ambit of permissible union conduct solely in terms of the nature (objectively viewed) of the activity involved. In the two *Coronado Coal* cases, decided shortly thereafter, the Court, in ruling that violent activity by the union against the employer was not of itself actionable under the Sherman Act, hit upon the test of legality of motivation. The idea was that a merely "local motive" to shut down one mine is not illegal, but that when the shutdown was for the purpose of stopping the production of non-union coal so as to prevent its shipment in interstate commerce, "where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines," the other-

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18 The term "concerted activity" is here used in the same sense as in the National Labor Relations Act. To speak of "union activity" or of "labor organizations" would be unduly restrictive in considering some of the early cases.
20 The misnomer is Samuel Gompers', quoted in Witte, The Government In Labor Disputes 68 (1932).
26 *Coronado Coal Co. v. UMW*, supra note 24 at 310.
wise innocuous act of violence is transmuted, solely by virtue of this question of intention, into a violation of the Sherman Act.

In the two decades that followed *Duplex v. Deering*, the popular climate was more favorable towards unionism than it had been in the early days of the Sherman Act. The Norris-LaGuardia Act and the original National Labor Relations Act (the Wagner Act) were among the legislative responses to the quite patent fact that something had gone wrong at the end of the 'twenties. But the labor laws, unlike most of the alphabet soup that the federal government brewed in the 'thirties, did not propose to regulate the enterprise that they sought to promote. The Norris-LaGuardia Act curbed the power of the federal judiciary to issue injunctions in "labor disputes"; and the Wagner Act, in addition to guaranteeing to employees the right to organize themselves into unions and to engage in concerted activities for the purpose of bettering their lot, spelled out four specific unfair labor practices which employers were forbidden to perform, as well as a catch-all one which made it illegal for them to restrain employees in the exercise of their guaranteed rights. To the draftsmen of these statutes, it was apparently unthinkable that any union conduct might contravene public policy.

In 1941 the Supreme Court came close to a declaration that unions are exempt from prosecution under the antitrust laws. The issue, as described by Mr. Justice Frankfurter in his majority opinion in *United States v. Hutcheson*, was:

> Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law.

The carpenters' union, of which Hutcheson was president, struck a brewery for the purpose of compelling it to assign certain work to its members, rather than to members of the machinists' union, with which the brewery also had a collective bargaining relationship. In furtherance of their aims, the carpenters instituted a consumer boycott against the employer's beer and also struck a lessee of the brewery for the apparent purpose of inducing it to compel the brewery to come to terms. As Mr. Justice Roberts and Mr. Chief Justice Hughes correctly observed in

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26 No attempt is here made to review exhaustively, or even adequately, the antitrust litigation that preceded the two cases—*Pennington* and *Jewel Tea*—which occasioned this article. For an incisive summary of the dismal history of the judiciary's attempt to regulate union conduct under the antitrust laws, see Winter, *supra* note 1.
29 312 U.S. 219 (1941).
30 *Id.* at 227.
their dissenting opinion, such secondary activity had traditionally been thought—since Loewe v. Lawlor,\(^{32}\) at least—to be prohibited by the Sherman Act.

In affirming the dismissal of the indictment, a bare majority\(^{33}\) of the Supreme Court read the provisions of the Norris-LaGuardia Act into the Sherman and Clayton Acts and wiped out, in a stroke, substantially all earlier doctrine on the question. After asserting that “an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations,”\(^{34}\) Mr. Justice Frankfurter went on to say:

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction §20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the ‘public policy of the United States’ in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex Printing Press Co. case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of union conduct.\(^{35}\)

Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in §20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be ‘considered or held to be violations of any law of the United States.’

So long as a union acts in its self-interest and does not combine

\(^{32}\) 208 U.S. 274 (1908).

\(^{33}\) Mr. Justice Murphy took no part in the decision; Mr. Justice Stone concurred in the result, but disagreed with the majority’s reasoning; and the Chief Justice and Mr. Justice Roberts dissented.

\(^{34}\) United States v. Hutcheson, 312 U.S. 219, 229 (1941).

\(^{35}\) The dissenters found this reasoning less than satisfactory:

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change in policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.

\textit{Id.} at 245.

It is of course a familiar proposition that certain conduct may not properly be enjoined, even though its commission may serve the basis for an action to recover tort damages or a criminal indictment. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931).
with non-labor groups, the licit and the illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.\textsuperscript{36} There is nothing remotely within the terms of §20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer.\textsuperscript{37}

Mr. Justice Stone, in a concurring opinion,\textsuperscript{38} points up the extent to which the Court in \textit{Hutcheson} granted labor unions amnesty under the antitrust laws. In his view, there was no need to construe the antitrust laws with the Norris-LaGuardia Act because the dispute was essentially a "local" matter—a direct hassle between an employer and a labor organization which, under the doctrine of the \textit{Coronado Coal} cases\textsuperscript{39} and \textit{Apex Hosiery v. Leader},\textsuperscript{40} was not subject to the regulatory ambit of the antitrust laws.\textsuperscript{41} But the Court's majority went far beyond and, in

\textsuperscript{36} In \textit{Hunt v. Crumboch}, 325 U.S. 821 (1945), decided the same day as \textit{Allen Bradley Co. v. Local 3, IBEW}, 325 U.S. 797 (1945), discussed below, at text accompanying footnotes 43 through 54, the Court held, five to four, that no violation of the Sherman Act resulted from the union's refusal to admit the plaintiff-petitioner's employees to membership, the refusal having been part of a personal vendetta against him and for the calculated purpose of driving him out of business. Mr. Justice Frankfurter silently joined in the dissenting opinion.

