

enabling the employers in the sheltered market to increase their gross return". Cox uses as an example the possibility that a union may interest itself in the price at which the product is sold, the volume of production, or the limitation of opportunities to enter the market and allocation of territory.<sup>57</sup>

Despite this careful break-down into three categories, we still have no answer to the question of which of these activities fall within the type of concerted restraint of trade intended to be prohibited by competition legislation and which fall within the scope of labour relations legislation, activities intended by collective bargaining legislation to be encouraged. Winter concludes that there is no principle upon which to distinguish 'legitimate' collective bargaining activity from 'illegitimate' monopolization.

Price-fixing may be designed to assure compliance with the terms of a collective agreement by seeing to it that the employer has sufficient funds to pay the required wages. Products may be excluded from a local market because they were manufactured under 'sweatshop' conditions and would, if allowed to compete freely, destroy even a modest union wage scale. Share the work programs may spread the available work among all the workers so that none of them have to bear the whole burden of bad times and marginal employers are not compelled to attempt to 'break' the union. But each of these schemes may also be designed to impose a 'monopoly' upon the public.<sup>58</sup>

Ultimately, Winter despairs of reconciling the policy conflict without statutory assistance, and declares that the only realistic interim solution to distinguish 'legitimate' from 'illegitimate' activity is to determine whether wages and prices are 'too high'.<sup>59</sup>

Despite the difficulties of making a rational distinction between legitimate collective bargaining activities and illegitimate monopoly activities, there are many who urge that it is necessary to delineate the kinds of union activity that will be tolerated and the kinds that will be subject to anti-combines legislation. Under collective bargaining legislation, trade unions have been the beneficiaries of favourable public policies affording them many privileges and immunities. It has been stated that the challenge to public policy lies in the need for measures which will reduce the dangers of excessive power without injuring weaker labour organizations or impairing the capacity of any union to fulfill its beneficent functions.<sup>60</sup>

It would seem that a combination in restraint of trade has the same effect on the consumer whether it is imposed by business, labour unions, or jointly by both. Businessmen commit such acts in order to increase profits, and society has decided that in the arena of competing values, greater profits fall behind the need for free competition. When labour unions commit such actions, they intend to seek higher wages and stability of employment for their members. The issue thus becomes whether we place a higher value on the ultimate union

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<sup>57</sup> *Id.* at 318.

<sup>58</sup> *Supra*, note 12 at 29.

<sup>59</sup> *Id.*

<sup>60</sup> Archibald Cox, *The Uses and Abuses of Union Power, Symposium, supra*, note 1 at 624.

aim of benefitting workers than on the need for free competition. Cox has argued that in the past, when wages were low and unions were weak, the interest in raising workers' standards may well have been greater. However, he argues that the passage of time has both increased union power to make restraints of trade effective and increased workers' living standards so that the present immunity of labour organizations from anti-combines laws should be cut down by legislation if practical abuses are shown and if union immunity can be scaled down without interfering with legitimate organizational and bargaining tactics or using the judicial process to make labour policy.<sup>61</sup>

In summary then, the theoretical policies of anti-combines legislation and labour relations legislation tend to conflict with each other very dramatically. Such theoretical conflict has been manifested in actual practical abuses by unions and employers to the extent that several authors have argued that trade union immunity from the anti-combines laws should be limited by legislation.

## B. THE AMERICAN APPROACH

The conflict between anti-combines policies and collective bargaining policies creates severe problems of statutory interpretation as well as critical issues of public policy. Through the *Sherman*,<sup>62</sup> *Clayton*,<sup>63</sup> *Norris La Guardia*,<sup>64</sup> and *Wagner*<sup>65</sup> *Acts*, the American government has espoused the doctrines of both collective bargaining and free competition. Difficult questions as to the application of the anti-trust laws to the activities of labour unions and the accommodation of apparently conflicting policies in the area of restraint of trade and labour-management relations in these Acts have been presented to the American courts over the years. Since the American courts have dealt with the issues involved in considerably more depth than have the courts in Canada, which has adopted similarly conflicting policies, it is helpful to examine the history of judicial decision-making on this matter in the United States.

