

CASENOTES

Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest: *McCourt v. California Sports, Inc.*¹—Since 1941 the Supreme Court has recognized a labor exemption to the antitrust laws. The Court initially viewed the exemption as grounded in a congressional policy of redressing a labor-management bargaining imbalance by protecting union organizational efforts. Construing the Clayton² and Norris-LaGuardia³ Acts to place certain union activity beyond the reach of the antitrust laws, the Court delineated a statutory labor exemption which protects unions acting in their self-interest. More recently, the Court has noted that the congressional policy favoring collective bargaining dictates that unions not lose this protection whenever they sign an agreement with a non-labor group. Accordingly, the Court has developed a *non*-statutory labor exemption and has fashioned a delicate test for applying it, under which two national labor policies—that favoring collective bargaining and that seeking to further union interests—are balanced against the antitrust laws. The Court has indicated that where both labor policies are advanced, a union may claim the exemption to protect an anticompetitive provision contained in an agreement with a non-labor group. The Court, however, has never extended this protection to union-employer agreements which further only one labor policy.

In a recent decision, *McCourt v. California Sports, Inc.*,⁴ the Court of Appeals for the Sixth Circuit examined the labor exemption in the context of a player's antitrust challenge to a professional sports league's reserve system. The court held that where only the parties are affected by market restraints included in a legitimately negotiated collective bargaining agreement, the labor exemption will shield even an employer-devised restraint sought in the employers' interest and adamantly opposed by the union.⁵ In effect, the Sixth Circuit found one labor policy—the promotion of the collective bargaining process—to outweigh the antitrust laws where no third party is affected. This line of reasoning is reconcilable with the Supreme Court's approach to the nonstatutory labor exemption, which developed in cases involving restraints on business competitors. The Supreme Court's test balances labor interests against threats to economic competition. This approach does not preclude ascribing less weight to the antitrust side of the scale where the anticompetitive provision does not affect third parties, but only those who have bargained over it. The Sixth Circuit's decision thus recognizes the validity of the balancing approach. The appeals court raises an important, albeit subtle, challenge to the Supreme Court's test, however, by implicitly suggesting in *McCourt* that the collective bargaining process ought to be weighted far more

¹ *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979).

² 15 U.S.C. § 12 *et seq.* (1976).

³ 29 U.S.C. §§ 101-115 (1976).

⁴ 600 F.2d 1193.

⁵ *Id.* at 1203.

heavily than the union interest policy on the labor side of the scale. If such a view were adopted by the Supreme Court, the labor exemption might soon bear little resemblance to that envisioned by Congress when it enacted the Clayton and Norris-LaGuardia Acts. It would square well, however, with more recent congressional pronouncements and changes in the labor-management bargaining framework.

This note will examine the nonstatutory labor exemption to the antitrust laws. First, the facts, holding, and reasoning of the *McCourt* decision will be summarized briefly. The note then will scrutinize the Supreme Court's decisions on the labor exemption issue. Because the Court has never addressed the precise question faced by the Sixth Circuit—under what circumstances, if any, an employer group may claim the labor exemption to protect an anticompetitive provision devised and sought by the employers in their own interest—lower court decisions on this issue will be surveyed. Finally *McCourt* will be analyzed in detail, to ascertain whether it marks a radical departure, or follows naturally from prior case law. It will be submitted that the holding of *McCourt* is a logical corollary of the Supreme Court's nonstatutory exemption test. It will be submitted further that the Supreme Court should respond to suggestions in the opinion by modifying its nonstatutory exemption balancing test.

1. *MCCOURT V. CALIFORNIA SPORTS, INC.*

California Sports, Incorporated ("Los Angeles Kings") and Detroit Hockey Club, Inc. ("Detroit Red Wings") are member clubs of the National Hockey League ("NHL" or "League"), a non-profit, incorporated professional hockey association. The NHL, like other professional sports leagues, utilizes a reserve system⁶ to control player movement and thereby to maintain a competitive balance among the member teams.⁷ Prior to 1972 this system was embodied in clause 17 of the uniform Standard Player's Contract, which had been drafted by the League and which every player was required to sign as a condi-

⁶ "Reserve system" in this note refers to a player restraint mechanism utilized by a professional sports league to equalize competitive strength within the league by controlling player movement. Typically, the mechanism takes the form of a "reserve" or an "option" clause, included in every player's contract, stipulating that at the termination of the contract, the club unilaterally may renew the contract for one additional year (option clause) or for an unlimited number of additional one year terms (reserve clause). It is contended that the reserve clause perpetually forbids a player from selling his services to another club. Lee, *A Survey of Professional Team Sport Player-Control Mechanisms under Antitrust and Labor Law Principles: Peace at Last* [hereinafter cited as Lee], 11 VAL. U.L. REV. 373, 381-82 (1977). It has been well argued that an option clause similarly restricts player mobility, since generally it is coupled with a compensation provision, whereby a team which acquires a player who has "played out his option year" must give the player's former club an "equalization payment." This compensation requirement tends to inhibit team owners from signing free agents, for fear of losing valuable players, draft rights, or money to the compensated team. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.03 at 500-03 (1979).

⁷ *McCourt v. California Sports, Inc.*, 460 F. Supp. 904, 909 (E.D. Mich. 1978).

tion of employment.⁸ This clause required a player, upon his contract's expiration, to execute a new agreement with the same team and upon the same terms and conditions as his old contract, except that salary could be modified by mutual agreement or by arbitration.⁹ Barring a trade, a player was bound perpetually to the same club, since the new contract had to include clause 17's renewal provision.¹⁰ In 1972 the NHL was enjoined from enforcing the reserve clause. In granting the injunction in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,¹¹ the District Court for the Eastern District of Pennsylvania determined that there was a substantial likelihood that clause 17 violated section 2 of the Sherman Act,¹² to the extent that it gave the NHL monopoly power over the supply of professional hockey players.¹³

The NHL sought to maintain an effective reserve system without violating *Philadelphia Hockey Club's* injunction by amending its by-laws and altering the uniform Standard Player's Contract.¹⁴ Paragraph 17 of the revised Standard Contract permitted a player, upon the expiration of his contract, to sign a "Player's Option Contract," identical to the terminated agreement, but limited to one season.¹⁵ After this option year, a player would become a "free agent," earning the "right, as provided by Section 9A of the League By-Laws . . . to negotiate and contract with any club in the League, or with any other club."¹⁶ Amended by-law section 9A allowed a free agent to sign with any team, but required any NHL team acquiring a free agent to compensate the player's former club for its loss.¹⁷ This "equalization payment" could be an assignment of player contracts, draft choices, or, as a last resort, cash.¹⁸ When the two teams could not agree on compensation, a neutral arbitrator, selected by the League's Board of Governors, would choose between equalization proposals submitted by the acquiring team and by the team to be compensated. The arbitrator would have no power to vary either proposal.¹⁹

When the National Hockey League Players' Association ("NHLPA"), as exclusive bargaining agent for all NHL players,²⁰ refused to agree to a new reserve clause, the owners, in November 1973, adopted revised paragraph 17

⁸ *Id.* at 906; *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 474 (E.D. Pa. 1972).

⁹ 460 F. Supp. at 906.

¹⁰ *Lee, supra* note 6, at 402.

¹¹ 351 F. Supp. 462 (E.D. Pa. 1972).

¹² 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.* (1976). Section 2 reads: "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 . . . shall be deemed guilty of a misdemeanor. . . ."

¹³ 351 F. Supp. at 518.

¹⁴ 460 F. Supp. at 906.

¹⁵ NHL Standard Player's Contract (1974), ¶ 17(c).

¹⁶ *Id.* (emphasis added). Paragraph 18 of the Standard Contract requires the parties to abide by the League's constitution and by-laws. *Id.* at ¶ 18.

¹⁷ National Hockey League By-Law Section 9A (Nov. 27, 1973).

¹⁸ *Id.*

¹⁹ *Id.* See 600 F.2d at 1195.

²⁰ Brief of Appellant National Hockey League at 12-13. Every NHL player belongs to the NHLPA. *Id.*

and section 9A unilaterally.²¹ Negotiations continued, however, with the League standing firm on the reserve system, while offering concessions on other matters.²² Finally, on May 4, 1976, the Players' Association signed a Collective Bargaining Agreement ("the Agreement"),²³ recognizing both paragraph 17 of the Standard Player's Contract (1974 form) and section 9A of the League's by-laws as "fair and reasonable terms of employment."²⁴

Dale McCourt was the Detroit Red Wings' first choice in the 1977 NHL player draft.²⁵ On October 11, 1977 he executed a Standard Player's Contract (1974 form) under which he was to receive \$325,000 for three years²⁶ plus a \$100,000 bonus for signing.²⁷ Paragraph 11 of the contract provides that the Red Wings shall have the right to "sell, assign, exchange and transfer this contract . . .," and that in such an event, McCourt agrees to "faithfully perform and carry out this contract with the same purpose and effect as if it had been entered into by the Player and such other Club . . ."²⁸ In paragraph 18 of the contract, the parties agree to be legally bound by the NHL by-laws.²⁹

Rogatien Vachon, recognized as one of hockey's premier goaltenders, became a free agent in the summer of 1978.³⁰ He had played six seasons with the Los Angeles Kings, including his option year during the 1977-78 season, but he rejected the Kings' offer of \$975,000 to return for another five years.³¹ Instead, he signed a five year contract with the Red Wings for \$1,900,000.³² By signing Vachon, Detroit subjected itself to the compensation provisions of by-law section 9A. Negotiations over a mutually agreeable equalization payment failed,³³ and each team submitted a proposal to the neutral arbitrator. On August 17, 1978 the arbitrator selected Los Angeles' proposal, which called for the assignment of McCourt's contract to the Kings, and on August 28 the contract was so assigned.³⁴ McCourt brought suit in the United States District Court for the Eastern District of Michigan to have the assignment of his contract enjoined.³⁵

McCourt's complaint alleged that the NHL, the Los Angeles Kings, the Detroit Red Wings, and the NHLPA³⁶ unreasonably had restrained trade in

²¹ 600 F.2d at 1200.

²² *Id.* at 1202.

²³ *Id.* at 1200. The Agreement was retroactive from September 15, 1975. *Id.*

²⁴ NHL-NHLPA Collective Bargaining Agreement (1976) at § 9.03(b).

²⁵ Plaintiff-Appellee's Brief at 5.

²⁶ 600 F.2d at 1196.

²⁷ Brief of Appellant National Hockey League at 4.

²⁸ 600 F.2d at 1195 n.4.

²⁹ Brief of Appellant National Hockey League at 5.

³⁰ *Id.*

³¹ Brief of Appellant National Hockey League at 7.

³² *Id.*

³³ *Id.* at 8.

³⁴ Plaintiff-Appellee's Brief at 5, 6.

³⁵ 460 F. Supp. 904 (E.D. Mich. 1978).

³⁶ For the sake of simplicity, defendants shall be referred to hereinafter as the National Hockey League (NHL), since Los Angeles and Detroit are member clubs of the League, and since the NHLPA, though technically a defendant, was ambivalent

violation of section 1 of the Sherman Act³⁷ by adopting and applying the reserve system supported by section 9A. The suit prayed for an injunction under section 10 of the Clayton Act³⁸ to prevent enforcement of the by-law provision which had enabled Los Angeles to acquire McCourt's services from Detroit.³⁹

The district court granted the request for a preliminary injunction, concluding that McCourt had established sufficiently that by-law section 9A violates section 1 of the Sherman Act.⁴⁰ The court found a substantial likelihood that the provision "unreasonably restrains professional hockey players from freely marketing their services and . . . deters member clubs from signing free agents because of the uncertainty created by the required equalization payment."⁴¹ The court rejected the NHL's claim that McCourt's challenge was vitiated by the nonstatutory labor exemption to the antitrust laws, which affords limited immunity to certain union-employer agreements. It found that the by-law was not the product of bona fide, arm's length collective bargaining, noting its appearance in the 1976 Agreement in language identical to that adopted by the League owners three years earlier.⁴² Thus, the court concluded that section 9A's "unilateral" inclusion in the Agreement would not shelter it from antitrust scrutiny.⁴³

Defendants appealed, and the Court of Appeals for the Sixth Circuit vacated the injunction.⁴⁴ In a 2-1 decision, Chief Judge Edwards dissenting, the court HELD: where a professional sports league reserve system is included in a collective bargaining agreement entered into by the players and the league as a result of good faith, arm's length negotiations, and where it affects only parties to the bargaining relationship, it is entitled to the nonstatutory labor exemption from the antitrust laws. A players' association's failure to keep the provision out of the agreement does not mean there has been no bona fide collective bargaining; where the league has agreed to other benefits in exchange for this provision, its inclusion is a part of, and not apart from, the collective bargaining process.⁴⁵

The majority reasoned that the nonstatutory exemption protects a professional sports league's reserve system when three criteria are met: (1) the restraint on trade must affect primarily the parties to the bargaining relationship; (2) the provision sought to be exempted must concern a mandatory sub-

about the suit's outcome due to its opposition to the owner-devised reserve system. Counsel for the NHLPA chose to allow the NHL and McCourt to brief and argue the antitrust and labor exemption issues. Brief for Appellant NHLPA at 3.