\textsuperscript{37} \textit{United States v. Hutcheson}, 312 U.S. 219, 231-32 (1941). (Emphasis added.)

\textsuperscript{38} \textit{Id.} at 237.

\textsuperscript{39} \textit{Note 24 supra.}

\textsuperscript{40} 310 U.S. 469 (1940).

\textsuperscript{41} The scope of federal authority under the antitrust laws and under the labor laws is coextensive with the constitutional "commerce power." \textit{United States v. Frankfort Distilleries}, 324 U.S. 293 (1945); \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937). It had formerly been thought that a wholly intrastate taxicab business which did not constitute a link of "commerce" by virtue of its monopolizing the means of transportation between the termini of interstate carriers was exempt from prosecution under the antitrust laws upon the theory that such business could not constitutionally be regulated by Congress, \textit{United States v. Yellow Cab Co.}, 332 U.S. 218 (1947). Today, however, the conduct of labor relations in such businesses is presumably subject to regulation by the NLRB, \textit{Guss v. Utah Labor Relations Board}, 353 U.S. 1 (1957).

In \textit{Terminal System, Inc.}, 22 S.L.R.B. 387 (1959) the employer contended that the New York Board lacked jurisdiction of an unfair practice charge filed by the UAW upon the theory that the \textit{Guss} decision brought the enterprise under the exclusive jurisdiction of the NLRB, even though under the jurisdictional standards that obtained at the time of filing, the NLRB would have declined to assert its jurisdictional power. The union argued that the \textit{Yellow Cab} case was authority for the proposition that the employer's business fell outside the scope of the commerce power, and that the State Board might properly assert jurisdiction. In dismissing the complaint, the Board agreed with the employer that the case fell within the exclusive jurisdiction of the NLRB.

The moral simply is that notions of the ambit of the commerce power have altered remarkably over the years. The Stone view of the power of the judiciary to regulate through the antitrust laws should properly, the writer suggests, be considered as expressive primarily of an understanding of the scope of the constitutional commerce power that is at
the italicized passage quoted above, made it clear that no union conduct was to be held subject to the antitrust laws unless it be found that the union acted in conjunction with "non-labor groups."42

*Allen-Bradley v. Local 3, IBEW*43 presents a classic instance of what the majority in *Hutcheson* felt properly subject to antitrust regulation and of the difficulties inherent in their view.

Local 3 of the IBEW had agreed with various New York City manufacturers of electrical equipment upon wages and other normal terms of collective bargaining agreements. It also had collective bargaining agreements with substantially all the electrical contractors in the city. There was a tripartite agreement pursuant to which the contractors agreed to purchase equipment only from those manufacturers that had collective bargaining agreements with Local 3; the union instructed its members not to work on other equipment; and the prices to be paid for various kinds of equipment were to be determined by an industry board. The manufacturers were enabled to sell their products to the contractors at enormous profits (far higher prices were charged than the prices at which the same manufacturers sold the same products to buyers outside New York City); the contractors, because of the standardization of their service rates, had no difficulty in passing the inflated cost of these products on to the consumers; and the union for its part exacted unusually favorable wages and other conditions of employment. It was a charming arrangement, i.e., everyone profited but the general public and those manufacturers of electrical equipment whose employees were not represented by Local 3.44

marked variance with the present thinking on the subject. This analysis would render the Court's holding in *Apex v. Leader* and the Stone opinion in the *Hutcheson* case as obsolete as the Court's treatment of the taxicab industry in the *Yellow Cab* case.

The present analysis differs from the usual view that the *Apex* case was concerned with the substantive legitimacy of certain forms of union conduct rather than with the jurisdictional power, under the commerce clause, to regulate such conduct. The general counsel of the Industrial Union Department of the AFL-CIO has written recently of "the universally accepted assumption that, since *Apex Hosiery Co. v. Leader* . . . any union action in which 'the immediate concession demanded from an employer' is a wage agreement is exempt from the antitrust laws." Feller and Anker, *Analysis of Import of Supreme Court's Antitrust Holdings*, 59 L.R.R.M. 103, 105 (1965). Variant readings of *Apex* are to be expected. See, for example, Winter, *supra* note 1, at 39-45. "Through an unsuccessful mixture of precedent and 'considered' dicta . . . [Mr. Justice Stone] attempted to describe to the bar and subordinate bench what kinds of union activity would violate the Sherman Act in the future. And in the process of elaborating the standard, he abandoned it." Winter, *supra* note 1 at 39.

42To the extent that a labor union engages in the conduct of an ordinary business its activities are, of course, as properly subject to antitrust regulation as are those of other entrepreneurs. See, e.g., Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 603 (E.D. La. 1958).

