Cornell Law Review

Volume 61
Issue 3 *March 1976*

Article 6

Antitrust Law—Labor Law-Illegal Hot Cargo Agreement May Be the Basis of Antitrust Suit Against Union Which Coerces Its Acceptance

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RECENT DEVELOPMENTS IN LABOR LAW

Antitrust Law—Labor Law—ILLEGAL "HOT CARGO" AGREEMENT MAY BE THE BASIS OF ANTITRUST SUIT AGAINST UNION WHICH COERCES ITS ACCEPTANCE

Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975)

In *Connell Construction Co. v. Plumbers Local 100*[1] the Supreme Court held that, absent a collective bargaining relationship, a union loses its antitrust immunity by coercing a general contractor to sign a "hot cargo" agreement.[2] In reaching its decision, the Court determined that such an agreement is not protected by the national labor policy. As the latest effort in the Court's sixty-seven year consideration of labor's status under the Sherman Act,[3] the *Connell* decision follows two of its most recent predecessors, *UMW v. Pennington*[4] and *Amalgamated Meat Cutters Local 189 v. Jewel Tea Co.*[5] in attempting to define the scope of labor's antitrust immunity. The vagueness in *Connell*, like that in *Pennington* and *Jewel Tea*, highlights the Court's inability to resolve the conflicts between labor and antitrust policy.[6] *Connell* adds further confusion to this problem and in so doing serves to illustrate the definite need for legislative guidance in this area.[7]

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[1] 421 U.S. 616 (1975).

[2] A "hot cargo" agreement in this context refers to a form of secondary boycott activity whereby a labor union agrees with an employer that the employer will not utilize the goods or services of another employer with whom the union has a labor dispute.

[3] 15 U.S.C. §§ 1-7 (1970). The Supreme Court first applied the Sherman Act to a labor union in 1908. *See* note 8 and accompanying text *infra*.

[4] 381 U.S. 657 (1965).

[5] 381 U.S. 676 (1965).

[6] For a general criticism of the Court's "unprincipled" approach to the labor-antitrust policy conflict, see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963). Commentaries after *Pennington* and *Jewel Tea* on this issue include Di Cola, *Labor Antitrust: Pennington, Jewel Tea, and Subsequent Meandering*, 33 U. PITT. L. REV. 705 (1972); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966); Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684 (1968).

[7] The need for congressional definition of the scope of labor's antitrust immunity has been recognized by several commentators. *See* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 304-05 (1955); Cox, *Labor and the Antitrust Laws–A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Di Cola, *supra* note 6.

I

HISTORICAL BACKGROUND

The Sherman Act was first held applicable to labor unions in the Danbury Hatter's Case[8] which, like *Connell*, involved union secondary activity.[9] Congress legislatively overruled that decision by passing the Clayton Act,[10] which attempted to exempt labor from the antitrust laws and limit the issuance of injunctions in labor disputes. The Court, however, in *Duplex Printing Press Co. v. Deering*[11] narrowly interpreted the anti-injunction provisions of section 20 of the Clayton Act[12] as applying only to workers in a proximate relation to the dispute, *i.e.*, the employees of the primary employers. *Duplex* committed the federal courts to a decade characterized by the phrase "Government by injunction."[13] This era of regulation of union activity under the Sherman Act undermined judicial prestige in the minds of the American public and labeled the Sherman Act as a weapon of class war that would be an emotional symbol to future generations.[14] In 1932, Congress responded to this restrictive decision with the Norris-LaGuardia Act,[15] which limited injunctive relief in labor disputes to certain explicitly defined situations. Norris-LaGuardia also broadened the

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[8] Loewe v. Lawlor, 208 U.S. 274 (1908).

[9] At this point it might be best to define certain terms used in this Note.

Most favored nation clause: A clause in a collective bargaining contract by which a labor union agrees that if it grants a more favorable contract to any employer it will extend the same terms to all other employers with whom it bargains.

Multiemployer bargaining: Collective bargaining covering more than one company in a given industry, as when an association of employers organizes as a single unit for purposes of bargaining with a single union which represents employees of each individual employer.

Secondary activity: As used here refers to pressure exerted by a union upon an employer who is not directly involved in a dispute with the union, *e.g.*, a union causes workers of Company A to refuse to work on or purchase goods of Company B with whom the union has a labor dispute.