³⁷ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.* (1976). Section 1 provides, in pertinent part, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."

³⁸ 15 U.S.C. § 26 (1976).

³⁹ 460 F. Supp. at 906.

⁴⁰ *Id.* at 907.

⁴¹ *Id.*

⁴² *Id.* at 910, 911.

⁴³ *Id.*

⁴⁴ 600 F.2d at 1193, 1203.

⁴⁵ 600 F.2d at 1203.

ject of collective bargaining; and (3) the agreement containing the restriction must be the product of bona fide arm's length negotiations.⁴⁶ The court summarily determined that section 9A primarily affects the players, who are parties, through the NHLPA, to the bargaining relationship⁴⁷ and that it is a mandatory bargaining subject, involving "terms and conditions of employment," within the meaning of section 8(d) of the National Labor Relations Act.⁴⁸ Unlike the district court,⁴⁹ however, the Sixth Circuit did not believe that the players had no alternative but to accept the owners' version of section 9A.⁵⁰ The court pointed out that the players had taken full advantage of legitimate negotiating tactics in an attempt to modify the League's position.⁵¹ It observed that these tactics had induced the League to include significant new player benefits in the 1976 Agreement, but that the League had stood firm on its position with regard to section 9A.⁵² The court explained that "nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position."⁵³ What the district court characterized as a "unilateral imposition" upon the NHLPA, which constituted a refusal to bargain in good faith,⁵⁴ the Sixth Circuit held to be good faith, albeit hard, bargaining.⁵⁵ In the court's view, the League had not failed to negotiate; rather, the Players' Association had failed to succeed.⁵⁶ Thus, having found all three criteria to have been met, the court vacated the injunction.⁵⁷

The Sixth Circuit's use of the labor exemption in *McCourt* seems at odds with the Supreme Court's initial view of it as a device to protect exclusively union activity conducted in a union's self-interest. Indeed, *McCourt* marks the first time that a court has allowed an employer group to claim the labor exemption to immunize an alleged restraint on competition initiated and sought by the employers in their interest. Before analyzing the Sixth Circuit's opinion further, it is useful to examine the labor exemption's history to ascertain whether *McCourt* is a radical departure from, or a logical extension of prior decisions on this issue.

⁴⁶ *Id.* at 1197-98, citing *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

⁴⁷ 600 F.2d at 1198.

⁴⁸ *Id.*

⁴⁹ 460 F. Supp. at 911.

⁵⁰ 600 F.2d at 1203.

⁵¹ *Id.* at 1202. The court noted that the NHLPA had threatened to strike, had refused to attend certain meetings, and had threatened to bring an antitrust action against the NHL. *Id.*

⁵² *Id.* at n.12.

⁵³ *Id.* at 1200.

⁵⁴ 460 F. Supp. at 910, 911.

⁵⁵ 600 F.2d at 1203.

⁵⁶ *Id.*

⁵⁷ *Id.* In September 1979, several months after the injunction was vacated, *McCourt* was traded from Los Angeles back to Detroit. *Boston Globe*, Sept. 23, 1979, at 46.

II. HUTCHESON TO CONNELL: THE SUPREME COURT'S DELINEATION OF THE LABOR EXEMPTION TO THE ANTITRUST LAWS

A. *The Statutory Exemption*

Since the turn of the century, the Supreme Court has had to reconcile the congressional policy of promoting business competition with that of protecting labor's organizational and collective bargaining efforts. The Sherman Act, enacted in 1890, declares illegal "[e]very contract, combination . . . , or conspiracy in restraint of [interstate] trade or commerce"⁵⁸ It has been argued forcefully that despite this sweeping language, the purpose of the Act was not to prohibit organized labor actions which are intended to further union interests but which incidentally interfere with interstate commerce.⁵⁹ When first called upon to decide the issue, however, the Court emphasized that "every" combination in restraint of trade had been declared illegal and that the Act's legislative history indicated that attempts expressly to exempt labor organizations from its operation had been unsuccessful.⁶⁰ Accordingly, the Court held, in *Loewe v. Lawlor*,⁶¹ that the Sherman Act reached a union's secondary boycott of a manufacturer.

Reacting to this decision, organized labor implored Congress to make its intention more explicit,⁶² and in 1914 the Clayton Act was passed.⁶³ Section 6 of the statute declares that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . ,"⁶⁴ and section 20 restricts the use of federal injunctions in union-employer disputes involving

⁵⁸ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1976).

⁵⁹ The Supreme Court observed in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), that the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Id.* at 492-93. Justice Goldberg, in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), cited *Apex Hosiery's* language and continued, "the Act was therefore aimed at business combinations, not labor unions, and . . . a careful reading of the legislative history shows that the interdiction of 'every' contract, combination or conspiracy in restraint of trade was not intended to apply to labor unions and the activities of labor unions in their own interests, aimed at promotion of the labor conditions of their members. . . ." *Id.* at 700-01 (Goldberg, J., concurring).

⁶⁰ *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908).

⁶¹ *Id.* at 292. *Loewe v. Lawlor*, the Danbury Hatters case, involved a union, seeking to organize a hat manufacturer, which allegedly instituted a nationwide boycott of the manufacturer's hats and of all persons who sold such hats. *Id.* at 284 n.1.

⁶² Mann, Powers, and Roberts, *The Accommodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 30 LAB. L.J. 295, 296 (1979); Gerard and Schlafly, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 ST. LOUIS U.L.J. 565, 597 n.77 (1977).

⁶³ 38 Stat. 730 (1914), as amended, 15 U.S.C. § 12 *et seq.* (1976).

⁶⁴ Ch. 323, § 6, 38 Stat. 730 (1914).

terms and conditions of employment.⁶⁵ The Supreme Court, however, again ignored congressional intent to exempt most union activity from antitrust regulation when, in *Duplex Printing Press Co. v. Deering*,⁶⁶ it rejected the argument that these two sections of the Clayton Act prohibit federal courts from enjoining secondary boycotts.⁶⁷ The Court wrote that "there is nothing in . . . [section 6] to exempt such an organization or its members from accountability where it or they depart from its *normal* and *legitimate* objects and engage in an actual combination or conspiracy in restraint of trade."⁶⁸ Section 20's restriction on injunctions, the Court determined, applied only to labor disputes involving the immediate employer-employee relationship.⁶⁹ The Court rejected the lower court's conclusion that the union's secondary boycott was a lawful union tactic⁷⁰ and concluded that Congress had not meant to "legalize" it under section 20.⁷¹ Thus, the Court did not construe the Clayton Act to override the Sherman Act in these circumstances, and it remanded the case to the district court to issue an injunction against the union's boycott.⁷² Subsequent decisions adhered to this limited interpretation of the scope of sections 6 and 20.⁷³ Congress, therefore, again was forced to make its intention more explicit. In 1932 it passed the Norris-LaGuardia Act,⁷⁴ which extended the allowable scope of union activity beyond the employer-employee relationship⁷⁵ and further restricted the use of federal injunctions in labor disputes.⁷⁶ Section 2 states that to effectuate the "public policy of the United States," the Act defines and limits the jurisdiction of federal courts.⁷⁷ Section 2's "declaration" of this public policy reveals that Congress was concerned with redressing a labor-management imbalance by improving labor's ability to organize freely and to negotiate terms and conditions of employment.⁷⁸

⁶⁵ *Id.* at § 20.

⁶⁶ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

⁶⁷ *Id.* at 478. The machinists' union in New York instituted a secondary boycott against the products of a printing press manufacturer who was being struck by machinists in Michigan. *Id.* at 462-64. The manufacturer brought suit in federal court to enjoin the New York union's boycott, charging an interference with interstate trade. *Id.* at 460. The District Court for the Southern District of New York dismissed the complaint, concluding that the object of the boycott was lawful, that it was carried out lawfully, and that section 20 of the Clayton Act forbade it from enjoining such lawful union actions. 247 F. 192 at 196, 199 (S.D.N.Y. 1917), and the Court of Appeals for the Second Circuit affirmed. 252 F. 722, 745 (2d Cir. 1918).

⁶⁸ 245 U.S. at 469 (emphasis added).

⁶⁹ *Id.* at 470-71.

⁷⁰ *Id.* at 474.

⁷¹ *Id.* at 477.

⁷² *Id.* at 478-79.

⁷³ *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37 (1927); *United States v. Brims*, 272 U.S. 549 (1926); *Coronado Coal Co. v. United Mine Workers of America*, 268 U.S. 295 (1925).

⁷⁴ 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1970).

⁷⁵ Ch. 90, § 13(c), 47 Stat. 70 (1932).

⁷⁶ *Id.* at § 1.

⁷⁷ Ch. 90, § 2, 47 Stat. 70 (1932).

⁷⁸ *Id.*

By 1941 Congress' message had become too clear to ignore, and the Supreme Court finally recognized a statutory labor exemption to the antitrust laws. In *United States v. Hutcheson*,⁷⁹ a union was charged with violating the antitrust laws when it struck and boycotted an employer who had refused to submit a labor dispute to arbitration, as allegedly required under a union-employer agreement.⁸⁰ Justice Frankfurter's majority opinion sketched a brief history of antitrust and labor statutes and cases, and concluded, "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 labor conduct."⁸¹ Justice Frankfurter viewed the Norris-LaGuardia Act as a congressional response to *Duplex Printing's* "unduly restrictive judicial construction" of the Clayton Act.⁸² He construed the purpose of the Act to be the protection of "the rights of labor in the same manner that the Congress intended when it enacted the Clayton Act."⁸³ Justice Frankfurter explained, "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and 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."⁸⁴ In this light, the Clayton and Norris-LaGuardia Acts were viewed by the Court as congressional grants to organized labor of a broad exemption from the Sherman Act for their unilateral activities.⁸⁵

⁷⁹ 312 U.S. 219 (1941).

⁸⁰ *Id.* at 227, 228.

⁸¹ *Id.* at 231.

⁸² *Id.* at 236.

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* at 232.

⁸⁵ *Id.* at 236. The Court's prior decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), although based on a different line of reasoning, had adumbrated the *Hutcheson* result. *Apex Hosiery* involved a union's violent primary sit-down strike in an attempt to conclude a closed-shop agreement. *Id.* at 481-82. Even though the union's action naturally interfered with the flow of manufactured goods into interstate commerce, *id.* at 484, the Court explained that the union's purpose was to promote labor interests, rather than to suppress interstate commerce, *id.* at 501, and that the Sherman Act was not meant to interdict the "indirect" trade restraints which resulted from the union's activities. *Id.* at 510-12. The Court also cited the Norris-LaGuardia and the National Labor Relations Acts, *id.* at n.24, in concluding that the elimination of price competition based upon differences in labor standards is a legitimate objective of any labor union and that it was not the evil sought to be remedied by the Sherman Act. *Id.* at 503-04.

As one commentator has noted, the *Apex Hosiery* Court was re-interpreting the scope of the Sherman Act, saying that it would not apply to a certain type of market restraint; it was not recognizing a statutory labor exemption to the antitrust laws based on the Clayton and Norris-LaGuardia Acts. See St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606-07 (1976).

The statutory labor exemption offers unions more protection from antitrust liability than does the *Apex Hosiery* decision in an important respect. In determining whether the statutory exemption applies, the inquiry into the union's intent is eliminated, so long as the union pursues its goals unilaterally. See Note, *Labor's Antitrust Exemption After Connell*, 36 OHIO ST. L.J. 852, 857 (1975).