43325 U.S. 797 (1945).

44The "out-group" included manufacturers whose employees were represented by other international unions and even manufacturers whose employees were represented by other locals of the IBEW.
The Allen-Bradley Company, a manufacturer situated outside New York City, brought suit under the Sherman Act for an injunction prohibiting the continuance of this arrangement. The district court confirmed the special master’s finding in favor of the plaintiff, and an appeal was taken to the Second Circuit.

In reversing, Judge Clark noted that the Department of Justice apparently believed that no violation of the antitrust laws was presented by the factual pattern alleged in the complaint, because in a similar context, the Supreme Court had refused to allow a Sherman Act conviction predicated upon coercive activity taken by another union that sought terms not unlike those embodied in Local 3’s agreements. Speaking for Judge A. N. Hand and himself, Judge Clark reasoned that if Local 3 might not properly be charged with antitrust violation if it had struck to compel the manufacturers and contractors to agree to an arrangement like the one at bar, it would be absurd to hold that the fact of agreement necessarily altered the picture. Thus:

If a dispute as to the conditions of work between a union and employers still remains a labor dispute as to third persons interested therein or injured thereby, its complexion is hardly changed by a settlement—possibly only an armistice, not a treaty—between the original parties which hurts the third persons more than did the original controversy.

The Supreme Court reversed. Speaking for the majority, Mr. Justice Black defined the issue in these terms:

Quite obviously, this combination of businessmen has violated both §§1 and 2 of the Sherman Act, unless its conduct is immunized by the participation of the union. For it intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. . . . Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?

Having thus stated the problem in terms of the narrow exception to the general rule of union nonliability formulated in the Hutcheson case, it

45 Subsequently, Allen-Bradley filed a treble damage suit, the litigation of which was held in abeyance pending disposition of the injunction suit. Allen-Bradley Co. v. Local 3, IBEW, 145 F. 2d 215, 216 (2d Cir. 1944).
48 Allen-Bradley Co. v. Local 3, IBEW, 145 F. 2d 215 (2d Cir. 1944).
49 Id. at 217 n. 1.
51 Allen-Bradley Co. v. Local 3, IBEW, 145 F. 2d 215, 222 (2d Cir. 1944).
52 Allen-Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945).
53 Id. at 800-801.
was quite easy for the Supreme Court to proceed to a holding that the acts described in Allen-Bradley did constitute a violation by Local 3 of the Sherman Act. In so doing, the Court was careful not to expand the Hutcheson exception:

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress.54

III.

Allen-Bradley was decided in 1945. The era of unabashed federal promotion of trade unionism was coming to an end; but the Court's view of legitimate union conduct was practically indistinguishable from the thinking that underlay the Wagner Act. Although—like most Supreme Court decisions—Allen-Bradley has been cited for a variety of propositions, its holding does not extend by an inch the narrow ambit of antitrust regulation of labor unions defined in the Hutcheson case. The conspiracy among Local 3 and the New York City electrical manufacturers and contractors was so clearly reprehensible that if it could not be enjoined under the antitrust laws, doubtless some other form of regulation would have had to be invented. It is a law school bromide that hard cases make bad law; but in Allen-Bradley the Court had before it a ready solution, Mr. Justice Frankfurter's celebrated dictum in the Hutcheson case. It was enough to apply that dictum to a set of facts that conveniently fitted its mold.

In the twenty years that followed Allen-Bradley the Supreme Court did little of interest in the field of the antitrust regulation of labor unions.55 In this period the public attitude towards labor unions and the

54 Id. at 810.
55 The two most significant exceptions to this blithe pronouncement are United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954) and Local 24, IBT v. Oliver, 358 U.S. 283 (1959). Both of these cases deal less with the question of substantive legality or illegality than with the question of the jurisdictional power of the forum to enforce a particular regulatory scheme under which certain conduct might be held illegal.

The Employing Plasterers case presented a factual pattern almost identical with that in Allen-Bradley. The one distinction was that the combination was solely between a union and an association of employers in the plastering industry; there was apparently no attempt to regulate the purchase in Chicago of plastering equipment or supplies similar to the agreement in Allen-Bradley that regulated the contractors' purchase of electrical equipment. The district court, thinking that the combination was essentially local and therefore beyond the reach of the antitrust laws, dismissed the government's complaint in a civil antitrust suit. In reversing, the Supreme Court's majority said:

We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act
propriety of their regulation by the federal government had undergone a sea-change. The Labor Management Relations Act of 1947,\(^{56}\) the Welfare and Pension Plans Disclosure Act of 1958,\(^{57}\) the Landrum-Griffin Act of 1959,\(^{58}\) and a variety of other legislative enactments document the shift of the government's approach to the problem of labor relations.

By virtue of 1947 and 1959 amendments to the National Labor Relations Act, the *Allen-Bradley* situation would now present a union unfair labor practice under section 8(b)(4)(B)\(^{59}\) and a union-employer unfair labor practice under section 8(e).\(^{60}\) (Ironically, a proviso to §8(e), which makes the execution of *Allen-Bradley* agreements an unfair labor practice, specifically validates such agreements so far as the construction industry is concerned.)\(^{61}\) Under the National Labor Relations Act in its present form, temporary injunctive relief could be granted,\(^ {62}\) upon the Board's application, after the issuance by its general counsel of a complaint founded upon a charge alleging the commission of acts identical with those involved in the *Allen-Bradley* litigation. In addition, the party cases ... However this may be, the complaint alleged that continuously since 1938 a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all. Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question.