### 1. *Legislation and Early Case Law*

The *Sherman Act* is the basic statute embodying the principles of com-

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<sup>61</sup> *Supra*, note 32 at 272. Bernard Meltzer in *Labour Unions, Collective Bargaining and Anti-Trust Laws* (1965), 32 U. Chi. Law Rev. 659 at 675 has also argued that the traditional ideology of trade unionism emphasized the worker's inequality in relation to capital, his need for a voice in the fixing of the terms and conditions of his employment, and the role of the union as an offset to combination and monopoly power on the enterprise side. Such considerations, he argues, could scarcely legitimize the use of union powers to create monopoly profits for industry by market-rigging, even though such profits were to be split with labour.

<sup>62</sup> 26 Stat. 209 (1890) as amended 15 U.S.C. (1964).

<sup>63</sup> 38 Stat. 730.

<sup>64</sup> 40 Stat. 70.

<sup>65</sup> 49 Stat. 449.

petition. This Act was passed in 1890 and provides broad definitions of what is to be classified as illegal anti-trust conduct:

Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanour . . . .

Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanour . . . .

The *Sherman Act*, as originally passed, contained no language expressly exempting any labour union activities, and controversy soon arose over whether the Act was applicable to unions. One viewpoint was that Congress had drafted the Act to apply only to business combinations and not to labour unions or any of their activities as such, that the Act was "a law to prescribe the rules governing barter and sale, and not the personal relations of employers and employees; . . . and that the Anti-trust laws designed to regulate trading were unsuitable to regulate employer-employee relations and controversies".<sup>66</sup> The contrary viewpoint was that the Act covered all classes of people and all types of combinations, including unions, if their activities physically interrupted the free flow of trade or tended to create business monopolies, and that a combination of labourers to obtain an increase in wages was itself a prohibited monopoly.<sup>67</sup>

The first case involving labour and the *Sherman Act* to reach the Supreme Court was the *Danbury Hatters'* case in 1908, *Loewe v. Lawlor*.<sup>68</sup> A union of hat workers was attempting to organize all of the large manufacturers of felt hats in the United States. It mounted a national secondary boycott on one recalcitrant employer, Loewe who brought suit against the membership of the union for treble damages for violation of the *Sherman Act*. The Supreme Court found the *Sherman Act* applicable to unions and granted a judgment for over half a million dollars. Injunctions were used to enforce the Act against unions. At the same time, employers invoked injunctions to restrain labour union activities even where no violation of the *Sherman Act* was charged.

Due to vigorous protests from employee groups, between 1890 and 1914 numerous bills were proposed to curb the use of injunctions and to take labour unions wholly outside the application of the *Sherman Act*.<sup>69</sup> Partly in response to these union complaints, Congress passed the *Clayton Act* in 1914. Section 6 of the *Clayton Act* reads as follows:

. . . [T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual self-help, and not having capital stock or conducted for

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<sup>66</sup> *Allen-Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945) at 801-02.

<sup>67</sup> *Id.* at 802.

<sup>68</sup> 208 U.S. 274 (1908).

<sup>69</sup> *Supra*, note 66 at 802-03.

profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Section 20 of the Act also drastically restricted the general power of federal courts to issue labour injunctions, restricting it to cases "involving or growing out of a labour dispute over terms or conditions of employment".

The U.S. Supreme Court declined to interpret the *Clayton Act* as manifesting a Congressional purpose to exempt labour unions completely from the *Sherman Act*. In the cases of *Duplex Co. v. Deering*,<sup>70</sup> and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*,<sup>71</sup> labour unions had engaged in secondary boycotts. The Supreme Court held that the *Clayton Act* exempted labour union activities only insofar as those activities were directed against the employees' immediate employers, and that controversies over the sale of goods by other dealers did not constitute "labor disputes" within the meaning of the *Clayton Act*.

Organized labour protested against this interpretation and Congress adopted their viewpoint by passing the *Norris-La Guardia Act* in 1932. That Act greatly broadened the meaning to be attributed to the words "labor dispute", further restricting the use of injunctions in such a dispute, and emphasizing the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection".<sup>72</sup> Further expression of this view was found in the *Wagner Act*, passed in 1935, which set the framework for collective bargaining in the American industrial sector.