Four years later the Supreme Court made it clear that this exemption was for the benefit of labor, not business, groups. In *Allen Bradley Co. v. Local 3, IBEW*⁸⁶ the Court held that a union forfeits its right to the labor exemption when it joins an employer conspiracy to monopolize the product market, even if the restraint of trade inures to the union's benefit.⁸⁷ Justice Black stated for the majority that the Clayton and Norris-LaGuardia Acts conferred upon the unions "special exceptions to a general legislative plan" intended to preserve business competition.⁸⁸ He concluded that although the statute permits a union to further its interests unilaterally,⁸⁹ the union can not "aid and abet" employers who are violating the Sherman Act.⁹⁰ He noted that Congress did not intend to allow businessmen to monopolize product markets with impunity merely by combining with labor unions in such an endeavor.⁹¹

The statutory labor exemption has remained limited to the *Hutcheson-Allen Bradley* interpretation of the Clayton and Norris-LaGuardia Acts. The Supreme Court construes these Acts to place certain labor interests beyond the reach of the antitrust laws. Where a union acts unilaterally and in its own interest, it cannot be held liable under the Sherman Act, even if its action produces incidental restraints on interstate commerce. The union's interests in organizing and in eliminating competition based upon differences in labor standards take precedence over the goal of encouraging business competition in such a case.

B. The Nonstatutory Exemption

Justice Goldberg observed that it would be irrational to permit labor and business groups to conduct industrial warfare, but to prohibit them from reaching a peaceful settlement of their disputes.⁹² Such a paradox could result if the only labor exemption to the antitrust laws were that embodied in the Clayton and Norris-LaGuardia Acts and recognized in *Hutcheson*. A union which struck or boycotted an employer to eliminate competition based upon

⁸⁶ 325 U.S. 797 (1945).

⁸⁷ *Id.* at 810. The Court found that a combination of local electrical contractors and manufacturers had conspired to monopolize the supply of electrical equipment in New York City. *Id.* at 800-01. The record below indicated that the businessmen had agreed among themselves and with the defendant union that the contractors would buy only from local manufacturers who had closed shop agreements with the union, and that the manufacturers would sell locally only to those contractors employing the union's members. All three groups benefited from the plan, as wages and equipment prices increased dramatically, and as outside groups were excluded from competing in the area. *Id.* at 800.

⁸⁸ *Id.* at 809.

⁸⁹ *Id.* at 807.

⁹⁰ *Id.* at 810. Here, the union had joined a conspiracy among businessmen to restrain competition in the product market. *Allen Bradley* left open the question whether the union loses its immunity when it seeks to advance its interests through an agreement with a non-labor group, where there is no evidence of a business conspiracy to restrain trade. *Id.* at 809.

⁹¹ *Id.* at 810.

⁹² *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 712 (1965).

differences in labor standards would be immune from antitrust sanctions, but if the union sought to advance these same interests by signing an agreement with a non-labor group, it well might lose this immunity. It no longer would be acting unilaterally, and *Allen Bradley* could be read to bar the statutory exemption.⁹³

The Supreme Court reacted to this potential paradox by creating a non-statutory labor exemption to the antitrust laws. Unlike the statutory exemption, the nonstatutory exemption does not stem from the Court's finding of a "special exception" to the Sherman Act.⁹⁴ Rather, it is grounded in (1) the Court's recognition that congressional antitrust and labor policies often lead in opposite directions, and (2) the Court's attempt to reconcile these conflicting national policies in cases in which a union seeks to advance its interests through an agreement with an employer group which restrains competition in the product market. As might be expected, this attempt to accommodate conflicting legislative policies has been difficult and has left open many questions. In a tangled series of opinions, the Supreme Court has outlined a delicate balancing test with which courts must struggle to apply the nonstatutory labor exemption.

The contours of the nonstatutory exemption were defined initially in two cases decided on the same day, twenty years after *Allen Bradley*. *United Mine Workers of America v. Pennington*⁹⁵ and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*⁹⁶ involved union-employer agreements which allegedly furthered labor interests while restraining competition in the product market. The issue in each case was whether the union was exempt from the antitrust laws, despite its combination with a non-labor group in agreeing to the anticompetitive provisions.⁹⁷ Three groups of Justices wrote separate opinions

⁹³ The Court, in *Allen Bradley*, wrote: "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." 325 U.S. at 810. This broad language is tempered by the facts of *Allen Bradley*, in which the union joined a business conspiracy to restrain product market competition. The Court's finding that the union violated the Sherman Act does not imply that a union necessarily forfeits its exemption when it seeks to advance a labor interest in an agreement with an employer group, where it has not joined an employer conspiracy to control the market. In fact, the Court assumed that such an agreement "standing alone" (that is, where it is not part of a business group conspiracy) would not violate the Sherman Act. *Id.* at 809. This left the door open for *Jewel Tea's* application of a nonstatutory exemption to a fact situation in which the union combined with an employer group by signing a collective bargaining agreement, but where there was no finding of an employer group conspiracy to restrain competition. See text at notes 94-138 *infra*.

⁹⁴ 325 U.S. at 809. See also text at note 88 *supra*.

⁹⁵ 381 U.S. 657 (1965).

⁹⁶ 381 U.S. 676 (1965).

⁹⁷ In *Pennington*, it was alleged that the union had agreed with an employer group to accept mechanization of the mines in return for higher wages. Under the alleged agreement the union would force its higher wage demands on all mine owners, regardless of their ability to pay or their degree of mechanization. It was alleged that this agreement was intended to drive the smaller operators out of business, thereby ameliorating the problem of chronic coal overproduction. 381 U.S. at 659-60. In *Jewel Tea*, the unions sought to lessen their members' working hours by setting the business

in each case.⁹⁸ In *Pennington*, six Justices agreed that the union was not entitled to an exemption, while in *Jewel Tea* the Court split 6-3 in allowing the exemption.

Justice Douglas' group viewed *Allen Bradley* as controlling in each case. In *Pennington*, Justice Douglas viewed the alleged agreement, if proved, as evidencing a union-employer conspiracy to eliminate weaker competitors, and he urged disallowance of the exemption.⁹⁹ His concurring opinion lauded the Court's "reaffirmance" of the *Allen Bradley* principles and stressed the labor exemption's unavailability to unions which "join hands" with organized business to restrain competition in the product market.¹⁰⁰ In his *Jewel Tea* dissent, Justice Douglas discovered, contrary to the finding of six Justices, another union-employer conspiracy to restrict business competition. The unions had induced a group of employers to sign a collective bargaining agreement containing provisions which were beneficial to labor but which restricted the marketing opportunities of the businessmen's competitors.¹⁰¹ Justice Douglas characterized this as a "conspiracy among the employers with the unions to impose the marketing-hours restrictions on Jewel via a strike threat by the unions."¹⁰² In Justice Douglas' opinion, even without other proof of a predatory intent, "the collective bargaining agreement itself . . . and the context in which it was written" were evidence enough of such a conspiracy.¹⁰³ It did not matter to him that the restrictive provision was initiated by the unions in their self-interest and was embodied in an agreement on working conditions; Justice Douglas thought that *Allen Bradley* prohibited any union-employer "conspiracy" to control the marketing of goods and services.¹⁰⁴ In essence, Justice Douglas' group would not allow a broader labor exemption than the statutory one recognized in *Hutcheson*.

hours of the markets in which the members were employed. Most of the employer group agreed to this demand. Jewel Tea Co. refused to sign the agreement, however, and the unions voted to strike Jewel's stores. Jewel subsequently signed the agreement under the strike threat, but it later brought suit to invalidate the agreement as violative of the Sherman Act. The complaint alleged that the unions had conspired with Jewel's competitors to impose the restriction in an attempt to lessen competition in the meat retailing industry. *Id.* at 680-82.

⁹⁸ Justice White, joined by Chief Justice Warren and Justice Brennan, wrote the lead opinion in each case. In *Pennington*, this group was joined by Justices Douglas, Black, and Clark in an opinion of the Court. The latter three Justices also joined in a concurring opinion under Justice Douglas' name. Justice Goldberg wrote a dissenting opinion, in which Justices Harlan and Stewart joined. In *Jewel Tea*, Justice White announced the judgment of the Court, and his lead opinion again was joined by Chief Justice Warren and Justice Brennan. This time, Justice Goldberg's group concurred with the result in a separate opinion, while Justice Douglas' group dissented.

⁹⁹ 381 U.S. at 672-73.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 680-81.

¹⁰² *Id.* at 736.

¹⁰³ *Id.* at 737. In *Pennington*, Justice Douglas made a similar assertion, writing that the existence of an industry-wide collective bargaining agreement, whereby employers and unions agree on a wage scale that exceeds the financial ability of some operators to pay, would be *prima facie* evidence of an antitrust violation. 381 U.S. at 672-73.

¹⁰⁴ 381 U.S. at 737-38.

Justice Goldberg, on the other hand, voted to allow the exemption in both cases. In an opinion which served as a dissent in *Pennington* and as a concurrence in the result of *Jewel Tea*, he reviewed the history of major labor and antitrust legislation.¹⁰⁵ He reasoned that labor's exemption "derives from a synthesis of *all* pertinent congressional legislation," not just the Sherman, Clayton, and Norris-LaGuardia Acts.¹⁰⁶ He explained that the Wagner Act, with its Taft-Hartley and Landrum-Griffin amendments (collectively, the National Labor Relations Act)¹⁰⁷ is an integral part of our national labor policy,¹⁰⁸ which is designed to "encourage the peaceful settlement of industrial disputes" by promoting free collective bargaining.¹⁰⁹ Justice Goldberg observed that Congress had implemented this "national scheme" by directing employers and unions to bargain over wages, hours, and other terms and conditions of employment.¹¹⁰ He determined that subjecting the product of such compulsory bargaining to antitrust scrutiny would be unfair to the negotiating parties and would stultify the congressional scheme.¹¹¹ He therefore advocated exempting any agreement on mandatory bargaining subjects (as defined by the NLRA) from judicial antitrust regulation.¹¹² Justice Goldberg's inquiry thus was limited to whether the market restrictions were imposed via a union-employer agreement concerning wages and working conditions. Finding that they were in *Pennington* and *Jewel Tea*,¹¹³ he would not have a court "roam at large" by inquiring into the purposes and motives of the parties to the agreement.¹¹⁴ His experience convinced him that this was the only way to prevent judicial frustration of the congressional judgment as to how collective bargaining should operate.¹¹⁵

In the lead opinions to both cases, Justice White's group reached a result which could be joined by Justice Douglas in *Pennington* and by Justice Goldberg in *Jewel Tea*. Justice White, like his Brother Goldberg, did not share Justice Douglas' view of the labor exemption as a narrow exception to the antitrust laws, carved out by the Clayton and Norris-LaGuardia Acts for the benefit of unions. He believed that the Court should look beyond Congress' express immunization of unilateral union activity and delineate a broader

¹⁰⁵ *Id.* at 700-09.

¹⁰⁶ *Id.* at 709 (emphasis added).

¹⁰⁷ 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959), 88 Stat. 395 (1974), 29 U.S.C. §§ 151-169 (1976).

¹⁰⁸ 381 U.S. at 709-11.

¹⁰⁹ *Id.* at 722.

¹¹⁰ *Id.* at 711.

¹¹¹ *Id.* at 711-12.

¹¹² *Id.* at 710.

¹¹³ *Id.* at 699-700.

¹¹⁴ *Id.* at 716.

¹¹⁵ *Id.* Justice Goldberg pointed to Justice Douglas' analysis, which seemed to permit a court or jury to infer a predatory intent on the part of the signatories to a collective bargaining agreement *from the agreement itself*, as the epitome of such judicial intrusion into the congressionally mandated collective bargaining process. *Id.* at 715, 719-20.

exemption for certain union-employer agreements.¹¹⁶ He reasoned that exemption for such agreements "is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws."¹¹⁷ Like Justice Goldberg, he emphasized that Congress, in the NLRA, had mandated collective bargaining on wages, hours, and working conditions in an effort to promote industrial peace.¹¹⁸ Justice White concluded that "this fact weighs heavily in favor of antitrust exemption for *agreements* on these subjects."¹¹⁹ He disagreed, however, with Justice Goldberg's conclusion that *all* agreements on mandatory bargaining subjects could claim the exemption. Justice White believed that one should not view the NLRA in isolation, but that both the Sherman Act and the labor policy of advancing union interests¹²⁰ also should be considered in the labor-antitrust accommodation.¹²¹ In *Pennington*, after noting the policy behind the NLRA, he added, "[t]his 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" ¹²² He explained that 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."¹²³

Pennington and *Jewel Tea* were the vehicles with which Justice White established these limits. In *Pennington*, he concluded that the exemption does not apply to protect union-employer agreements—even on wage scales—that contain a market restriction¹²⁴ which (1) is sought in furtherance of an employer group's "scheme" to eliminate weaker competitors,¹²⁵ rather than in pursuance of a purely union interest,¹²⁶ and (2) "straitjackets" the union in its negotiations with other employers, thereby interfering with the union's right

¹¹⁶ *Pennington*, 381 U.S. at 662-65; *Jewel Tea*, 381 U.S. at 688-91. It was not until later cases that the term "nonstatutory exemption" was used to differentiate the labor exemption adopted in *Jewel Tea* from that recognized in *Hutcheson*. See text at note 148 *infra*.