United States v. Employing Plasterers Ass'n, *supra* at 189. As pointed out in Mr. Justice Minton's dissenting opinion, the holding clearly flouted the *Apex Hosiery* rule concerning "local" occurrences presumably not subject to federal regulation.

*IBT v. Oliver* showed the opposite side of the coin. There the Supreme Court reversed an injunction that had been issued under the Ohio antitrust law, finding that the assertedly illegal provision of the collective bargaining agreement attacked by the plaintiff covered a mandatory subject of collective bargaining and was therefore not to be subjected to the taint of illegality under state law. Fudged were the questions whether the contractual provision at bar might properly have been held violative of the federal antitrust laws and whether the mere fact that a contractual provision concerns a mandatory subject of collective bargaining is absolute insulation from violation of the antitrust laws. All that the case really holds, therefore, is that collective agreements which regulate the rental paid to owner-drivers of trucks by interstate motor carriers fall within the regulatory power granted to Congress by the commerce clause of the Constitution.

injured by the commission of an unfair labor practice defined in section 8(b)(4) has been given a new federal cause of action, independent of NLRB procedures, for actual damages and “the cost of the suit” including, perhaps, attorney's fees.64

If the Frankfurter dictum in the Hutcheson case and the Supreme Court's holding in Allen-Bradley are to be taken seriously as limiting the possibility of union violation of the antitrust laws to situations where unions combine with “non-labor groups,” it would seem that the entire realm of union conduct presently thought to be violative of the antitrust laws is now regulated under the labor laws. It is proper, therefore, to ask whether such conduct should still be held subject to the antitrust laws, or whether it should be exclusively regulated under the statutory scheme which covers it in explicit detail.

So to phrase the question, one should think, would be to call for only one answer. In 1965 the Supreme Court, like Horace's mountain, labored over this problem. Its solution, to say the least, is puzzling.

IV.

A sampling of the commentary on the Pennington65 and Jewel Tea66 cases is indicative of the abstruseness they have created. A champion of new curbs upon unions' power complains:

The Pennington case has . . . added a major amendment to the Allen-Bradley doctrine, namely, unions may legitimately conspire with management to eliminate competition when they do so in conjunction with public officials.67

Equally troubled union spokesmen express the fear that the recent decisions will cripple collective bargaining:

[Under Jewel Tea, an agreement with a single employer as well as a group of employers which has an effect on competition may be held to violate the Sherman Act if the subject matter of the agreement is found not to be related to wages, hours and working conditions. Obviously, a hostile finder of fact could have concluded in Jewel Tea that there was no necessary relationship between hours of work and hours of sale of meat. In that situation, the Court apparently would have sustained a treble-damages award against the Union.68

Professor Summers expresses the same belief:

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68 Feller and Anker, supra note 41 at 107.
Although the union in [Jewel Tea] escaped liability, collective agreements were made captives of the anti-trust laws. Even a simple agreement between a union and an employer loses its immunity if it regulates matters not "intimately related to wages, hours and working conditions." Although the location of the line is left in doubt, it is generally the same line as that separating mandatory and non-mandatory subjects of bargaining. Thus, any agreement on a non-mandatory subject may lose its claim to immunity, and if then found to be an unreasonable restraint on competition, will constitute a violation of the anti-trust laws.69

What is most interesting about these cases is not, paradoxically, the changes (if any) wrought upon substantive doctrine, but the attitudes displayed therein towards the threshold question of the continuing propriety of imposing antitrust sanctions upon unions.

The Pennington litigation started out as a suit by the trustees of the Mine Workers' Welfare and Retirement Fund for contributions allegedly due from the defendant-employer under a series of collective bargaining agreements. In its answer and in a cross-claim against the union, the defendant asserted that the union and certain coal mine operators had conspired to restrain trade by, among other things, agreeing upon wage scales and rates of welfare fund contributions that were calculated to exceed what the operators of nonmechanized mines could afford to pay. As described by Mr. Justice White:

The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies.70

A trial before a jury resulted in the assessment of treble damages in the employer's favor against the union and the trustees. The trial court set aside the verdict against the trustees, but overruled the union's motion for judgment notwithstanding the verdict. The Court of Appeals affirmed.

In reversing, the Supreme Court was unanimous in the result but divided three ways in approach. Mr. Justice White wrote the opinion of the Court, joined by the Chief Justice and Mr. Justice Brennan. One separate opinion was written by Mr. Justice Douglas, joined by Mr. Justice Black and Mr. Justice Clark; another was written by Mr. Justice Goldberg, joined by Mr. Justice Harlan and Mr. Justice Stewart.