In summary, then, American legislation embodies the doctrines of both competition and collective bargaining. The *Sherman* and *Clayton Acts* provide the framework for anti-trust prosecution and the *Norris-La Guardia* and *Wagner Acts* provide the framework for collective bargaining activities. Some legislative recognition of the conflicting pulls of the two doctrines is found in s. 6 of the *Clayton Act* which provides that anti-trust laws should not be construed to prohibit the existence of labour organizations or to prevent them from "lawfully carrying out the legitimate objectives thereof". In phrasing the statute in these terms, however, Congress failed to define precisely the scope of immunity to which unions were entitled in their product market activities, and thus left to the courts the development of policy on this fundamental issue.

## 2. The Product Market — Labour Market Distinction

*Apex Hosiery Co. v. Leader*<sup>73</sup> involved a suit for damages resulting from a violent 'sit-down strike' which not only damaged the plaintiff's plant but

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<sup>70</sup> 254 U.S. 443.

<sup>71</sup> 274 U.S. 37.

<sup>72</sup> *Supra*, note 66 at 805.

<sup>73</sup> 310 U.S. 469 (1940).

also prevented the shipment of finished hosiery in interstate commerce. The Court, speaking through Mr. Justice Stone, attempted to formulate and rationalize the broad principles governing labour-anti-trust litigation. It found that union activity was not violative of the anti-trust laws unless it intended "to restrain commercial competition"<sup>74</sup> or "was directed at control of the [product] market".<sup>75</sup> Mr. Justice Stone said:

Since, in order to render a labor combination effective it must eliminate the competition from non-union-made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.<sup>76</sup>

The Court found the Apex strike legal under the anti-trust laws though three members of the Court dissented. Thus, *Apex* held that the *Sherman Act* did not apply to strikes or other activities of labour unions unless they affected commercial competition. Strikes might restrict the employer's power to compete in the market, but ". . . the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act".<sup>77</sup> This decision raises the product market—labour market distinction: union activities directed towards altering the labour market are exempt, but activities directed towards the product market itself are not. The decision and its distinction are perhaps best supported by the argument that unions are interested in levelling off not so much the 'prices' of commodities produced throughout a given industry, but 'wages' and other 'working standards'. This argument has been put forth by Charles Gregory:

The unions wish to eliminate the differentials existing between union and non-union wages in all industries in which they are established. In so far as the competitive price differential between the union-made and non-union-made products of a given industry reflect the wage differential between union and non-union rates, *to that extent* the unions are trying to eliminate competition through restraints involving the control of commodity prices. Aside from this, unions exhibit no real interest in standardizing the prices of the products in any given industry, leaving employers relatively unhindered in making the most of competitive factors like efficiency in management, advertising and incentive plans, as long as union's employees' toes are not stepped on in the process.<sup>78</sup>

However, the scope of collective bargaining has expanded to the extent that unions negotiate with management over such issues as the methods of production, technological change, incentive plans, *etc.* Control over these issues is no longer left solely to management, and to this extent, the traditional areas of union concern with the few factors of wages and hours of work have expanded almost beyond recognition.

Winter has argued that the distinction between product market and labour market restraints cannot soundly be made in the context of a system of collective bargaining based on employee organization along product lines, because

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<sup>74</sup> *Id.* at 497.

<sup>75</sup> *Id.* at 506.

<sup>76</sup> *Id.* at 503-04.

<sup>77</sup> *Id.* at 503.

<sup>78</sup> *Supra*, note 2 at 267.

it misconceives the basis of union power and the relationship of product competition to collective bargaining:

. . . the imposition of uniform high wage rates may be a purposeful attempt to drive out small marginal operators, thereby radically changing the nature of competition in the product market. On the other hand, some of the most direct intervention by unions in product markets, such as prohibitions on sales at a price less than labor costs, are most obviously related to control of the labor market, such as the protection of contractually-established wage rates.<sup>79</sup>

Cox has queried whether, when a court was attempting to distinguish between product markets and labour markets, it would look to the kind of combination (the purpose, motive or intent) or to the effect on commercial competition. He believes that both tests are unhelpful:

Motivation is a slippery guide, for a man can always be found to, and in a sense does, intend any consequence which foreseeably follows from his conduct . . . . If proof of an adverse 'effect' on consumers is enough even though the union confines itself to the labor market, then the act may apply to any strike which impairs the flow of goods or services essential to the public health or safety of the national economy. It might also affect bargaining demands which have an impact on price competition or the level of production.<sup>80</sup>

It might be added that the purpose-and-motive approach depends to a large extent on judicial notions of the social and economic desirability of unions.