¹¹⁷ 381 U.S. at 689.

¹¹⁸ *Id.*; *Pennington*, 381 U.S. at 665.

¹¹⁹ 381 U.S. at 689 (emphasis added).

¹²⁰ Justice White made it clear that, unlike Justice Goldberg, he viewed the advancement of exclusively union interests as an element of our national labor policy at least as important as that of promoting collective bargaining to achieve industrial peace. In *Pennington*, he gave explicit recognition to the policy of achieving uniformity in labor standards, *id.* at 666, and argued that the exemption should apply only where the agreement is reached "as a matter of . . . [the union's] own policy," and "in pursuance of its own union interests." *Id.* at 664, 665. In *Jewel Tea*, he reasoned that the agreement must be intimately related to a subject of "immediate and direct" concern to union members. 381 U.S. at 691.

¹²¹ *Id.* at 665-66.

¹²² *Id.* at 664-65.

¹²³ *Id.*

¹²⁴ In *Pennington*, the alleged restrictive provision stipulated that the union would seek to impose the agreed-upon wage scales on other employers outside of the bargaining unit, regardless of their ability to pay. *Id.*

¹²⁵ *Id.* at 665-66.

¹²⁶ *Id.* at 664-65; see note 120 *supra*.

to act freely in its self-interest.¹²⁷ *Jewel Tea*, on the other hand, enabled Justice White to apply his balancing test to allow the exemption. He found that the marketing-hours provision was obtained, "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."¹²⁸ Furthermore, he characterized the union interest as "immediate and direct,"¹²⁹ since the provision was "intimately related" to wages, hours, and working conditions.¹³⁰ Thus, although the anticompetitive effect of the agreement was "apparent and real,"¹³¹ Justice White concluded that labor concerns outweigh antitrust considerations in these circumstances, and he led his colleagues to exempt this agreement from the Sherman Act.¹³²

Justice White's analysis effectively finds a middle ground between Justice Douglas'¹³³ extreme deference to the antitrust laws and Justice Goldberg's emphasis on the labor policy of promoting collective bargaining to achieve industrial peace.¹³⁴ Disagreeing with Justice Douglas, Justice White reasoned that an "accommodation" of labor and antitrust laws requires union immunity in some cases in which market restrictions accompany a union-employer agreement.¹³⁵ Believing that no labor law is inherently preeminent, however, he also did not agree with Justice Goldberg that the Sherman Act is overridden automatically whenever the agreement concerns a mandatory bargaining

¹²⁷ *Id.* at 666-67. Justice White determined that an agreement such as that alleged in *Pennington* would "straitjacket" the union, since it obligates the union to bargain in a certain way with the employers outside of that particular bargaining unit. *Id.* at 666. He concluded that "the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements." *Id.* at 667.

¹²⁸ 381 U.S. at 688. Since at least 1919, the union, as part of its bargaining policy, had sought determinedly to shorten night working hours. *Id.* at 695-97.

¹²⁹ *Id.* at 691.

¹³⁰ *Id.* at 689-90. It appears that Justice White used this "intimately related" language to distinguish agreements on non-mandatory bargaining subjects—product prices, for example—from agreements concerning wages, hours, and working conditions. As he explained in *Pennington*, an agreement on product prices only benefits the union indirectly: "In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act, and the union gets from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663. In *Jewel Tea*, on the other hand, he found that "the particular hours of the day . . . during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain. . . . And, although the effect on competition is apparent and real . . . , the concern of union members is immediate and direct." 381 U.S. at 691.

¹³¹ *Id.*

¹³² *Id.* at 689-90.

¹³³ See text at notes 99-104 *supra*. Justice Douglas was concerned with the "freedom of traders to carry on their business in their own competitive fashion," *Jewel Tea*, 381 U.S. at 737, and believed that "big business and big labor" should not be granted "the power to remold our economy. . . ." *Pennington*, 381 U.S. at 675.

¹³⁴ See text at notes 105-115 *supra*.

¹³⁵ See text at notes 116-17 *supra*.

subject.¹³⁶ In effect, then, Justice White developed a test, far more delicate than his Brothers', in which labor policies are *balanced* against the antitrust laws to determine whether the labor exemption protects a union which signs an agreement with a non-labor group. Where, as in *Jewel Tea*, it is found that *both* major national labor policies—that of promoting industrial peace and that of advancing union interests—are furthered, the labor scale of Justice White's balance outweighs the antitrust side, even where a product market restriction exists. *Pennington* indicates, however, that where one of these policies is not adequately advanced—for example, where the agreement restricts the union's bargaining opportunities and where it is not sought exclusively in the union's interest¹³⁷—Justice White will ascribe far less weight to the labor side of the balance. In such a case, the anticompetitive effects of the agreement may tilt the scales toward the antitrust side, and no exemption will be allowed.¹³⁸

Ten years after *Pennington* and *Jewel Tea*, the Supreme Court, in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*,¹³⁹ endorsed a balancing test very similar to Justice White's. *Connell* involved Local 100's attempt to organize subcontractors in the construction industry by inducing general contractors to sign a "hot cargo" agreement, under which they would only contract work to subcontractors who recognized the union as bargaining representative.¹⁴⁰ When *Connell*, a general contractor, refused to sign such an agreement, the union picketed its major construction site and ultimately forced it to accede to the union's demand. *Connell* sought an injunction against the picketing on state antitrust grounds, and Local 100 removed the case to the United States District Court for the Northern District of Texas.¹⁴¹ *Connell* amended its complaint, seeking a declaratory judgment that the agreement violated sections 1 and 2 of the Sherman Act and further seeking injunctive relief.¹⁴² The district court held that the agreement was exempt from federal antitrust laws,¹⁴³ and the Court of Appeals for the Fifth Circuit affirmed.¹⁴⁴ The Supreme Court granted certiorari.¹⁴⁵

¹³⁶ See text at notes 119-21 *supra*.

¹³⁷ See text and notes at notes 124-27 *supra*.

¹³⁸ *Id.*

¹³⁹ 421 U.S. 616 (1975).

¹⁴⁰ *Id.* at 619. Section 8(e) of the NLRA declares such an agreement ordinarily to be an unfair labor practice, but offers this exception: "*provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . ." 29 U.S.C. § 158(e) (1976). Local 100 argued that this proviso explicitly allowed its agreement with *Connell*, 421 U.S. at 626. The Court concluded, however, that Congress only intended this exception to allow agreements between unions and employers in a collective bargaining relationship and that it was thus irrelevant in the instant case. *Id.*

¹⁴¹ 78 L.R.R.M. 3012 (N.D. Tex. 1971).

¹⁴² 421 U.S. at 620-21. Upon removal of the case to federal court, *Connell* signed the agreement and amended its complaint to include the alleged Sherman Act violation, claiming that the effect of the agreement was to exclude non-union subcontractors from a portion of the market. *Id.* at 621, 623.

¹⁴³ 78 L.R.R.M. 3012 (N.D. Tex. 1971).

¹⁴⁴ 483 F.2d 1154 (5th Cir. 1973).

¹⁴⁵ 416 U.S. 981 (1974).

Justice Powell, writing for a 5-4 majority, explained that although the goal of organizing subcontractors was legitimate and legal,¹⁴⁶ the union could not claim the statutory exemption, since its organizational efforts included an agreement with non-labor group.¹⁴⁷ The Court continued its analysis, however, by explicitly recognizing a limited "nonstatutory" exemption to the antitrust laws,¹⁴⁸ and considered whether Local 100 could invoke its protection. The majority found that the agreement with Connell imposed a direct business restraint by excluding non-union subcontractors from a portion of the construction market.¹⁴⁹ Where such a "substantial anti-competitive effect"¹⁵⁰ exists, the Court would not allow an exemption if the agreement "contravenes antitrust policies to a degree not justified by congressional labor policy. . . ." ¹⁵¹ The majority adhered to Justice White's *Pennington-Jewel Tea* analysis, reasoning that two national labor policies have to be considered in this labor-antitrust balancing. Justice Powell explained that the nonstatutory exemption derives from "the congressional policy favoring collective bargaining under the NLRA" and from "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."¹⁵² The majority concluded that neither of these policies was promoted sufficiently by the hot cargo agreement, since the signatories were not in a collective bargaining relationship, and since the anticompetitive effects did not "follow naturally" from the elimination of substandard working conditions.¹⁵³ The Court would not allow the antitrust laws to be overridden where neither policy was advanced.¹⁵⁴

¹⁴⁶ 421 U.S. at 624-25.

¹⁴⁷ *Id.* at 622, 623. Interestingly, *Connell* did not involve a third party challenge of a union-employer agreement: Connell was a party to the agreement. Even though the *Apex Hosiery* Court's fear of an employer "using" a union to restrain competition was not present, the *Connell* Court nevertheless read *Hutcheson's* "combination with non-labor" restriction literally to deny the statutory exemption. See Note, *Labor's Antitrust Exemption After Connell*, 36 OHIO ST. L. J. 852, 869 (1975).

¹⁴⁸ 421 U.S. at 622.

¹⁴⁹ *Id.* at 623.

¹⁵⁰ *Id.* at 625. *Connell* involved no allegation of any employer group conspiracy to restrain product market competition, as had *Pennington*. *Id.* at 625 n.2. Thus, the antitrust side of the balance was weighted exclusively by the anticompetitive effects of the agreement. Cf. Note, *Labor Law-Antitrust Liability of Labor Unions: Connell Construction Co. v. Plumbers Local 100*, 17 B.C. IND. & COM. L. REV. 217, 224 (1976) (effects alone determinative of union's antitrust exemption) [hereinafter cited as B.C. NOTE].

¹⁵¹ 421 U.S. 625.

¹⁵² *Id.* at 622.

¹⁵³ *Id.* at 625. The Court determined that because the union had no interest in representing Connell's employees, and because the anticompetitive provision was not contained in a collective bargaining agreement, the federal policy favoring collective bargaining could not protect the union. *Id.* at 625-26. Moreover, it found that the agreement "indiscriminately" harmed the market position of certain subcontractors, "even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *Id.* at 623. The majority concluded, therefore, that the union interest in eliminating competition based on wages and working conditions was not furthered sufficiently by the agreement to override the antitrust laws. *Id.* at 625.

¹⁵⁴ *Id.* at 635.

When viewed in conjunction with Justice White's lead opinions in *Pennington* and *Jewel Tea*, *Connell* outlines the general contours of the nonstatutory labor exemption, while underscoring the delicacy of the Supreme Court's labor-antitrust balancing approach. The *Connell* Court held that the exemption does not protect a union's agreement with a non-labor group where the agreement produces direct business restraints, and where *neither* the collective bargaining policy nor the elimination of substandard labor conditions policy is advanced. The Court would not allow the exemption even though there was no allegation of an employer group conspiracy, as in *Pennington*, and even though a concededly legitimate labor goal underlay the agreement. Justice White's *Jewel Tea* opinion, on the other hand, stands for the proposition that a union may claim the exemption, provided the union concern is "direct and immediate" and the restriction is "intimately related" to wages, hours, and working conditions—that is, where *both* major labor policies are advanced by the agreement.