The White opinion first considered the union's argument that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. The question presented was whether, in the circumstances of the case, the union was exempt from liability for violation of the antitrust laws. The question deserved short shrift and was accorded it: the facts having clearly presented a combination between a union and "non-labor groups," the rule of the Hutcheson and Allen-Bradley cases required rejection of the union's contention.71

Having said this much, the Court might profitably have turned to the other issues involved in the case. However, apparently in response to an argument by the union's attorney that the present situation differed from Allen-Bradley in that the collective agreement at bar concerned itself only with wages and did not presume to regulate prices,72 the Court speculated at some length on the question of whether the traditional application of antitrust laws to combinations of unions and employers may properly impose liability where the agreement concerns wages rather than the pricing of products. All that Mr. Justice White was doing was inquiring whether the Hutcheson, Allen-Bradley rule might be further qualified so as to broaden the scope of the "labor exemption" from the antitrust laws; but in the course of his opinion, unfortunate dicta were set loose which might well be—and have been73—read in a contrary way.

The touchstone of legality, as Mr. Justice White sees it, is whether the agreement is by its terms coextensive with the bargaining unit represented by the union, or whether it imposes upon the union a duty to obtain from employers outside the unit, the same conditions of employment as provided in the agreement. Thus:

It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit.... We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.74

71 Id. at 662.
72 Brief of counsel, UMW v. Pennington, 14 L. Ed. 2d 1017 (1965).
73 See text accompanying nn. 68-69.
Having gone this far, Mr. Justice White at first blush seems to reverse his field in an obiter dictum.

This [the passage just quoted] is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act. . . . But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.75

The "limits," apparently, describe the point at which it may be reasonably inferred that the union's wage demands are made (1) for the calculated purpose of placing the employer at a competitive disadvantage and (2) for the benefit of and with the connivance of the employer's competitors. Thus:

Unilaterally, 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. The union need not gear its wage demands to those which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.76

Mr. Justice White then reviews some ancient NLRB doctrine which holds it an unfair labor practice for an employer to condition his execution of a collective bargaining agreement upon the union's procuring similar terms from his competitors, and seems to conclude that the antitrust laws are in some way concerned with the preservation of unions' rights to agree upon different terms with different employers.77

Having thus disposed of the union's argument concerning the "labor exemption" from the antitrust laws, the Court reversed the judgment below because the trial judge erred in instructing the jury that joint efforts by the union and employers to influence the Secretary of Labor

75 Id. at 664-665.
76 Id. at 665 n. 2.
77 From the view of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. The salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy.
Id. at 668.
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and the TVA to serve as unwitting allies in their conspiracy to drive small operators out of business would constitute evidence of a violation of the Sherman Act.

In his concurring opinion Mr. Justice Douglas characterizes the White opinion as an instruction to the trial judge that an "industry-wide agreement" pursuant to which employers and a union agree on a wage scale that exceeds the financial ability of some employers, if made for the purpose of forcing those employers out of business, should be held "prima facie evidence of a violation."78 Under this approach, antitrust liability might be imposed upon a union for the execution, in a multi-employer bargaining unit, of a contract whose terms exceeded the financial abilities of certain members of the employer group, even though the union was unaware of that fact and the acquiescence of the majority of the employer group (thus binding the dissidents) to the wage scale was predicated less on their desire to improve the lot of their own employees than upon an intention to drive some of their fellows out of business. In a footnote aside, Mr. Justice Douglas indicates that he would apply the doctrine of conscious parallelism—under which an unlawful conspiracy may be inferred from the fact of acceptance by competitors, without previous agreement, of an invitation to participate in a plan the necessary consequence of which is a restraint of trade—in antitrust suits involving unions, an approach which would seem wholly at variance with that formulated in the White opinion.

Unlike Pennington, Jewel Tea posed the simple question of whether an agreement between an employer and a union that was "imposed after arm's length bargaining . . . and was fashioned exclusively" by the union to serve its own interests, but which regulated the employer's marketing hours, could be held violative of the Sherman Act.79 The grant of cer-

78 Id. at 673.
79 Local 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965). It seems plain from the Court's opinion that the agreement was designed for the primary purpose of enabling retail butchers to compete with supermarkets. The plaintiff, a supermarket chain, had introduced in the Chicago area the practice of selling packaged meats in its stores. The meat-cutting and packaging, one gathers, was performed during their regular working hours by butchers who were members of the defendant unions. Small butcher shops apparently found it uneconomical to stay open after 6:00 p.m. evenings because their sales level, presumably, did not justify the overtime rates that would have to be paid to their employees. Supermarkets, which customarily stayed open for business several hours after the normal closing of small butcher shops, would have been accorded an enormous competitive advantage if, during those hours, they were able to sell, upon a self-service basis, packaged meats which had been earlier cut, packaged, and arranged on shelves by their butchers during their regular working hours. If this advantage had been accorded to the supermarkets, the effect upon small butcher shops might well have been disastrous. It was to the unions' interest—although perhaps not to the interest of their members employed by the supermarkets—to encourage the survival of small butcher shops, for any decrease in their number would of necessity decrease the number of butchers' jobs in the unions' geographical jurisdiction.