[10] Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified in scattered sections of 15, 18, 29 U.S.C.).

[11] 254 U.S. 443 (1921). *See also* Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37 (1927). The *Duplex* decision bears some resemblance to the instant case in that it not only involved secondary activity by the union, but also construed the labor law concerned as applying only to employers and employees in a proximate or collective bargaining relationship. Judge Clark, dissenting below in *Connell*, recognized this similarity, although as a matter of statutory interpretation, he saw only a "superficial resemblance" between his reasoning and that of *Duplex*. Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1179 n.11 (5th Cir. 1973).

[12] 29 U.S.C. § 52 (1970).

[13] F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 1 (1930).

[14] Winter, *supra* note 6, at 30.

[15] 29 U.S.C. §§ 101-15 (1970).

definition of a "labor dispute" to include any controversy concerning terms or conditions of employment regardless of whether the disputants stood in the proximate relation of employer and employee.[16] As it forbade court injunctions in cases involving such "labor disputes," the statute was later held to have closed the judicially created gaps in the Clayton Act.[17] Three years later, Congress enacted a broad statutory framework for the conduct and management of labor relations in the National Labor Relations Act (NLRA),[18] which evidenced a national policy of promoting labor organization and collective bargaining.

Subsequent decisions of the Court between 1932 and 1945 created a judicial recognition of a nonstatutory exemption from the Sherman Act for labor organizations. In *Apex Hosiery Co. v. Leader*[19] the Court held immune from the Sherman Act a union's violent sit-down strike to obtain a closed shop which prevented the shipment of the plant's existing inventory in interstate commerce. Such activity was held exempt from antitrust prosecution because it was in furtherance of the elimination of nonunion competition, was privileged by section 6 of the Clayton Act, and had not been intended to restrain "commercial competition."[20] Following *Apex*,

[16] *Id.* § 113(c).

[17] *See* United States v. Hutcheson, 312 U.S. 219, 236 (1941). Commentators have differed as to the Act's intended effect on the antitrust liability of labor unions. *Compare* Willis, *In Defense of the Court: Accommodation of Conflicting National Policies, Labor and the Antitrust Laws,* 22 MERCER L. REV. 561, 565 (1971) (Congress intended the Norris-LaGuardia Act to preclude judicial intervention in labor relations through application of the antitrust laws), *with* Note, *supra* note 6, at 701 (Norris-LaGuardia and Clayton Acts protect the economic weapons that one party to labor dispute can lawfully use to induce agreement, *i.e.*, strikes, boycotts, picketing, etc., but do not protect union-employer agreements promoting anticompetitive schemes).

The Court in *Connell* did not decide whether the Norris-LaGuardia Act precluded injunctive relief where, as in this case, a union seeks to coerce an illegal "hot cargo" agreement. The Court merely conjectured that if, on remand, the subject agreement were held to be violative of the antitrust laws, it could not assume that Local 100 would resume picketing to obtain or enforce an illegal agreement. 421 U.S. at 637-38 n.19.

[18] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), *as amended,* 29 U.S.C. §§ 151-68 (1970). The NLRA established the system of mandatory collective bargaining used in labor relations today, and created the National Labor Relations Board (NLRB), vesting it with powers to supervise the established system of bargaining. 29 U.S.C. §§ 159-60 (1970).

[19] 310 U.S. 469 (1940).

[20] *Id.* at 495. The Court declared that the Sherman Act would continue to apply to union activities that affected or restrained "commercial competition." The opinion distinguished restraints on the product market from restraints on the labor market, a distinction which some commentators believe the courts are unable to make given the inherently ambiguous effects of labor activity on prices and levels of production. *See* Winter, *supra* note 6, at 42 (distinction between product market and labor market restraints cannot be soundly made in the context of a system of collective bargaining based on employer organization along product market lines); Di Cola, *supra* note 6, at 708. In *Apex* the Court determined that

the Court in *United States v. Hutcheson*[21] apparently departed from the "commercial competition" test of antitrust immunity. The Court held that union conduct during a labor dispute was immune from the operation of the antitrust laws. The rule of the case was formulated in the following statement:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit [union conduct] under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[22]

However, it remained for the Court to treat a problem raised by Justice Frankfurter in *Hutcheson*—union-employer combinations that effected price restraints, production allocation, or other market control schemes proscribed for employers acting without labor union involvement.