### 3. *The Self-Interest Test*

*U.S. v. Hutcheson* was the next in a series of landmark American cases. A carpenters' union had a jurisdictional dispute with a machinists' union over which of the two should get the work of dismantling certain machinery at the Anheuser-Busch brewery in St. Louis. The company gave the work to the machinists' union. Thereupon, the employees belonging to the carpenters' union went on strike and picketed the plant. In addition, the officials of the carpenters' union organized a consumer boycott of Anheuser-Busch beer.

The U.S. Supreme Court found that there had been no violation of the *Sherman Act*:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit [under s. 20 of the *Clayton Act*] are not to be distinguished in any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.<sup>81</sup>

In short, union activity in pursuit of economic self-interest was to be exempt from the anti-trust laws. Gregory has stated that although the language of this decision is different, it is consistent with the main position taken in *Apex*, since this was not an attempt by the carpenters' union to gain control over the market for a particular brand of beer. It was, rather, an attempt to compel Anheuser-Busch to give certain work to the carpenters as against the machinists.<sup>82</sup>

<sup>79</sup> *Supra*, note 13 at 42.

<sup>80</sup> *Supra*, note 32 at 263-64.

<sup>81</sup> 312 U.S. 219 at 232 (1941).

<sup>82</sup> *Supra*, note 2 at 277.

#### 4. *Combination with Non-Labour Groups*

The *Hutcheson* decision did leave open one loophole which allows unions to run afoul of the legislation. Anti-trust laws might still be applied where a union acted in combination with non-labour groups; the decision suggested that unions conspiring with employers to control the supply and price of commodities for their mutual benefit might still be regarded as offenders under the Act.

*Allen-Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers*<sup>83</sup> seized on this loophole to find a violation of the *Sherman Act* in union activities. In this case, Local 3 of the IBEW, having jurisdiction only over metropolitan New York City, organized the employees of most of the electrical equipment manufacturers and contractors in the area. Under the collective agreements entered into, the contractors agreed to buy electrical equipment only from manufacturers in contractual relations with Local 3, *i.e.*, those in New York City, while the manufacturers agreed to sell only to those area contractors who employed members of Local 3. The union, through the usual weapons of picketing and boycotts, prevented non-union operations. Sheltered from competition, the manufacturers were able to raise their prices, while the contractors, with the union's blessing and participation, could rig bids. The result was higher wages and shorter hours for Local 3's members, greater profits for the manufacturers and contractors, exclusion of outsiders, and monopolistic prices for the public.

The Supreme Court stated that this combination of businessmen (the New York electrical manufacturers and contractors) had violated the *Sherman Act* unless its conduct was immunized by the participation of the union. The Court noted that the union was acting in its own self-interest, but held that unions violate the *Sherman Act* when they aid non-labour groups to create business monopolies,<sup>84</sup> and went so far as to state that "the same labor activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups".<sup>85</sup>

Kirkpatrick attempts to explain the decision by stating that a union's long-range goal may be the perfectly legitimate one of higher wages for its members, but if, in seeking this goal, it permits itself to be used to promote the employer's desire for higher prices, the union is equally responsible under the anti-trust laws with the employer group. "Absent corruption, everything a union does is intended to further its own objectives, but if it seeks these objectives by helping the employer achieve a more secure position in the market, free from competitive pressures, then the labor exemption is forfeited."<sup>86</sup> The exemption granted labour was designed to strengthen the union's ability to bargain with an employer, not to allow the union to act as

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<sup>83</sup> 325 U.S. 797 (1945).

<sup>84</sup> *Id.* at 808.