After trial, the district court ruled that the "record was devoid of any
tiorari fragmented this question into two issues: whether the contractual limitation upon the plaintiff's marketing hours was within the labor exemption of the Sherman Act; and whether a claimed violation of the Sherman Act which falls within the regulatory scope of the National Labor Relations Act is subject to the exclusive primary jurisdiction of the National Labor Relations Board.\textsuperscript{80}

With respect to the first issue, Mr. Justice White\textsuperscript{81} took pains to note the limited scope of review presented under the grant of certiorari:

It is well at the outset to emphasize that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel. The trial court found no evidence to sustain Jewel's conspiracy claim and this finding was not disturbed by the Court of Appeals. We therefore have a situation where the unions, having obtained a marketing-hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own labor union interests.\textsuperscript{82}

If the Hutcheson dictum and the rule that may be synthesized from the companion Allen-Bradley and Hunt v. Crumboch\textsuperscript{83} cases were to evidence to support a finding of a conspiracy\textsuperscript{9} between an association of small butcher shops and the unions to force the restrictive provision on the plaintiff. Jewel Tea Co. v. Local 129, Amalgamated Meat Cutters and Butcher Workmen, 215 F. Supp. 839, 845 (N.D. Ill. 1963). The court of appeals, in reversing the dismissal of the complaint, did not disturb this finding. In effect, the court of appeals held that the mere making of a collective agreement which sought to regulate the employer's marketing hours was in and of itself violative of the Sherman Act, although its opinion (Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, 331 F. 2d 547, 551 [7th Cir. 1964]) seems to flirt with the application of something like the conscious parallelism test.

As it stood before the Supreme Court, the case was devoid of any question concerning the existence of an actual conspiracy between the defendant unions and non-labor groups to impose the marketing hours limitation upon the plaintiff; and the Court, therefore, quite properly viewed the issue as the narrow one of the legality of such a provision viewed solely in the context of collective bargaining between one employer and one union. If nothing else, Jewel Tea is a fascinating example of the permutation of a litigant's substantive rights that proceed from the doctrinal flipflops that commonly occur as major litigation is pursued through various appellate procedures. If the court of appeals had reversed the district court's findings on the question of actual conspiracy, the logic of the White opinion in Pennington would have doubtless compelled a different result in Jewel Tea.


In Jewel Tea, as in Pennington, the Chief Justice and Mr. Justice Brennan joined in the White opinion. Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Clark joined, concurred in Pennington, but dissented in Jewel Tea. Mr. Justice Goldberg, with whom Mr. Justice Harlan and Mr. Justice Stewart joined, dissented from the opinion but concurred in the reversal of Pennington, and concurred in the judgment, but seemingly dissented from the opinion, in Jewel Tea.


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have been literally applied, this statement of the issue would seem to permit only one answer: the acts shown do not constitute a violation of the Sherman Act. But since an agreement solely among businessmen pursuant to which marketing hours are regulated might properly be held a violation of the antitrust laws, Mr. Justice White concludes that the true issue is not whether the facts show a substantive violation of the Sherman Act, but whether "the agreement is immune from attack by reason of the labor exemption from the antitrust laws." The labor exemption derives from section 20 of the Clayton Act, which speaks in terms of the "lawfulness" of the particular union conduct under scrutiny, and so inquiry is focussed upon the question of the lawfulness of the conduct at bar. Since the antitrust laws furnish but slight help as to what union conduct is "lawful" and what is not, Mr. Justice White accepts the gambit offered by Mr. Justice Frankfurter in Hutcheson, and concludes, as he intimated was proper in Pennington, that lawfulness must be determined by considering "the subject matter of the agreement in the light of the national labor policy."

Having gone this far, Mr. Justice White flirts with the possibility that the "lawfulness" of a union's demands and, hence of a collective bargaining agreement, may be determined by considering whether the

84 Local 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 693 n. 6 (1965).
85 Id. at 689.
86 The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.


No restraining order or injunction shall be granted by any court of the United States . . . [which] shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.


particular issue at bar may properly be held to be a "mandatory" subject of collective bargaining under section 8(d) of the National Labor Relations Act\(^8\) but never quite decides the issue in precisely that way. The question, then, is one of analogy: does the disputed item in the agreement at bar seem more akin to mandatory subjects of collective bargaining than to trade regulation, or do the scales tip the other way? As Mr. Justice White puts it:

> [T]he issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arms-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.\(^9\)

The White opinion goes on from this point to explain why the marketing-hours restriction resembles wages, hours, and working conditions and is therefore within the labor exemption. The fuzziness of the distinction made between mandatory subjects of collective bargaining and those subjects which are so "intimately related to wages, hours and working conditions" as to warrant invocation of the labor exemption has troubled a variety of commentators;\(^90\) but the distinction was dictated by the way in which the Court answers the first question posed

\(^8\) See text accompanying nn. 68-69. Professor Handler is apparently of the opinion that no meaningful distinction was intended by Mr. Justice White.

in the grant of certiorari, whether the subject matter of the case falls within the exclusive primary jurisdiction of the National Labor Relations Board.