The Court condemned such a conspiracy four years after the *Hutcheson* case. Justice Black, speaking for the Court in *Allen Bradley v. IBEW Local 3*,[23] found an antitrust violation by the local

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the union's purpose in imposing the sit-down strike was dispositive, and thus followed previous decisions which had employed a purpose-motive analysis to resolve suits against labor unions under the Sherman Act. In these cases, liability resulted if the Court conceived of the union's purpose as an attempt to impose restraints on competition in prices or production—the product market—rather than on wages, hours, or extension of union organization. Representative of this approach are UMW v. Coronado Coal Co., 259 U.S. 344 (1922), and Coronado Coal Co. v. UMW, 268 U.S. 295 (1925).

[21] 312 U.S. 219 (1941). The *Hutcheson* Court, by weaving together § 20 of the Clayton Act and § 13 of the Norris-LaGuardia Act, ruled that these two statutes made the Sherman Act inapplicable to the practices specifically enumerated in § 20, at least if they occurred in the course of a labor dispute.

[22] *Id.* at 232 (footnotes omitted).

[23] 325 U.S. 797 (1945). The case arose out of a situation in which Local 3 had organized both the manufacturers of electrical equipment and electrical contractors in its New York City jurisdiction. The union, manufacturers, and contractors agreed that the contractors would purchase only equipment made by the manufacturers, who in turn agreed that they would restrict their sales in New York to those same contractors. The union policed the entire scheme and augmented the restrictive agreements by assisting in bid-rigging among the contractors. The union also prevented nonunion operations through picketing and boycotts. The end result was higher wages and shorter hours for Local 3's members, greater profits for the manufacturers and contractors, and monopolistic prices for the public. *See* Allen Bradley Co. v. IBEW Local 3, 41 F. Supp. 727, 728-34 (S.D.N.Y. 1941) (Master's Report); Allen Bradley Co. v. IBEW Local 3, 51 F. Supp. 36 (S.D.N.Y. 1943). The conspiracy in *Allen Bradley* mutually benefitted the union, the manufacturers, and the contractors and was willingly entered into by the employers. Furthermore, the conspiracy was challenged on antitrust grounds by an electrical contractor who had been excluded from the market. The conspiracy alleged by Connell in the instant case, however, appears to be of a materially different character. *See* note 86 *infra*. For a detailed and perceptive analysis of *Allen Bradley*, see Winter *supra* note 6, at 45-59.

union for two interdependent reasons. First, it had not been acting alone but "in combination with business groups," and second, the industry-wide understandings had intended and had achieved price and market controls.[24] Thus, the policies of the Norris-LaGuardia Act and the NLRA were to be subordinated to the competition ethic of the Sherman Act when a union participated in a business monopoly. The Court, however, noted that its conclusion meant 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."[25] In 1945, then, the Supreme Court established that absent a business conspiracy to which a union was a part, judges would not impose antitrust liability for activity undertaken by a union in its self-interest.[26]

Congress amended the NLRA in 1947[27] and 1959[28] to regulate labor's use of secondary activity as an economic weapon in the industrial struggle. This legislation made the NLRA applicable to many anticompetitive problems. It did not, however, specifically preclude the application of the antitrust laws to all union activity. Consequently, the scope of labor's antitrust immunity before *Pennington* and *Jewel Tea* remained uncertain.[29] Various proposals for legislation during the period from 1945 to 1965 sought to provide antitrust sanctions for union activity based on the *Apex* distinction between labor market and product market restraints.[30] Other proposals imposed antitrust liability upon specific union activities which produced anticompetitive market effects.[31] In

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[24] 325 U.S. at 799, 800.

[25] *Id.* at 810.

[26] Hunt v. Crumboch, 325 U.S. 821 (1943), exemplifies the extent of a labor union's exemption at this time. In this case, a Teamsters' local imposed a secondary boycott on an employer's principal customers out of spite against the employer. The employer lost the customers' business as a result of the boycott. The Court held, however, that the union's activity was beyond the reach of the federal antitrust laws: "That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." *Id.* at 825 n.1.

[27] In 1947 the NLRA was amended by the Labor-Management Relations Act, 1947 (Taft-Hartley), ch. 120, 61 Stat. 136 (codified in scattered sections of 18, 29 U.S.C.).