The breadth of the labor exemption in the area between these two cases—where only *one* labor policy is promoted by the agreement—is far less clear. That the Court was willing to analyze the *Connell* agreement, although it was not the product of collective bargaining,¹⁵⁵ suggests that it might allow the exemption where union interests are advanced sufficiently to outweigh the anticompetitive effects of the agreement.¹⁵⁶ By the same token, one could seize upon an enigmatic dictum in *Connell* to argue that the exemption also applies where no union interest is advanced, but where the restrictive provision is included in a collective bargaining agreement. Having found the hot cargo agreement to curtail competition based on efficiency, as well as on differences in labor standards, the Court added, "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement."¹⁵⁷ The facts of *Connell*, however, together with the Court's failure to overrule *Pennington*, militate against interpreting this dictum as an acceptance of Justice Goldberg's extreme deference to collective bargaining policy. Justice Powell's statement more properly should be read in the light of the Court's explicit finding that a union organizational interest did exist in *Connell*. His dictum thus accords with Justice White's reasoning that the exemption protects a restrictive provision which is included in a collective bargaining agreement and which also sufficiently advances a union concern. The White-*Connell* balancing test would still reach the *Pennington* result by disallowing the exemption where union interests are not sufficiently advanced, and where product market competition is unduly restrained, by an agreement with a non-labor group.

¹⁵⁵ See B.C. Nore, *supra* note 150, at 224.

¹⁵⁶ For example, the Court might have allowed the exemption had it found that the union interest in eliminating substandard working conditions, as well as its organizational interest, underlay the agreement. See note 153 and text at note 146 *supra*.

¹⁵⁷ 421 U.S. at 625-26.

III. THE NONSTATUTORY EXEMPTION CLAIMED BY NON-LABOR GROUPS: THE CASES PRIOR TO *McCourt*

With the exception of *Jewel Tea*, the Supreme Court decisions on the labor exemption have involved only union defendants, and the issue always has been under what circumstances a union can claim the exemption to protect anticompetitive behavior undertaken in its self-interest. Even in *Jewel Tea*, where an employer group was joined with the unions as a defendant, Justice White framed the issue as whether the labor exemption protects the "unions' successful attempt" to include a restrictive provision in a bargaining agreement "in pursuit of their own labor union policies."¹⁵⁸ A majority of the Supreme Court has never addressed the question faced by the Sixth Circuit in *McCourt*: under what circumstances—if any—an employer group may claim the exemption to protect an anticompetitive provision devised and sought by the employers in their own interest.¹⁵⁹

With only the *Hutcheson-Connell* line of cases as guidance, lower courts have struggled with this issue in a number of contexts, including professional sports. In a series of cases involving antitrust challenges to professional sports leagues' reserve systems, the leagues have raised the labor exemption defense.¹⁶⁰ Prior to *McCourt*, the courts always had rejected this defense,¹⁶¹

¹⁵⁸ 381 U.S. at 689-90 (emphasis added).

¹⁵⁹ Justice Goldberg's *Jewel Tea* analysis would allow either party to a bargaining agreement to immunize any agreement on wages, hours, and working conditions. Congress had mandated that both sides bargain over these subjects and, in Justice Goldberg's words, "[i]t would seem the height of unfairness . . . to penalize employers for the discharge of their statutory duty to bargain on wages, hours, and other terms and conditions of employment, which duty, this Court has held, requires the employer to enter into a signed contract with the union embodying the collective bargaining terms agreed upon." 381 U.S. at 730. Under this analysis, the exemption would extend to employers even if they had initiated the mandatory bargaining provision in their own interest, since only then would judicial "roaming at large"—in the form of an "inquiry into the purpose and motive of the employer and union . . ."—be foreclosed. *Id.* at 716. Justice Goldberg's approach has never been accepted by a majority of the Court.

¹⁶⁰ The 1970s have witnessed a series of antitrust challenges to the established professional sports leagues' reserve systems. It is beyond the scope of this study to examine these cases in detail. For an excellent comprehensive treatment of antitrust law in the context of professional sports, see J. WEISTART & C. LOWELL, *THE LAW OF SPORTS*, §§ 5.01-5.07 at 477-629 (1979). See also *Flood v. Kuhn*, 407 U.S. 258 (1972) (baseball); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) (football); *McCourt v. California Sports, Inc.*, 460 F. Supp. 904 (E.D. Mich. 1978), rev'd, 600 F.2d 1193 (6th Cir. 1979) (hockey); *Robertson v. National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (hockey). Gerard & Schlafly, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 ST. LOUIS U.L.J. 565 (1977); Brody, *The Impact of Litigation on Professional Sports*, 14 TRIAL 35 (1978); Lee, *A Survey of Professional Team Sport Player-Control Mechanisms under Antitrust and Labor Law Principles: Peace at Last*, 11 VAL. U.L. REV. 373 (1977); Note, *Antitrust—Professional Football: The Rozelle Rule as an Unreasonable Restraint of Trade*, 26 KAN. L. REV. 121 (1977).

Briefly and generally stated, these cases involved player attacks on the leagues' player control mechanisms as being illegal restraints of trade under the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976). It was usually alleged, *inter alia*, that the team owners had conspired to restrain competition for player services by instituting a "group boycott," in the form of the reserve or option clause. *Flood*, 407 U.S. at 265-66; *Mackey*, 543 F.2d at 609. It was argued that the purpose of the restrictive devices was to lessen competition for players among franchises and that the effect was severely to restrict a player's ability to market his professional athletic services. *McCourt*, 600 F.2d at 1197 n.7; see WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.07 at 594-95. The owners countered that the sports industry's viability can only be maintained with such anticompetitive devices. Absent restraints on player movement, the reasoning went, the wealthier, more successful, or more attractively located clubs would stockpile a disproportionate share of the player talent; relative parity among the member teams would be impossible to achieve; spectators would not pay to watch uneven contests; and the whole league—owners and players alike—would suffer the economic consequences. *Mackey*, 543 F.2d at 621; *Robertson*, 389 F. Supp. at 892; WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.07 at 595-97; Note, *Keeping the Illusion Alive: The Public Interest in Professional Sports*, 12 SUFFOLK U.L. REV. 48, 57-63 (1978). Moreover, the leagues contended that the labor exemption sheltered them from antitrust liability, since the systems allegedly were the products of bona fide, arm's length collective bargaining. *Mackey*, 543 F.2d at 609; *Robertson*, 389 F. Supp. at 881-82; *Philadelphia Hockey Club*, 351 F. Supp. at 496.

Prior to *McCourt*, the courts had been quite receptive to the players' arguments, while always disallowing the owners' claims to the labor exemption. *Mackey*, 543 F.2d 606; *Robertson*, 389 F. Supp. 867; *Philadelphia Hockey Club*, 351 F.2d 462. The one exception was the Supreme Court's decision in *Flood v. Kuhn*, which declared baseball to be outside the scope of the antitrust laws. 407 U.S. at 284. This was, however, an "exception and an anomaly . . . confined to baseball," which stemmed from an extremely rigid application of the doctrine of *stare decisis*. *Id.* at 282. Lower courts, prior to *McCourt*, had sustained antitrust challenges to the reserve systems of the major professional sports leagues. In *Robertson*, 389 F. Supp. 867 (players' antitrust action against the National Basketball Association for conspiring to restrain competition in the player service market), the District Court for the Southern District of New York denied the National Basketball Association's (NBA) motion for summary judgment on the reserve system issue, noting the system's similarity to such *per se* antitrust violations as group boycotts, price-fixing schemes, and horizontal market divisions. *Id.* at 893-94. The NBA settled the case before the legality of its reserve system could be tested fully in a trial on the merits. The settlement came in conjunction with a comprehensive collective bargaining agreement signed in April 1976, under which the NBA agreed to phase out of the most restrictive elements of the reserve system by the 1981-82 season. WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.03 at 507-08; Lee, *supra* note 6 at 400-01. *Philadelphia Hockey Club*, 351 F. Supp. 462, involved an attack by a rival league (the World Hockey Association) on the "established" league's (NHL) reserve system. The District Court for the Eastern District of Pennsylvania granted a preliminary injunction against enforcement of the rule, finding that the NHL had used this system to exercise monopoly power in controlling the supply of professional hockey players. *Id.* at 518. Football's reserve system was attacked by players in *Mackey*, 543 F.2d 606. The Eighth Circuit held that the "Rozelle Rule" (the compensation provision which formed the backbone of the reserve system, named after National Football League (NFL) Commissioner Alvin "Pete" Rozelle) was more restrictive than was necessary to serve the legitimate business purposes of the NFL, and that, therefore, it violated the Sherman Act. *Mackey*, 542 F.2d at 622. The football owners, like their basketball counterparts, were forced to modify their reserve system, which modifications were agreed to by the players in March 1977 as part of a new Collective Bargaining Agreement. WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.03 at 513-14.

¹⁶¹ *Mackey*, 543 F.2d at 742; *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976); *Robertson*, 389 F. Supp. at 884-85 (S.D.N.Y. 1975); *Philadelphia Hockey Club*, 351 F. Supp. at 496.

often using language suggesting that an employer group can *never* claim the exemption to protect an employer-devised reserve system. For example, in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,¹⁶² the District Court for the Eastern District of Pennsylvania found that the NHL had perpetuated a monopolistic reserve system¹⁶³ which the Players' Association persistently had opposed.¹⁶⁴ The court distinguished the *Hutcheson-Connell* line of cases on these facts, noting, "[f]irst, those cases all involved situations where the union had been sued . . . , and the union, not the employer, sought to invoke the labor exemption. . . . Second, . . . [those cases] pertained to issues which furthered the interests of the union members and on which there had been extensive collective bargaining."¹⁶⁵ The court concluded that the employer group, NHL, "is not a beneficiary of . . . [*Jewel Tea*, a] decision in behalf of the union."¹⁶⁶ Similarly, in *Robertson v. National Basketball Association*,¹⁶⁷ another players' antitrust action against a professional sports league, the District Court for the Southern District of New York suggested that the labor exemption is never available to employer groups. In denying the National Basketball Association's motion for summary judgment on the reserve system issue, the court wrote that the labor exemption was created for the benefit of unions,¹⁶⁸ and that it "extends only to labor or union activities, and not to the activities of employers."¹⁶⁹ The court concluded that the basic inquiry should be whether the anticompetitive provisions were in the union's own interests.¹⁷⁰ Similar assertions and intimations can be found in other sports cases.¹⁷¹

¹⁶² 351 F. Supp. at 462; see note 160 *supra*.

¹⁶³ *Id.* at 500.

¹⁶⁴ *Id.* at 498.

¹⁶⁵ *Id.* at 498-99.

¹⁶⁶ *Id.* at 498.

¹⁶⁷ 389 F. Supp. 867 (S.D.N.Y. 1975); see note 160 *supra*.

¹⁶⁸ *Id.* at 886.

¹⁶⁹ *Id.* at 885.

¹⁷⁰ *Id.* at 889.

¹⁷¹ *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976), *rev'd on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978).

Smith involved a player's antitrust challenge to the National Football League draft system. The court rejected the League's labor exemption defense on the ground that at the time the plaintiff was drafted, the players' union had not agreed to the draft in a collective bargaining agreement. 420 F. Supp. at 742. In dicta, the court went on to consider whether a collective bargaining agreement would have immunized the draft. The court intimated that one of the criteria for granting such immunity should be that the agreement be "the result of the union's own efforts in its self-interest, free of any agreement with or among the employers to attempt to accomplish these objectives." *Id.* at 743 (emphasis added). See Lee, *supra* note 6, at 420; Note, *The NFL Draft and the Antitrust Laws—The Player Draft of the National Football League Held to Violate the Federal Antitrust Laws*, *Smith v. Pro-Football*, 41 ALB. L. REV. 154 (1977). Accord, *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 907 (1979). *Kapp* held that because the record showed no collective bargaining to have taken place with regard to the NFL's reserve system, the labor exemption would not apply. *Id.* at 85. Then, in dicta, the court intimated that the exemption "does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an

The language which intimates that an employer group can never claim the labor exemption loses much of its force when it is recognized that the pre-*McCourt* sports cases all were decided on narrower grounds than the above-cited passages might suggest. No court ever disallowed a league's claim to the exemption solely on the ground that the reserve system was initiated by the employer group in its own interest. Although the tenor of certain opinions indicates that such a finding alone *might* have been determinative of these cases, each decision was based upon a finding that the reserve system had not been the subject of legitimate collective bargaining, but rather had been imposed unilaterally by the respective leagues and team owners. For example, the *Philadelphia Hockey Club* court's rejection of the precedential value of *Jewel Tea* was based not only on its determination that the NHL reserve system did not further the interests of union members,¹⁷² but also on its finding that the system was never a subject of serious, arm's length bargaining.¹⁷³ Similarly, the *Robertson* court's broad assertion that the labor exemption extends "only to labor or union activities, and not to the activities of employers,"¹⁷⁴ should be read in the light of the entire opinion. The court continued its analysis by recognizing "the possibility of a circumscribed exemption for employers . . .," which would afford protection to certain collective bargaining agreements.¹⁷⁵ It held that the evidence as to whether the reserve system was the "subject of serious bargaining . . . or whether [it was] baldly imposed by the NBA" was conflicting and could only be passed upon at trial.¹⁷⁶ Writing that "resolution of this conflict may be the most critical issue in this litigation,"¹⁷⁷ the court refused to grant the League's motion for summary judgment.¹⁷⁸ In each of the other major sports cases involving this issue, the court stated explicitly that its decision to disallow the labor exemption rested upon its finding that the reserve system was not the product of bona fide collective bargaining.¹⁷⁹

employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust laws." *Id.* at 86 (emphasis in original). No other court has adhered to this line of reasoning, and it has been severely criticized by most commentators. See WEISTART & LOWELL, *THE LAW OF SPORTS* at 573-75; Gerard & Schlafly, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 *St. Louis U.L.J.* 565 at n.128; Lee, *supra* note 6, at 419.