<sup>85</sup> *Id.* at 810.

<sup>86</sup> *Supra*, note 15 at 304.

a tool for the employer's actions of seeking a stronger position vis-à-vis his competitors:

When labor joins a non-labor group in applying the combined power of both to secure objectives desired by both, the effect is felt in the product market, and trade in a commodity is restrained. This deprives the public of the protection it expects from competition, and the public is not compensated for this loss by any improvement in the collective bargaining process. The public loses its safeguard against higher prices and lower quality and gets no improved safeguard to assure a better allocation of resources in the labor market.<sup>87</sup>

The requirement for violation of the *Sherman Act*, according to *Allen-Bradley*, is that unions 'combine' with employers. But Winter argues that there is no class of cases involving such combinations which can be distinguished from the mainstream of union activities in collective bargaining:

The goal of unions is to control the behavior of particular employers, and their principal functional significance is in terms of those firms. Under those circumstances, unions 'combine with employers' every time there is agreement between them, or at least when no conflict of interest exists. And if the point is not clear enough stated in that fashion, ask how unions 'act alone.'<sup>88</sup>

Archibald Cox also echoes the same doubts:

The difficulty lies in determining what constitutes such combination, for one can imagine a spectrum of cases ranging from restraints imposed by a union without employer agreement to price fixing schemes concocted by business firms in which the union serves merely as a cloak or enforcement agency.<sup>89</sup>

Winter has even suggested that if employers do not agree among themselves on the scheme, resist union demands, and acquiesce only under pressure, *Allen-Bradley* is inapplicable.<sup>90</sup>

Murray has argued that *Allen-Bradley* sets forth merely another test for trying to distinguish between the product and labour markets, *i.e.*, that when collusion is present, unions are influencing the product market. He states that *Allen-Bradley* held that labour unions remain subject to anti-trust laws if they collude with management to set prices. In *Allen-Bradley*, the union's agreement directly affected the price of the product sold, as well as the price of labour services, and the court implied that unions were in violation of the anti-trust laws when their demands influenced the price of the product.<sup>91</sup> The relationship between wages and prices has been analyzed in many lengthy treatises by economists, notably William G. Bowen and John M. Clark.<sup>92</sup> The extent of the interplay between wages and prices is not completely clear, but prices are undoubtedly influenced by wages. Murray argues that the only real issue is over the initial direction of causality: do wages determine prices to a greater extent than prices determine wages?<sup>93</sup> The Court in *Allen-Bradley*

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<sup>87</sup> *Id.*

<sup>88</sup> *Supra*, note 12 at 47.

<sup>89</sup> *Supra*, note 32 at 270.

<sup>90</sup> *Supra*, note 12 at 50.

<sup>91</sup> *Supra*, note 19 at 283.

<sup>92</sup> William G. Bowen, *The Wage-Price Issue; A Theoretical Analysis* (New York: Greenwood Press, 1969).

<sup>93</sup> *Supra*, note 19 at 283.



did not deal with these questions, but merely concluded that when collusion exists, unions are affecting the price of goods, while absent collusion between union and management, unions are only influencing the price of labour services. Murray concludes that the court is much more concerned with the means rather than the ends of collective bargaining.<sup>94</sup>

It has been noted, also, that *Allen-Bradley* is an attempt to resolve a problem which naturally occurs when one group is allowed to use economic power in a way forbidden to another group. The problem is how to prevent the group permitted to use the power from selling it to the other group.<sup>95</sup>

In the next major case, *U.M.W. v. Pennington*,<sup>96</sup> the U.S. Supreme Court determined that the union had violated the *Sherman Act* by conspiring with non-labour groups to eliminate small mine operators and leave the coal industry to major coal producers. The allegations made against the union constitute a fascinating illustration of the extent to which unions can tamper with the competitive elements in an industry.