[28] Congress amended the NLRA again by enacting the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

[29] Winter, *supra* note 6, at 58.

[30] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 304-05 (1955).

[31] Cox, *supra* note 7, at 284. Professor Cox proposed a statute which set forth the national antitrust and labor policies and proscribed specific labor union conduct as violative of the antitrust laws. He saw fit to exclude from antitrust liability secondary boycotts in aid of

addition, suggestions for further amendment of the NLRA were made with the objective of outlawing specific union economic weapons other than those proscribed by the Taft-Hartley and Landrum-Griffin amendments, such as the elimination of "most favored nation" clauses and modification of multiemployer bargaining.[32] In sum, the scope of labor's antitrust exemption during this period was undefined. In large measure, this uncertainty resulted from the conflict between a national policy favoring freely competitive business markets on the one hand, and the national labor policy promoting the combined action of workers, organized along product market lines, on the other hand.[33] The Court, in *UMW v. Pennington*[34] and *Amalgamated Meat*

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organizing campaigns and strikes for higher labor standards because he believed that these activities should be regulated in the context of the labor laws. In the opinion of Professor Cox such boycotts "do not significantly hamper our efforts to maintain a competitive economy." *Id.* at 282.

[32] Winter, *supra* note 6, at 70-73. *But see* Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 701 (1965). It is significant that Professors Winter and Meltzer disagreed as to the intent of the Taft-Hartley Congress in abandoning proposals to eliminate the Clayton Act's labor exemption with regard to union engagement in direct market restraints. This disagreement foreshadows that between the majority and dissent in *Connell.* Professor Winter is apparently in accord with Justice Stewart's belief tbat Congress, in making secondary activity violative of the labor laws, intended the labor law remedies for such conduct to be exclusive. Winter, *supra* note 6, at 66. Professor Meltzer, on the other hand, agrees with Justice Powell's opinion that the enactment of labor law remedies does not preclude the application of the antitrust laws. *See* H. R. CONF. REP. No. 510, 80th Cong., 1st Sess. 65 (1947).

[33] Attempts at judicial resolution of the conflict between the two policies have been seen as unavailing due to the inherent limitations of the judicial process and its dependence upon principled analysis. Under the Sherman Act, for example, a union, to the extent that it restrains competition in any market, succumbs to the doctrine of per se illegality which was developed in business conspiracy cases under the Act to overcome the evidentiary burden of proving a conspiracy in restraint of trade. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940). Another doctrine developed under the Sherman Act would infer a conspiracy from "things actually done" in order to overcome the evidentiary obstacle of proving a conspiracy. *See* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914). Interstate Circuit v. United States, 306 U.S. 208 (1939), by announcing the doctrine of "conscious parallelism," represents the furthest reach of the inference of a conspiracy from acts otherwise innocent: "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Id.* at 227.

The implications of such a rule of law for the multiemployer bargaining system described at note 9 *supra* are readily apparent. Agreements between labor and management on subjects such as wages, hours, and conditions of employment will necessarily tend to lessen competition in both the labor and product markets. But an attempt to eliminate such anticompetitive effects by application of the Sherman Act subverts the national policy of promoting industrial peace through negotiation. On the one hand, the application of an *Apex Hosiery* "market effects" test in the labor-antitrust field to judge the legality of union activity ignores the possibility of various motives on the part of the union. On the other

Cutters Local 189 v. Jewel Tea Co.[35] attempted once again to address this labor-antitrust policy conflict.[36]

Pennington involved allegations of a Sherman Act conspiracy between large coal mine operators and the United Mine Workers Union to force smaller mine operators out of business by establishing a minimum wage scale which the smaller operators could not afford to pay.[37] It was alleged that a multiemployer bargaining agreement had been negotiated in the industry to effect the conspiracy's illegal purpose.

With regard to the alleged conspiracy, Justice White determined that even though the subject of the agreement—wages—was a mandatory bargaining subject under the NLRA, such an agreement, when entered into for the purpose of running the employers' competitors out of the market, would result in the loss of the union's antitrust immunity.[38] However, he also acknowledged that it was "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws,"[39] and that the union could, as a matter of its own policy, seek the same wages from

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hand, confining "legitimate" union practices to activity in the labor market (wages, hours, and working conditions, for example) disregards an equally difficult problem: intended restraints on the product market may often be as easily achieved through conventional labor market techniques as by direct product market restraints. *See* Meltzer, *supra* note 32, at 691, 696. This inherent ambiguity has led one commentator to the conclusion that unions should be exempt from Sherman Act liability for any conduct undertaken in pursuit of economic self-interest. Winter, *supra* note 6, at 65-70. *Compare* Willis, *supra* note 17, at 578-79 (it is the duty of the judiciary to attempt resolution of the conflict in the absence of congressional guidance for the conciliation of labor-antitrust conflicts).