¹⁷² 315 F. Supp. at 498.

¹⁷³ *Id.*

¹⁷⁴ 389 F. Supp. at 885.

¹⁷⁵ *Id.* at 886. Such an exemption for employers would, in the court's words, "arise derivatively, and become effective when employers are sued by third parties for the activities of unions. . . . [T]he protection of the exemption is afforded only to employers who have acted jointly with the labor organization in connection with or in preparation for collective bargaining negotiations." *Id.*

¹⁷⁶ *Id.* at 895.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 896. The court indicated the direction its inquiry would take when the case was tried on the merits: "Conceivably, if the restrictions were part of the union policy deemed by the Players' Association to be in the players' best interest, they could be exempt from the antitrust laws . . . [citations omitted]. The proper inquiry in respect of this controversy is whether the challenged restraints were ever the subject of serious, intensive, arm's-length collective bargaining." *Id.* at 895.

¹⁷⁹ *Mackey*, 543 F.2d at 616; *Smith*, 420 F. Supp. at 742, and see note 171 *supra*; *Kapp*, 390 F. Supp. at 85, and see note 171 *supra*.

These sports decisions which disallow the exemption to leagues and owners in the absence of legitimate collective bargaining, thus do not stand for the broader proposition that an employer group may never claim the labor exemption to protect a restrictive provision sought in its self-interest. Rather, in accord with the Supreme Court's test, these cases hold that where neither the labor policy of furthering union interests, nor that of promoting collective bargaining are advanced, the employer group—like the union—cannot claim the exemption to immunize an anticompetitive provision.

Outside of the sports context, although several lower court decisions prior to *McCourt* allowed the labor exemption to an employer group,¹⁸⁰ not one was decided solely on the ground that the restrictive provision was included in a collective bargaining agreement. Again, however, certain language might suggest a more expansive interpretation of these opinions than the underlying facts would warrant. For example, in *Scooper Dooper, Inc. v. Kraftco Corp.*¹⁸¹ the Third Circuit discussed whether an employer ever could claim the labor exemption and wrote:

We reject Scooper Dooper's contention that the labor exemption is unavailable to employers. . . . To preserve the integrity of the negotiating process, *employers who bargain in good faith* must be entitled to claim the antitrust exemption. . . . The labor exemption to the antitrust laws applies to the bargaining *agreement*, the product of negotiations between unions and management.¹⁸²

This language suggests Justice Goldberg's approach, under which both employer and employee groups may claim the labor exemption to protect any collective bargaining agreement on mandatory bargaining subjects.¹⁸³ *Scooper Dooper*, however, involved a provision contained in a bargaining agreement at the union's behest and in its self-interest;¹⁸⁴ it thus does not stand for the

¹⁸⁰ *California Dump Truck Owners Ass'n, Inc. v. Associated General Contractors of America, San Diego Chapter, Inc.*, 562 F.2d 607 (9th Cir. 1977); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974); *National Ass'n of Broadcast Employees and Technicians v. International Alliance of Theatrical Stage Employees*, 488 F.2d 124 (9th Cir. 1973); *Intercontinental Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); see notes 182, 185 *infra*.

¹⁸¹ 494 F.2d 840 (3d Cir. 1974).

¹⁸² *Id.* at 847, n.14 (emphasis added). *Scooper Dooper* previously had challenged an allegedly anticompetitive provision contained in a bargaining agreement between a union and its employer, Kraftco. *National Dairy Products Corporation v. Milk Drivers and Dairy Employees Union Local 680*, 308 F. Supp. 982 (S.D.N.Y. 1970). The court in that action had found that the union was entitled to the labor exemption. *Id.* at 986. *Scooper Dooper* involved one of the plaintiffs from the original action attempting to re-try the labor exemption issue in the context of alleged "changed circumstances." 494 F.2d at 847. The Third Circuit found "no changed circumstances of controlling legal significance" and held that *Scooper Dooper* was collaterally estopped from re-trying the issue. *Id.* at 850. It was in the process of rejecting *Scooper Dooper's* contention that the issues presented in the instant case differed from the first merely because the defendant was now the employer, rather than the union signatory to the bargaining agreement, that the Third Circuit discussed the scope of the nonstatutory labor exemption. *Id.*

¹⁸³ See note 159 *supra*.

¹⁸⁴ See *National Dairy Products*, 308 F. Supp. at 986.

proposition that either bargaining party may claim the labor exemption to protect *any* restrictive provision which results from good faith collective bargaining on mandatory subjects, without regard to which party sought the provision. Other pre-*McCourt* cases which extend the exemption to employers also have narrow holdings which do not support such a proposition.¹⁸⁵

The holdings of these cases allowing employers to claim the exemption accord with the Supreme Court's balancing approach. Where a union seeks to further a legitimate labor interest via a bargaining agreement with an employer group, the Supreme Court has ruled that labor policies outweigh ensuing product market restrictions and that the union may claim the labor exemption.¹⁸⁶ Subjecting the employer signatories to antitrust liability in these circumstances would emasculate the nonstatutory exemption, since an affected third party could attack the anticompetitive provision simply by moving against the employer, rather than against the union signatory.¹⁸⁷ It does

¹⁸⁵ See, e.g., *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970), in which the Second Circuit found that a union, "acting solely in its own self-interest, [had] forced reluctant employers to yield to certain of its [legitimate labor] demands," which then were included in a collective bargaining agreement. *Id.* at 888. The court held that, "[u]nder these circumstances the resulting agreement is within the protection of the labor exemption to the antitrust laws," and the defendant employer group was absolved of antitrust liability. *Id.* at 888-89.

See also *National Association of Broadcast Employees and Technicians v. International Alliance of Theatrical Stage Employees*, 488 F.2d 124 (9th Cir. 1973), in which the Ninth Circuit dismissed an antitrust action against an alleged union-employer combination on the ground that the unions were acting "in their own lawful self-interest" to protect job opportunities from the effects of wage competition. *Id.* at 125. The court would not expose the employer group to antitrust liability under these circumstances. *Id.* at 126.

Cf. *California Dump Truck Owners Ass'n, Inc. v. Associated General Contractors of America, San Diego Chapter, Inc.*, 562 F.2d 607 (9th Cir. 1977). Here, the Ninth Circuit allowed both the employer and the union parties to a collective bargaining agreement to claim the labor exemption. The court used disarmingly broad language when it wrote "The . . . [collective bargaining agreement] pertains to wages, hours, and working conditions. These are mandatory bargaining subjects. Thus the . . . [collective bargaining agreement], by itself, does not violate the federal antitrust laws." *Id.* at 614. The court's presentation of the evidence did not indicate that the restrictive provision had been sought in the employers' interest. This, together with the court's reference to Justice White's proscription against restrictions sought "at the behest of . . . nonlabor groups," *id.* at 614, militates against reading this case to afford protection to *any* market restraint resulting from mandatory collective bargaining, even if initiated and sought by the employers.

¹⁸⁶ See *Jewel Tea*, 381 U.S. 676.

¹⁸⁷ Note how this would undermine *both* congressional labor policies. Whether the defendant is the union or the employer, the union's goal of furthering labor interests would be thwarted if such an agreement could be invalidated on antitrust grounds. By the same token, employers might hesitate to enter into collective bargaining agreements with labor groups, lest this "combination" expose them to antitrust liability. Gerard & Schlafly, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 St. Louis U.L.J. at 589. Both the labor policies of advancing union interests and of promoting collective bargaining to achieve industrial peace thus would be frustrated if an affected third

not follow, and no case prior to *McCourt* held, that the employer group should be able to claim the exemption where a product market restriction occurs in circumstances where both labor policies are *not* advanced. The Supreme Court, in *Pennington*, indicated that the inclusion of a business restraint in a collective bargaining agreement does not immunize a union where union interests are not sufficiently advanced.¹⁸⁸ One would be hard-pressed to make an argument that an employer group's right to the labor exemption should be greater than the union's.

In another pre-*McCourt* decision, *Mackey v. National Football League*,¹⁸⁹ the Eighth Circuit reached a result consistent with both the Supreme Court's enunciation and prior lower court applications of the nonstatutory labor exemption balancing test. The court, however, used this opinion to forge the shield which later would protect the NHL in *McCourt*.¹⁹⁰ *Mackey* involved a player group's challenge of the National Football League's ("NFL") reserve system on antitrust grounds. Based on its finding that the reserve system was never the subject of bona fide collective bargaining,¹⁹¹ the Eighth Circuit rejected the NFL's claim to the labor exemption¹⁹² and held that this system unreasonably restrained trade in violation of section 1 of the Sherman Act.¹⁹³ *Mackey's* narrow holding—that an employer group can not claim the labor exemption to protect an employer-devised player restraint where there has been no bona fide collective bargaining—was in accord with prior case law, since neither union interests nor the national collective bargaining policy are advanced in these circumstances.

The Eighth Circuit, however, also examined the circumstances under which the labor exemption will apply where there *has* been bona fide collective bargaining.¹⁹⁴ In the course of this inquiry, the court, while acknowledging the balancing approach toward applying the nonstatutory exemption,¹⁹⁵ departed from prior analyses in two important respects. First, the Eighth Circuit seemed to accord a higher value to the labor policy of promoting the collective bargaining process than to that of advancing union interests. It stressed that the nonstatutory exemption's roots lie in the national policy favoring collective bargaining,¹⁹⁶ and relegated to a brief footnote a reference

party, although prevented from moving against the union, could attack the agreement by choosing the employer signatory as the defendant. Although Justice White did not make this argument explicit in *Jewel Tea*, it seems that it underlay his jump from framing the issue as "whether . . . the unions' successful attempt to obtain [the marketing-hours] provision . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act," 381 U.S. at 689-90 (emphasis added), to concluding that the *agreement* (and therefore the union and employer defendant-signatories) was not illegal under the antitrust laws. *Id.* at 691.

¹⁸⁸ See text at note 137 *supra*.

¹⁸⁹ 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

¹⁹⁰ See text at notes 212-233 *infra*.

¹⁹¹ 543 F.2d at 616.

¹⁹² *Id.*

¹⁹³ *Id.* at 622.

¹⁹⁴ *Id.* at 613-14.

¹⁹⁵ *Id.* at 613.

¹⁹⁶ *Id.* at 611, 612, 614.

to the policy of eliminating substandard working conditions.¹⁹⁷ Second, the court recognized that the restrictiveness of an anticompetitive provision included in a bargaining agreement which affects only parties to the agreement is less weighty than the restrictiveness of a similar provision which affects third parties. The Eighth Circuit distinguished the *Hutcheson* to *Connell* line of cases as involving restraints on the trade of *competitors* of the business group signatories.¹⁹⁸ In *Mackey*, on the other hand, the reserve system affected only professional football players, whose union representatives had signed the bargaining agreement.¹⁹⁹ The court cited Justice Powell's *Connell* dictum²⁰⁰ to support its conclusion that "the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship."²⁰¹

The Eighth Circuit thus fashioned a test balancing the interests involved in *Mackey*. For the court, the labor policy favoring collective bargaining would prevail over the antitrust laws where (1) the restraint on trade is included in a collective bargaining agreement as a result of bona fide, arm's length bargaining; (2) the bargaining agreement concerns mandatory bargaining subjects; and (3) the restraint on trade primarily affects only the parties to the agreement.²⁰² Whether the restrictive provision was sought by the union or whether it promotes union interests is not a focus of inquiry under the *Mackey*

¹⁹⁷ *Id.* at 612 n.9.