There were allegations that the union agreed to the termination of employment for thousands of its members because of the mechanization of mines, that it would not protest the closing down of mines which could not be mechanized, and that it would go along with the understanding that the coal industry would be confined to comparatively few companies, and that the miners would be drastically reduced in number. (Although this would seem contrary to employee interests, it was a move intended to stabilize dangerously shaky financial conditions in the industry). The large coal-producing companies agreed with the union that they would not protest the demands of the union with respect to wage increases so long as the companies were able to match those increases, by increased productivity through mechanization. The 1958 Wage Agreement required all signatory operators to refrain from buying or marketing non-union coal. The union agreed that it would not make special agreements with the small operators in the Kentucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but would have a standardized agreement for all operators. It was alleged that when the thousands of men who were being driven into unemployment were put out of the industry, they would cease to participate in the Welfare Fund benefits and that it was planned that the Fund would remain as a source of benefit only for the employees of those companies that survived, to their economic gain.

The U.S. Supreme Court had stated in *Apex Hosiery* that it recognized that a legitimate aim of any national labour organization was to obtain uniformity of labour standards and that a consequence of such union activity might be to eliminate competition based on differences in such standards.<sup>97</sup> But the Court stated in *Pennington* that there was nothing in the labour policy

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<sup>94</sup> *Id.*

<sup>95</sup> Herbert N. Bernhardt, *The Allen-Bradley Doctrine: An Accommodation of Conflicting Policies* (1962), 110 U. Pa. Law Rev. 1094 at 1115.

<sup>96</sup> 381 U.S. 657 (1965).

<sup>97</sup> *Supra*, note 73 at 503.

indicating that the union and the employers in one bargaining unit are free to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit led the Court to a quite different conclusion. The union's obligation to its members would seem to be best served if the union retains the ability to respond to each bargaining situation as individual circumstances might warrant, without being strait-jacketed by some prior agreement with favoured employers.<sup>98</sup>

For the salient characteristics of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and might conclude that the objective of uniform standards should temporarily give way.<sup>99</sup>

The opinion of the Court, delivered by Mr. Justice White, states three propositions: first, that a union and employers may conclude a wage agreement for a multi-employer bargaining unit without violating the anti-trust laws; second, as a matter of its own policy and not by agreement with any employer, a union may seek the same wages from all employers; third, a union forfeits its exemption from the anti-trust laws when it agrees with one set of employers to impose an agreed wage scale upon other bargaining units. The critical distinction seems to be that while a union alone may pursue industry-wide labour standards policies, even though it consciously drives marginal employers out of business, a union and a group of employers may not join together to promote industry-wide standards. They must confine themselves to the established bargaining unit so that each labour-management group, whether single employer or multi-employer, large or small, shall operate independently, except for such uniformity as the union, acting alone and not by agreement with any group of employers, is able and chooses to impose.<sup>100</sup>

Justice White concluded that the anti-trust provisions, rather than labour interests, should govern where the union bound itself to a group of employers through collective agreements to force the same bargaining terms upon all other employers in the product market. It would almost seem as if *Pennington* stood for the proposition that the negotiation of a 'most-favoured nation clause' was not union activity that would be held to be exempt under the *Sherman Act*. By "most favoured nation clauses" is meant those devices by which employers consent to the terms of a collective agreement conditioned upon union imposition of identical terms on competitors, or those devices by which the union binds itself contractually to impose such terms on others. They assure employers that there will be concerted action as to all matters covered by the collective agreement and lessen the conflict of interest between labour and management.<sup>101</sup> The main thrust of this argument to prohibit 'most favoured nation clauses' under the *Sherman Act* is that such agreements not only run counter to the anti-trust laws but also contravene the labour policy

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<sup>98</sup> *Supra*, note 96 at 666.

<sup>99</sup> *Id.* at 668.

<sup>100</sup> *Id.* at 666.

<sup>101</sup> See Winter, *supra*, note 12 at 71.

of 'open-end' collective bargaining, in that the union is not free to respond to each bargaining situation as the circumstances might warrant. The Court's analysis of this combination was that an agreement which bound both parties to seek to stifle product market competition frustrated both the anti-trust and labour policies.

It is interesting to examine some of the thoughts expressed by Mr. Justice Goldberg, speaking in dissent in *Pennington*. He stated that it was no secret that the UMW wished the removal from the market of marginal operators who could not afford high wages, fringe benefits, and good working conditions. The UMW had articulated this policy since 1933.<sup>102</sup> But this desire was based on the protection of the miners, since marginal operators depressed wage standards and perpetuated undesirable conditions.