[34] 381 U.S. 657 (1965).

[35] 381 U.S. 676 (1965).

[36] The Court divided into three groups of three justices in both *Pennington* and *Jewel Tea.* As a result, there were five separate opinions for the two cases. Justice White, joined by Chief Justice Warren and Justice Brennan, delivered the opinion of the Court in *Pennington,* and announced the judgment of the Court in *Jewel Tea.* Justice Douglas, joined by Justices Black and Clark, concurred in *Pennington* and dissented in *Jewel Tea.* In a single opinion, Justice Goldberg, joined by Justices Harlan and Stewart, dissented from the opinion but concurred in the reversal of *Pennington,* and concurred in the judgment in *Jewel Tea.*

[37] The case was reversed and remanded for a new trial because of an erroneous charge to the jury in which the district judge failed to give proper scope to the doctrine of Eastern R.R. Presidents' Conf. v. Noerr Motor Freight, 356 U.S. 127 (1961) (competitor's attempts to influence public officials exempt from the Sherman Act). The Court, however, considered the labor-antitrust issue in rejecting the union's contention that the trial court had erred in denying its motions for directed verdict and judgment notwithstanding the verdict. *See* 381 U.S. at 669-72.

[38] The Court states its position as follows: "But we think a union forfeits its exemption from the antitrust laws when it is *clearly shown* that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665 (emphasis added).

[39] *Id.* at 664.

other employers. Justice White, in addition, said that a union, in unilaterally adopting a uniform wage policy and seeking to implement it, did not have to align its wage demands with those that the industry's weakest employers could afford to pay, even though it might suspect that some employers could not effectively compete if they were required to pay the wage scale demanded.[40] But the "more basic defect" in the agreement was that the union, in agreeing to impose the wage scale upon other employers, had surrendered its freedom of action with respect to future bargaining.[41] Justice White's opinion has been criticized for failing to state what evidence, apart from the multiemployer agreement, would be necessary to establish an illegal conspiracy.[42] He did allude to "other evidence" in the case, but declined to comment on its sufficiency other than to say that there must be "additional direct or indirect evidence of the conspiracy."[43]

Justice Douglas, in a concurring opinion, felt no such reservation as to the evidence necessary to establish an antitrust violation. Justice Douglas stated that an industry-wide collective bargaining agreement which imposed a wage scale beyond the financial ability of some employers to pay, and which was entered into for the purpose of driving those employers from the market, was "prima facie evidence"[44] of an *Allen Bradley* conspiracy.[45] Justice Goldberg concurred in the reversal but dissented from the opinion of the Court.[46]

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[40] *Id.* at 665 n.2.

[41] *Id.* at 668.

[42] Di Cola, *supra* note 6, at 718. Failure to set an evidentiary standard leaves certain practical matters in question. For example, whether the parties to a multiemployer agreement might discuss the effect of a wage increase upon their competitive positions in the market, the future plans of the union, or the effect of a proposed wage increase upon marginal employers are matters left unresolved by the *Pennington* opinion. *See* Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea,* 46 B.U.L. REV. 317, 323 (1966). Furthermore, unions and employers might be forced into clandestine bargaining or needless refusals to agree on bargaining subjects in order to avoid the possibility of antitrust liability.

In a later case alleging a *Pennington*-type conspiracy to impose a wage rate outside the bargaining unit, the Court held that the preponderance of the evidence is needed to sustain Sherman Act conspiracy charges against labor unions. Ramsey v. UMW, 401 U.S. 302 (1971).

[43] 381 U.S. at 665 n.2.

[44] *Id.* at 673.

[45] Justice Douglas, by invoking the "conscious parallelism" doctrine of Interstate Circuit v. United States, 306 U.S. 208 (1939), would apparently infer an antitrust conspiracy from evidence of a multiemployer collective bargaining agreement and injury to an employer group. *See* note 33 *supra.*

[46] 381 U.S. at 697. Justice Goldberg's position was that agreements reached on mandatory subjects of bargaining—wages, hours, and working conditions—should be exempt from the antitrust laws. *Id.* at 710.