¹⁹⁸ *Id.* at 613-14. The court cited Justice Marshall's dissenting opinion in *Flood*, *supra* note 160, in which it was written: "It is apparent that none of the prior cases is precisely in point. They involve union-management agreements that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor." 543 F.2d at 614 n.12 (quoting from *Flood*, *supra* note 160, 407 U.S. at 294 (Marshall, J., dissenting)).

¹⁹⁹ 543 F.2d at 609, 610.

²⁰⁰ *Id.* at 614 n.13. The Eighth Circuit quoted the language discussed in the text at note 157 *supra*, where Justice Powell wrote: "There can be no argument in this case whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement." 421 U.S. at 625-26. *Mackey's* differentiation between agreements which affect third parties and those which affect only the signatories seems to stem from the court's reading of the "in other contexts" language as implying a situation where the agreement does *not* affect third parties, as it did in *Connell*. Justice Powell's dictum, however, might be read more accurately as pointing towards another situation, in which the union *does* have an interest in representing the employers' workers, *whether or not* a third party is affected by the agreement. The *Mackey* court chose not to quote Justice Powell's following sentences, which read: "In this case, Local 100 had no interest in representing *Connell's* employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against *Connell* or its campaign to exclude nonunion firms from the subcontracting market." *Id.* at 626.

All this is not to say that the Eighth Circuit's ascription of lesser weight to an agreement which affects only the parties to it is invalid. It is merely suggested that the court's reliance on Justice Powell's dictum in support of this proposition is misplaced.

²⁰¹ 543 F.2d at 614.

²⁰² *Id.*

test. Despite the Eighth Circuit's emphasis on collective bargaining policy,²⁰³ however, one should not read *Mackey* as suggesting that whenever bona fide negotiations on mandatory bargaining subjects have taken place, the resulting agreement is protected by the labor exemption.²⁰⁴ The Eighth Circuit's test only applies where the trade restraint exclusively affects parties to the agreement. In such circumstances, the court would lessen the weight of the antitrust scale to such an extent that the advancement of *one* labor policy—that of promoting the collective bargaining process—could invoke the labor exemption.

IV. *McCOURT*: THE LABOR EXEMPTION
SHIELDING AN ANTICOMPETITIVE PROVISION
DEvised BY A NON-LABOR GROUP IN ITS INTEREST

The NHL's attempt to protect its reserve system with the nonstatutory labor exemption must be viewed against this background. From *Hutcheson* to *Connell*, the Supreme Court has concentrated upon union claims to antitrust immunity to protect union interests.²⁰⁵ Under the Court's balancing test, a product market restriction escapes antitrust scrutiny only if both the labor policies of furthering union interests and of promoting the collective bargaining process are advanced.²⁰⁶ Certain lower court dicta suggest that employers may never claim the exemption.²⁰⁷ The better reasoned, and more widely held position is that where a union includes an anticompetitive provision in a bargaining agreement in its own self-interest, the union's and the employers' immunity is coextensive.²⁰⁸ Prior to *McCourt*, however, no court had allowed either party to claim the labor exemption solely because the provision was included in a collective bargaining agreement;²⁰⁹ the labor exemption's protection was never extended to an employer-devised scheme.²¹⁰ The Eighth Circuit indicated that it would allow the exemption to protect employer-initiated provisions where no third party was affected and where the market

²⁰³ It is important to emphasize that in delineating its test, the Eighth Circuit assumed that the only "relevant" labor policy to be balanced against the Sherman Act, *id.* at 613, is that favoring collective bargaining. *Id.* at 614.

²⁰⁴ *Cf. Id.* at 614 n.14, where the court refers to Justice Goldberg's *Jewel Tea* opinion but then adds: "That test, however, has never been adopted by a majority of the Supreme Court. Rather, a majority of the Court seems to favor an accommodation less heavily weighted in favor of labor policy." The Eighth Circuit left open the question whether its ascription of greater weight to collective bargaining policy than to union interests policy could ever warrant the application of the exemption where a third party is affected by a restrictive provision, but where no legitimate labor interest is advanced within the bargaining agreement containing the market restraints. This issue will be discussed in greater detail below.

²⁰⁵ See text at notes 158-59 *supra*.

²⁰⁶ See text at notes 124-57 *supra*.

²⁰⁷ See text at notes 161-71 *supra*.

²⁰⁸ *National Ass'n of Broadcast Employees*, 488 F.2d 124; *Intercontinental Container Transport Corp.*, 426 F.2d 884; *Scooper Dooper*, 494 F.2d 840; see text at notes 180-88 *supra*.

²⁰⁹ See text at notes 184-88 *supra*.

²¹⁰ *Id.*

restraint results from bona fide collective bargaining on mandatory bargaining subjects, but this reasoning was developed in the course of an inquiry far broader than that necessary to support the limited holding of *Mackey*.²¹¹

If the narrow holding of *Mackey* in any way lessened the import of the court's broader inquiry, the full significance of the Eighth Circuit's analysis became manifest in *McCourt*. The Sixth Circuit "assumed without deciding" that the NHL's reserve system might contravene the Sherman Act²¹² and then focused on the labor exemption issue. The majority accepted without question the *Mackey* criteria, stating that the Eighth Circuit had properly enunciated "the governing principles" in determining whether the nonstatutory labor exemption applies to the reserve system provisions of a collective bargaining agreement in professional sports.²¹³ It also agreed with the *Mackey* court that the first two criteria had been met in the instant case: the reserve system primarily affected the players, a party to the bargaining relationship,²¹⁴ and it was a mandatory bargaining subject, within the meaning of section 8(d) of the National Labor Relations Act.²¹⁵ In holding that the reserve system was immunized from antitrust scrutiny, based upon its finding that it was the product of good faith, arm's length bargaining, however, the Sixth Circuit reached a result different from that reached by both the Eighth Circuit in *Mackey* and the district court in the instant case. In so doing, it became the first court to uphold an employer group's claim to the labor exemption to immunize an employer-devised restraint sought in the employers' interest.

²¹¹ See text at notes 189-204 *supra*.

²¹² 600 F.2d 1193, 1197. The Sixth Circuit noted that "[l]ower court activity has almost uniformly indicated that the restraints of the reserve system in sports other than baseball amount to a type of group boycott against a player who desires to sell his professional athletic services to another team after having earlier been engaged by a competing team." *Id.* at 1197 n.7. It also pointed out, however, that the Supreme Court "has never directly ruled upon whether the reserve system common to most professional athletics comes within the ban of the Sherman Act. . . ." *Id.* at 1197. The Sixth Circuit's reluctance to endorse wholeheartedly lower court decisions on this issue may stem from a recognition that *Apex Hosiery* has never been overruled and that a decision on the reserve system's antitrust liability, arguably, could be based on a finding that a restraint on labor market competition is not the kind of anticompetitive behavior at which the Sherman Act was aimed. See note 85 *supra*. The Sixth Circuit avoided the issue, whether this type of restraint falls within the Sherman Act's coverage, by holding that the labor exemption immunizes section 9A from antitrust scrutiny. 600 F.2d at 1203.

²¹³ *Id.* at 1197.

²¹⁴ *Id.* at 1198. As the court noted, the only rival league, the World Hockey Association, had agreed to the NHL's reserve system as part of the settlement to the *Philadelphia Hockey Club* litigation. *Id.* at n.8.

²¹⁵ *Id.* "[T]he agreement concerning the reserve system involves in a very real sense the terms and conditions of employment of the hockey players both in form and in practical effect. As *Mackey* correctly points out, the restriction upon a player's ability to move from one team to another within the league, the financial interest which the hockey players have and their interest in the mechanics of the operation and enforcement of the rule strongly indicate that it is a mandatory bargaining subject within the meaning of The National Labor Relations Act, Section 8(d), 29 U.S.C. § 158(d) (1976)." *Id.* See also Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 11-12 (1971).

The district court's finding that by-law section 9A was not the product of collective bargaining²¹⁶ was based on its conclusions that (1) the by-law was imposed unilaterally upon the NHLPA and was incorporated into the Collective Bargaining Agreement in the identical language it contained when first adopted by the League,²¹⁷ and (2) new benefits to players in the 1976 Agreement were not directly related to bargaining on section 9A.²¹⁸ The trial judge wrote that the purpose of the by-law's inclusion in the Agreement was merely "to give the impression that it was a bargained-for provision."²¹⁹ This purpose, which, according to the court, did not reflect good faith bargaining, would not immunize the signatories from antitrust sanctions, since, in the court's words, "[w]hen labor and non-labor groups combine to insert into a collective bargaining agreement a non-negotiated provision, courts will not afford either party the non-statutory labor exemption."²²⁰

The Sixth Circuit's reversal of the trial court's decision was based on its contrary finding that the NHL reserve system was the product of good faith, arm's length bargaining.²²¹ The majority concluded that the trial court had

failed to recognize the well established principle that nothing in the labor law compels either part negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue.²²²

The court stated that it was irrelevant that section 9A was not bargained *for* by the NHLPA, provided it was bargained *over*.²²³ The court highlighted two lines of evidence establishing that the reserve system was bargained over. First, the court noted that at various times, the NHLPA had refused to meet with the owners to discuss the reserve system further, had attempted to develop an alternative system, had threatened to strike, had threatened to bring an antitrust suit against the League, and had threatened to recommend that the players not report to training camp.²²⁴ Despite this negotiating pressure, the owners stood firm in their insistence on section 9A.²²⁵ The court concluded "what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract."²²⁶ The Sixth Circuit viewed the "significantly new benefits to the players" included in the 1976 Agreement as the

²¹⁶ 460 F. Supp. at 911.

²¹⁷ *Id.* at 910.

²¹⁸ *Id.* at 911.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See text at notes 49-56 *supra*.

²²² 600 F.2d at 1200.

²²³ *Id.* at 1203.

²²⁴ *Id.* at 1202.

²²⁵ *Id.*

²²⁶ *Id.* at 1203.

second line of persuasive evidence of bargaining over the reserve system.²²⁷ The court concluded that the NHLPA had bargained for these new benefits "in connection with" the reserve system²²⁸ and that to retain section 9A, the League had yielded significantly on other issues.²²⁹

This discussion of new player benefits does not require reading *McCourt* to imply that union interests must be advanced for the labor exemption to apply. The NHL argued that it is not the restrictive provision alone, but the agreement as a whole, that must inure to the employees' benefit for "union interests" to weigh on the labor scale.²³⁰ Although certain language in prior cases fails to support the NHL's contention,²³¹ the Sixth Circuit easily could have based its decision on a finding that the NHLPA agreed to the reserve system "as part of a package which the union deems to be in the best interests of the employees,"²³² and, therefore, that *both* collective bargaining policy and union interests were advanced sufficiently to outweigh any accompanying restraints on trade. Rather than characterizing the new player benefits as determinative of the "union interest" issue, however, the court chose to view them as *quid pro quos*, which indicated that the bona fide bargaining requirement had been met.

The Sixth Circuit's characterization of the significance of the new player benefits enabled it to express its views on two aspects of the labor exemption which have never been addressed by the Supreme Court. Had it chosen to view the benefits not only as evidence of bona fide bargaining, but also as establishing that the national policy of eliminating substandard working conditions had been advanced sufficiently by the Agreement, the court only would

²²⁷ *Id.* at 1202. These benefits included increased pension benefits, bonus money, and expense allowances, as well as modified waiver procedures, schedule, and travel plans. *Id.* at n.12.

²²⁸ *Id.* at 1203.

²²⁹ *Id.* at 1202.

²³⁰ Brief of Appellant, NHL, at 47-52.

²³¹ In *Jewel Tea*, Justice White framed the issue as, "whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain *that provision* through bona fide, arm's-length bargaining *in pursuit of their own labor union policies* . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." 381 U.S. at 689-90 (emphasis added). And in *Flood*, Justice Marshall wrote: "This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, 'benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires.' *United States v. Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460, 464 (1949)." 407 U.S. at 294 (Marshall, J., dissenting).