Somewhat obscurely, the White opinion describes the issue in the following terms:

On this point, which is distinct from the unions' argument that the operating hours restriction is subject to regulation only by the Board and is thus wholly exempt from the antitrust laws, the unions' thesis is that the pivotal issue is whether the operating hours restriction is a "term or condition of employment" and that the District Court should have held the case on its docket pending a Board proceeding to resolve that issue, which is said to be peculiarly within the competence of the Board.91

In the discussion of the issue as thus framed, the opinion completely ignores the question of whether exclusive jurisdiction of the subject matter of the litigation was intended by Congress to fall within the regulatory scheme of the Labor Management Relations Act of 1947—both NLRB proceedings and court litigation under §303—and treats solely of the question of primary jurisdiction to determine whether the marketing hours regulation really involves a "term or condition of employment." Since "courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment,"92 and the "doctrine of primary jurisdiction is not a doctrine of futility . . . [which would] require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency',"93 Mr. Justice White sees no reason why the Board, rather than the district court, should make the determination. This is particularly so because "the Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain";94 and Jewel Tea, having actually come to terms with the unions, could not have filed a charge upon which the Board would have acted.95 Moreover, the opinion notes, Jewel Tea had filed no charge with the

92 Id. at 686.
93 Ibid.
94 Id. at 687.
95 Actually, it is not uncommon for the Board to issue a complaint founded upon charges of refusal to bargain filed by a party to a signed collective bargaining agreement. See, e.g., N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963). It is fundamental that a party to a collective agreement may obtain relief from compliance with an unlawful provision thereof upon a properly filed §8(a)(5) charge. Old Town Shoe Co. and United Shoe Workers of America, 91 N.L.R.B. 240 (1950).
Board; and the six-month limitation period would thus prevent the litigation of its claim. A further consideration is the fact that the issuance of complaints is a matter for the discretion of the Board's General Counsel, and so, "even in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action."68

In his separate opinion, Mr. Justice Goldberg expresses sharp criticism of both White opinions. These opinions "represent refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the anti-trust route in legitimate collective bargaining"97 and "constitute a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because 'a judge considered' the union or employer conduct in question to be 'economically and socially' objectionable."98 A thumbnail review of the major antitrust decisions in the light of legislation enacted specifically to regulate the conduct of labor-management relations impels the conclusion that there is "a consistent congressional purpose to limit severely judicial intervention in collective bargaining under cover of the wide umbrella of the antitrust laws, and rather, to deal with what Congress deemed to be specific abuses on the part of labor unions by specific proscriptions in the labor statutes"99 and that, accordingly, "the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws."100

The basic trouble with *Pennington*, according to Mr. Justice Goldberg, is that:

Since free collective bargaining inevitably involves and requires discussion of the impact of the wage agreement reached with a particular employer or group of employers upon competing employers, the effect of the Court's decision will be to bar a basic element of collective bargaining from the conference room.101

97 Id. at 697.
98 Id. at 700.
99 Id. at 709. In a footnote (Id. at 708 n. 9) Mr. Justice Goldberg observed:
   As this case does not involve an *Allen-Bradley* situation, it is not necessary to determine whether Congress, in enacting these Taft-Hartley boycott and related revisions to the Labor Act and at the same time rejecting an attempted codification of the *Allen-Bradley* doctrine in the antitrust laws, intended that all union activities in this area be covered solely under the comprehensive regulation of the labor statutes with their restricted injunctive and damage provisions.

Mr. Justice Goldberg to the contrary notwithstanding, it does seem quite patent that the Court's opinion in *Pennington* assumes that an *Allen-Bradley* situation was presented. See text to accompany notes 70-73, supra.
100 Id. at 710.
101 Id. at 714.
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It is to be presumed that well advised employers and unions will take pains, in the future, to avoid the making of express agreements pursuant to which the unions undertake to exact from other employers identical terms with those agreed to by the contracting employer; and this means that, "under settled antitrust principles . . . the existence of such an agreement, express or implied, may be inferred from the conduct of the parties." The making of such an inference, Mr. Justice Goldberg goes on to say, would depend upon a determination that "hourly wage rates and fringe benefits were set at a level designed to eliminate the competition of the smaller nonunion companies by making the labor cost too high for them to pay." The White opinion thus constitutes an "approval of judges and juries determining the permissible wage scale for working men in an industry," although the history of congressional action makes it "clear that Congress intended to foreclose judges and juries from making essentially economic judgments in antitrust actions by determining whether unions or employers had good or bad motives for their agreements on subjects of mandatory bargaining."

The Goldberg criticism of the White opinion in Pennington proceeds upon the assumption that unions have a legitimate interest in the maintenance of uniform wage levels and that it is therefore mandatory, under the labor laws, for employers and unions to bargain with reference to conditions among employers not covered by the affected (single-employer or multi-employer) bargaining unit. Since it is agreed that the doctrine of the NLRB's primary jurisdiction has no application in antitrust litigation, the crux of the opinions' difference would seem to be nothing more than differing views as to the proper ambit of the scope of mandatory bargaining.

This difference is also at the heart of their disagreement in Jewel Tea. Although the White opinion was careful to skirt making a deter-

102 Cf. Feller and Anker, supra note 41 at 107-08:

What can unions do, in the light of these decisions, to protect themselves against antitrust suits? The first rule, of course, which is prescribed by Pennington is to make no agreements with any employers as to what kind of agreements, even as to wages, hours or working conditions, the union will negotiate with other employers. Beyond, that, it is important, if a union has a policy of seeking uniform agreements across an industry, to make it clear in every possible way that this is a union policy developed without consultation with employers, so as to negate any inference of a forbidden agreement. It would be helpful, for example, to express such a policy in formal convention or executive board resolutions which explain the reasons for the policy, and which stress the workers' interest in uniform terms and conditions of employment.