Mr. Justice Goldberg rejected as a useless test the distinction between unions that acted 'unilaterally' and those which acted 'in agreement with employers':

A union can never achieve substantial benefits for its members through unilateral action; I should have thought that the unsuccessful history of the Industrial Workers of the World, which eschewed collective bargaining and espoused a philosophy of winning benefits by unilateral action, proved this beyond question. See Dulles', *Labor in America*, 208-223 (1949); Chaplin, *Wobbly* (1948) . . . . Unions cannot, as the history of the [Industrial Workers of the World] shows, successfully retain employee benefits by unilateral action; nor can employers be assured of continuous operation without contractual safeguards.<sup>103</sup>

He stated that history had also shown that labour contracts establishing more or less standardized wages, hours, and other terms and conditions of employment in a given industry or given market area were often secured through either bargaining with multi-employer associations or through bargaining with market dealers that set a 'pattern' for agreements with other employers. The multi-employer association and the 'pattern-setting' structure were merely two similar systems used to achieve the identical result of fostering labour peace through the negotiation of uniform labour standards in an industry. He found it distressing that the Court should make anti-trust liability for both employers and unions turn on which of the two systems was used, *i.e.*, wage agreements could be made with multi-employer units but agreements could not be made to affect employers outside the formal bargaining unit.

*Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, presented another aspect and a different decision from the Court. The Chicago local of the Amalgamated Meat Cutters bargained for its members with small independent butchers as well as larger, automated, self-service chains. It sought from both a uniform policy that no fresh meat would be sold after six o'clock p.m. This union policy had a long history dating back to 1919, and had grown from the union's struggle to reduce the long arduous hours worked by butchers, which in 1919 were 81 hours per week. It took a long strike in 1920 to achieve the

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<sup>102</sup> Baratz, *The Union and the Coal Industry* (1955) at 62-74.

<sup>103</sup> See his decision in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 at 721-22 (1965).

first limitation on hours, and hard collective bargaining had followed to maintain the policy and further reduce the number of hours worked.

The restraint directly affected the labour market because it involved not only hours of work and job opportunities, but also directly restricted competition among employers in the product market by limiting the hours during which they could be open for business. In the background, there appears to have been the thought that night sales by supermarkets and other large stores would endanger the jobs of butchers in small, independent establishments.

The Supreme Court held that the restrictive collective agreement (stipulating no night work) did not violate the *Sherman Act*. It was felt that the marketing hours restriction was so intimately connected to wages, hours and working conditions that the union's successful attempt to obtain that provision in pursuit of its own policy and not in combination with non-labour groups was within the protection of the national labour policy and therefore exempt from the *Sherman Act*.<sup>104</sup>

The first determination was that the union was acting in pursuit of its own policies and not by agreement with employers. Second, Mr. Justice White evidently considered it essential that there be a judicial finding that a restriction upon store hours was in fact necessary to protect the butchers' job opportunities against the intrusion of clerks. Third, although there is some doubt, Mr. Justice White apparently thought it proper to appraise whether the benefits of the agreement to the union outweighed the injury produced by the direct restraint upon the product market.<sup>105</sup>

Mr. Justice Goldberg quoted an earlier opinion in which he said: "[T]o believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lessons of American labor union history."<sup>106</sup> Mr. Justice Goldberg argued that judges should not undertake to substitute their judgment for that of union leaders on the question of what was in the union's self-interest.

In *Local 24, International Brotherhood of Teamsters v. Oliver*, a union was permitted to negotiate concerning the price which would be charged for the rental of owner-driven trucks, as this was found to have a direct and immediate relationship to the wages paid to non-union drivers because the trucker was, in effect, getting a rebate on the union wage scale by paying the owner-driver less rental for his truck. The Court held that:

[T]he point of the Article is obviously not price fixing but wages. The regulations embody not the 'remote and indirect approach to the subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of a basic wage structure established by the collective bargaining contract.<sup>107</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 689.

<sup>106</sup> *Id.* at 728.

<sup>107</sup> 358 U.S. 283 at 294 (1959).