²³² Brief of Appellant, NHL, at 49. Although this would be a logical and warranted extension of Justice White's *Jewel Tea* approach, see note 231 *supra*, it would not necessarily be accepted by the Supreme Court, since it would further limit the scope of the antitrust laws. The NHL's argument would be rejected if the Court were to view the requirement that the *provision itself* be sought by the union in its own interest as an essential part of the *White-Connell* balancing mechanism. By this view, a court could only find a sufficiently direct advancement of union interests where the restrictive provision is sought by the union in the first instance, and not where it is included in the agreement as a union concession.

have had to cite *Jewel Tea* as support for upholding section 9A. The court's more limited inquiry into whether only *one* labor policy—that of promoting legitimate collective bargaining—was advanced, allowed it to consider the *Mackey* distinction between a market restraint which affects only parties to a collective bargaining agreement, and one which affects third parties. Like the Eighth Circuit, the *McCourt* court thought that a restraint of the former type should be ascribed far less weight in the antitrust scale than should one which affects business competitors, as in *Pennington*, *Jewel Tea*, and *Connell*. Under this analysis, where no third party is affected, the labor exemption may apply, even in the absence of a finding that the restrictive provision was sought by the union in its own interest. Provided the policy of promoting legitimate collective bargaining is advanced, the labor side of the nonstatutory exemption scales will outweigh the antitrust side.²³³

If the Supreme Court were to review this issue, it likely would extend the Justice White-*Connell* approach and distinguish market restraints which affect only parties to a bargaining agreement containing the restrictive provision from those which affect third parties. The difference between the restraints involved in the *Hutcheson* to *Connell* line of cases and those involved in most of the sports reserve system cases²³⁴ has been pointed out by at least two commentators²³⁵ and by Justice Marshall in *Flood v. Kuhn*.²³⁶ The Supreme Court decisions holding that a restriction which adversely affects business competitors can be outweighed only by the advancement of two labor policies, do not necessarily require such a heavy labor weight to overcome a restraint which only operates on the players. The argument that a market restraint which is imposed only after bona fide, arm's length bargaining between all affected parties should be weighed less heavily in the antitrust side of the scales is compelling indeed. Labor law requires both sides to negotiate over mandatory bargaining subjects, and a restrictive provision included in a collective bargaining agreement in this form, theoretically, has been subject to the input and bargaining strategies of the negotiating parties.²³⁷ Third parties have no similar opportunity to participate in the negotiations. It seems clear that a court should be more willing to hold the agreement up to the light of the Sherman Act where a non-bargaining unit is affected than where the signatories seek to invalidate an agreement over which they have bargained in good faith. This is the Sixth and Eighth Circuits' view, and the Supreme Court should agree.

Thus, *McCourt* most likely marks the end of the decade of successful player challenges to professional sports league reserve systems on antitrust grounds. The players' associations of football, baseball, and basketball, like

²³³ See text at notes 194-204 *supra*.

²³⁴ *Philadelphia Hockey Club*, 351 F. Supp. 462, is the exception, since it involved an allegation by a third party, competitor league that the NHL's reserve system violated the Sherman Act.

²³⁵ WEISTART & LOWELL, *THE LAW OF SPORTS*, § 5.05; Jacobs & Winters, 81 *YALE L.J.* at 26-28.

²³⁶ 407 U.S. at 294 (Marshall, J., dissenting); see note 198 *supra*.

²³⁷ WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.05 at 556-68.

that of hockey, recently have signed collective bargaining agreements accepting reserve systems in various forms.²³⁸ Since there no longer are any competitor leagues to allege injury from the agreements,²³⁹ since courts view reserve systems as mandatory bargaining subjects,²⁴⁰ and since there is no evidence that the negotiations leading to these agreements were less bona fide than the NHL-NHLPA's,²⁴¹ the *Mackey-McCourt* analysis would seem effectively to shield the reserve systems of all major sports leagues from antitrust attack.

Far more subtly, the Sixth Circuit's characterization of the new player benefits, when viewed in light of the entire opinion, reveals the court's belief that it is time to reexamine the relative weights of the policies that are considered on the labor side of the scale. Had the *McCourt* panel agreed with Justice White that two labor policies should be accorded equal weight, the court at least would have addressed the issue whether union interests were advanced in the 1976 Agreement. Instead, it chose to ignore the argument that the new player benefits were important insofar as they advanced these interests, while pointing to these same benefits as evidence of bona fide collective bargaining. The court's implicit challenge to Justice White's *Jewel Tea* analysis is buttressed by its endorsement of the Eighth Circuit's *Mackey* reasoning—which primarily emphasizes the nonstatutory exemption's origins in collective bargaining policy²⁴²—and by its contention that the restrictive provision need not be bargained for by the union, provided it is bargained over.²⁴³ In the Sixth Circuit's view, a union's failure to advance its interests because of the employers' hard bargaining does not mean that the labor exemption must be disallowed. Such a failure, the court notes, is "a part of and not apart from the collective bargaining process," the "ultimate objective" of which is an agreement accepted by the parties.²⁴⁴ Thus, examining the tenor of the *McCourt* opinion, the court's reluctance to accept the NHL's argument that the union interest, as well as the collective bargaining, policy had been advanced, and its interpretation of the significance of the new player benefits, it is submitted that, at least as far as the labor exemption issue is concerned, the Sixth Circuit views the integrity of the collective bargaining process as more important than the labor interests which a union may seek to further via that process.

Such a reading of *McCourt* could have consequences extending far beyond the sports reserve system cases. While not directly challenging the Supreme Court,²⁴⁵ the Sixth Circuit has joined its brethren on the Third and

²³⁸ WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.03 at 507-24; Lee, *supra* note 6, at 423.

²³⁹ The last major "competitor" league, the World Hockey Association, was merged into the NHL in May of 1979. Boston Globe, Dec. 26, 1979, at 51.

²⁴⁰ See note 215 *supra*.

²⁴¹ WEISTART & LOWELL, *THE LAW OF SPORTS* § 5.06 at 568-90; Lee, *supra* note 6, at 243.

²⁴² See text and note at note 203 *supra*.

²⁴³ See text at note 223 *supra*.

²⁴⁴ 600 F.2d at 1203.

²⁴⁵ The decision in *McCourt* follows naturally from the Justice White-Connell balancing approach if it is accepted that where no third party is adversely affected, the

Eighth Circuits in intimating that the two labor policies in the Supreme Court's balance no longer should be weighed equally.²⁴⁶ The question left open by these courts is whether the collective bargaining process policy is weighty enough to protect market restraints which affect non-signatories when the restrictive provision is the product of bona fide collective bargaining on mandatory subjects, but where no union interest is advanced. One is left with the distinct impression that these circuit courts lean toward Justice Goldberg's affirmative answer to this question.

If the Supreme Court were to respond to the concerns and suggestions implicit in these circuit court opinions by reexamining the labor exemption issue, a reasoned analysis should lead it to modify the Justice White-*Connell* balancing test. As suggested by the confusing sets of three opinions of three Justices in *Pennington* and *Jewel Tea*, and by the close 5-4 decision in *Connell*, there is no clear or long-standing consensus on the nonstatutory exemption issue at the Supreme Court level. The result in *Jewel Tea*, after all, owes as much to Justice Goldberg's opinion as to Justice White's. It would seem, then, that an approach more closely aligned with that of Justice Goldberg is not totally foreclosed by Court precedent.

Implicit lower court challenges and the lack of a Supreme Court consensus do not mandate a rejection of the Justice White-*Connell* test. The argument for modifying the test, however, becomes compelling when it is recognized that the main premise upon which it is based has been invalidated. Justice White premised his balancing of labor and antitrust laws upon his perception that congressional labor policies were at least equally concerned with benefiting organized labor as with facilitating the collective bargaining process. This was clearly Congress' intent when the Clayton, Norris-LaGuardia, and Wagner Acts were passed. As one commentator has observed, these Acts were designed, in full or in part, to protect "a weak and nascent labor movement from destruction at the hands of powerful industrialists who had a demonstrated ability to use the courts to their advantage."²⁴⁷ It is arguable,

antitrust side of the balance can be outweighed by *one* labor policy. See text at notes 234-37 *supra*.

²⁴⁶ *Mackey*, 543 F.2d at 611, 612. As noted above, the Eighth Circuit wrote that the "basis of the nonstatutory exemption is the national policy favoring collective bargaining . . ." *id.* at 612, and assumed that this was the only relevant labor policy to be balanced against the antitrust laws. *Id.* at 613-14. See text and notes at notes 196 & 203 *supra*.

Scooper Dooper, 494 F.2d at 847 n.14. The Third Circuit wrote that it was concerned with "preserving the integrity of the negotiating process," and that the "labor exemption to the antitrust laws applies to the bargaining agreement, the product of negotiations between unions and management." *Id.* See text and notes at notes 182 & 183 *supra*.

Accord, *Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n*, 579 F.2d 484, 501 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (citing *Mackey*, *Scooper Dooper*, and Justice Goldberg's *Jewel Tea* opinion, in support of its statement that the nonstatutory exemption stems from a concern with "the congressional policy favoring the peaceful resolution of employer-union disputes through bargaining. . .").

²⁴⁷ Siegel, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DuQ. L. REV. 411, 466-67 (1975).

however, that the Norris-LaGuardia Act's protection of labor was meant to apply only "under prevailing economic conditions,"²⁴⁸ until such time as organized labor is no longer demonstrably weaker than most employer groups.²⁴⁹ Largely because of this congressionally mandated labor protection, the framework within which labor-management negotiations take place is far different today than in the 1930s. As organized labor has become more economically, politically, and numerically powerful in recent decades, it has become less clear that there is an imbalance in labor-management bargaining that needs redressing. The Supreme Court has noted that Congress reacted to this change in prevailing conditions by passing legislation which places primary emphasis on free collective bargaining between theoretically equal bargaining units. In its 1970 decision in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*,²⁵⁰ the Court explained:

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments ²⁵¹

This congressional "shift in emphasis" would seem to undermine the continuing validity of Justice White's premise that Congress intends to accord equal weight to the two national labor policies considered in the Justice White-*Connell* test.

The Court should respond to these changes in congressional labor concerns by ascribing greater weight to the national policy favoring collective bargaining and correspondingly less weight to that of advancing the interests of organized labor. This could result in a balancing test very similar to Justice Goldberg's, under which collective bargaining policy would be viewed as important enough to allow the labor exemption to protect *any* market restraint which results from bona fide, arm's length collective bargaining on mandatory subjects. If the Court were to view unions and employers as bargaining equals, neither the origin of an anticompetitive provision, nor its effect on union interests would be relevant to the nonstatutory exemption issue. In addition, the *Mackey-McCourt* distinction between different types of market restraints would be unnecessary, since the Court would not require two labor policies to be advanced to protect a restriction which affects business competitors, but only one where no third party is affected.

V. CONCLUSION

The contours of the nonstatutory labor exemption to the antitrust laws are by no means cast in stone; reconciling congressional labor and antitrust policies is a difficult task. The Justice White-*Connell* balancing mechanism was

²⁴⁸ 47 Stat. 70 (1932) at § 2.

²⁴⁹ See Siegel, 13 DUQ. L. REV. at 466-72.

²⁵⁰ 398 U.S. 235 (1970).

²⁵¹ *Id.* at 251.

developed to steer a course between those who would place primary emphasis on the Sherman Act and those who would focus on the labor policy favoring collective bargaining. Yet, no clear or long-standing consensus exists, either at the Supreme Court or among the lower courts, as to how the labor and antitrust scales should be weighted. In distinguishing between restrictive provisions which affect only parties to a collective bargaining agreement and those which affect third parties, *McCourt* properly has recognized that some market restraints are more abhorrent to the Sherman Act than are others. The Supreme Court would likely agree that this analysis accords with its balancing approach, and it seems that the era of successful player antitrust challenges to professional sports league reserve systems has ended with *McCourt*.

More importantly, *McCourt* forces reflection upon the labor side of the balance. The Sixth Circuit's primary concern for collective bargaining policy is not a novel approach; three Supreme Court Justices advanced a similar analysis in the first case applying the nonstatutory exemption. *McCourt* follows increasing recognition by commentators, lower courts, and the Supreme Court itself of a pronounced shift in congressional emphasis from protecting weak unions to promoting the collective bargaining process. The Supreme Court should readdress the nonstatutory labor exemption issue and decide whether this shift in emphasis warrants a modification of its balancing test. It would not be surprising if the Court were to adopt an approach under which only the national collective bargaining policy is weighed against the antitrust laws. A "labor" exemption which is in no way based upon the advancement of union interests policy would bear little resemblance to that first recognized by the Court in 1941. It would be, however, a logical outgrowth of the changes in the labor-management bargaining framework that have occurred since the passage of the Clayton and Norris-LaGuardia Acts.

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