104 Id. at 718. The reference to "nonunion" companies seems to have been a slip of the pen.

105 Ibid.

106 Id. at 719.

107 Id. at 710 n. 18.
mination that the marketing-hours limitation constituted a mandatory subject of collective bargaining, the Goldberg opinion imputes to it the making of such a determination and then chastises it for not holding that agreement upon such an issue necessarily precludes antitrust liability. Thus:

My Brother White recognizes that the issue of the hours of sale of meat concerns a mandatory subject of bargaining based on the trial court's findings that it directly affected the hours of work of the butchers in the self-service markets, and therefore, since there was a finding that the Union was not abetting an independent employer conspiracy, he joins in reversing the Court of Appeals. In doing so, however, he apparently draws lines among mandatory subjects of bargaining, presumably based on a judicial determination of their importance to the worker, and states that not all agreements resulting from collective bargaining based on mandatory subjects of bargaining are immune from the antitrust laws, even absent evidence of union abetment of an independent conspiracy of employers. Following this reasoning, my Brother White indicates that he would sustain a judgment here, even absent evidence of union abetment of an independent conspiracy of employers, if the trial court had found 'that self-service markets could actually operate without butchers, at least for a few hours after 6 p.m., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased. . . .'

Such a view seems to me to be unsupportable. It represents a narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about.

In dissenting, Mr. Justice Douglas argued that there was no "immediate and direct" connection between marketing hours and working hours, and that, presumably, the question of marketing hours could in no way be classified a mandatory subject of collective bargaining. The case thus presented a clear instance of the Allen-Bradley rule, and the dissent would affirm the ruling of the Court of Appeals.

V.

The most curious thing about the Pennington and Jewel Tea decisions is that the Court's three-way split is predicated upon unanimous assent to one basic proposition: the power of the judiciary to regulate, under the antitrust laws, matters which also fall within the regulatory scheme of the labor laws. Although the three opinions differ sharply

108 See text to accompany notes 87-95, supra.
110 Id. at 737-738.
111 In Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, (1966) the doctrine—see, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)—that conduct arguably protected by §7 of the National Labor Relations Act or arguably prohibited by §8 of the Act, except for acts or threats of violence, falls within the preemptive jurisdiction of the National
in their characterization of the conduct involved in each case, they all seem in agreement upon two issues: if the defendants' agreement were indeed upon a mandatory subject of bargaining and there were no independent evidence of such agreement being in aid of a conspiracy among non-labor groups, liability could not attach under the antitrust laws; and it is for the court, when faced with a claimed violation of the antitrust laws, to determine whether the agreement at bar really did involve an issue upon which employers and unions are required to bargain.

There are certain mandatory subjects of collective bargaining which have, over the years, been so clearly identified that it is hard to imagine judges arguing over whether they are, indeed, mandatory. Among these issues are, pre-eminently, wages, hours of work, pensions, and the like. Other issues—and the marketing hours limitation in *Jewel Tea* is a perfect example of these—seem to partake, at first blush, both of an encroachment upon the businessman's capacity to exercise ordinary business judgment and of an analogue to "wages, hours and terms of employment." Although Mr. Justice White was able to point to numerous instances in which agreements among businessmen to limit marketing hours were held violative of the antitrust laws, it is significant that in none of the three opinions was there any reference to authority under the National Labor Relations Act for the proposition that it is or is not an unfair labor practice for an employer to refuse to bargain with the representative of his employees concerning the hours during which the employer will be open for business, if the employer's marketing hours and the hours of work of a certain class of his employees represented by the particular union do not necessarily coincide. Thus one is presented with the anomalous situation of the White opinion refusing to decide whether the issue is a mandatory subject of bargaining; the Goldberg opinion asserting that it plainly is a mandatory subject and claiming the White opinion agrees therewith; and the Douglas opinion clearly indicating that the subject has nothing whatever to do with the scope of mandatory bargaining.

There is clearly presented here a sharp conflict between the policies of the antitrust laws and of the national labor laws—but not only a substantive conflict. What is more significant is that the congressional intention of leaving to the courts the determination of what arrangements should be held violative of the antitrust laws, while spelling out in detail what forms of conduct are violative of the national labor policy, has been frustrated. If we are to take seriously the idea that the National Labor Relations Board is endowed with some peculiar exper-

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Labor Relations Board received another setback. Here, the question was whether the doctrine of preemption would bar the maintenance of an action for damages for libel; and the Court, in a 5-4 decision, answered it in the negative.
tise that suits it better for the determination of what forms of activity are to be encouraged and what to be discouraged within the broad exercise of jurisdiction under which it operates, it would seem that only the Board should have the power to determine, in the first instance, whether a particular subject really does fall within the scope of mandatory bargaining. The contrary rule, adopted unanimously by the Court, will doubtless stifle collective bargaining by tending to fix for all time as “mandatory” issues what a court at one time may believe is or is not such an issue; and the declared public policy in favor of the peaceful resolution of labor disputes cannot but be impeded by such a view.\textsuperscript{112}

\textsuperscript{112} The Court ... bleeds some of the vitality from \textit{Fibreboard}, for unions and employers may now be reluctant to bargain concerning non-mandatory subjects and thus not develop many practices which will permit growth in the scope of collective bargaining. Summers, \textit{supra} note 69, at 78 n. 82.