In *Jewel Tea*[47] an association of food retailers had agreed with the union not to sell prepackaged meat before 9 a.m. or after 6 p.m. Jewel Tea signed the agreement under protest after being threatened with a strike, and thereupon brought suit under the Sherman Act alleging that the marketing hours restriction imposed by the agreement was a direct restraint of trade. In approaching the question whether the marketing hours clause was within the nonstatutory labor exemption from the antitrust law, Justice White observed that the facts did not present a *Pennington* union-service market employer conspiracy against self-service market employers like *Jewel Tea.*[48] Relying upon a district court finding of fact that had not been reversed on appeal,[49] the Court held that the marketing hours restriction was so "intimately related" to wages, hours, and working conditions that the union's imposition of the restriction, unilaterally and in its own self-interest, fell "within the protection of the national labor policy and is therefore exempt from the Sherman Act."[50] In a footnote, however, Justice White stated that the "crucial determinant" was not the agreement's form but its relative impact on the product market as balanced against the interest of union members in obtaining it.[51] This "balancing

[47] Unlike *Pennington,* the majority in *Jewel Tea* was composed of the White and Goldberg groups, although these Justices divided three-to-three as to the rationale for the decision. *See* note 36 *supra.*

[48] 381 U.S. at 688-89. A service market is one in which a butcher is present behind a meat counter to cut, weigh, and package meat for customers. A self-service market is one where meat is set out, weighed, priced, and prepackaged for customer selection. Jewel Tea argued that because it was a self-service operation, it could sell prepackaged meat at night without requiring butchers to do night work. In a critical finding of fact, however, the district court found that night sales would adversely affect the butchers. *See* note 49 *infra.*

[49] The district court had found that self-service store night operations would require butchers to do night work, work longer hours, or face the prospect of nonbutcher encroachment upon the union's work jurisdiction. Jewel Tea Co. v. Meat Cutters Local 189, 215 F. Supp. 839, 846 (N.D. Ill. 1963).

[50] 381 U.S. at 689-90.

[51] *Id.* at 690 n.5. The "legitimate union interest" test has been deemed "inherently ambiguous." Di Cola, *supra* note 6, at 721. Commentators other than Mr. Di Cola have also seen the test as susceptible to various constructions. *See generally* Comment, *supra* note 6, at 757-59. Justice White's opinion apparently separates the question of the union's immunity from that of substantive violation of the antitrust laws. The question of violation arises only when the union's claim of immunity is found wanting. The "balancing test" then requires the Court to determine whether the benefit of an agreement to a union outweighs the injury to consumers produced by its direct restraint on the product market. The decisive factor in such a balance will ultimately be the economic prejudices of the judiciary with courts weighing the social desirability or undesirability of the union's objectives. Congress, however, prohibited the courts from this practice by the Norris-LaGuardia Act. *See* Cox, *supra* note 42, at 326. Finally, in terms of antitrust policy, the "balancing test" makes less sense than did the *Apex Hosiery* product market-labor market distinction. In *Apex Hosiery,* antitrust liability, at least in theory, turned on the existence of anticompetitive strictures in the product market.

test," then, was to determine whether or not the union interest is "legitimate," that is, whether union effort to obtain the agreement is exempt from the antitrust laws. If the restraint on the product market is direct and immediate and if the subject matter of the agreement is not so "intimately related" to wages, hours, and working conditions that it falls within the exemption, then there should be no antitrust immunity.

Justice Douglas dissented, maintaining that the multiemployer agreement between the union and the retailers association was evidence of an antitrust violation.[52] Justice Goldberg, on the other hand, believed that the marketing hours was a mandatory subject of bargaining and reiterated his position in *Pennington* that agreement on such subjects should be exempt from the antitrust laws.

The Court next considered the legitimate union interest test in *American Federation of Musicians v. Carroll.*[53] This decision illustrated that the balancing test could be applied to achieve any result compatible with the economic predelictions of the courts.[54] In so doing, the Court's opinion illustrates that the test lacks a general

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Justice White's "intimate relation" test, on the other hand, allows such restraints if they are outweighed by the court-determined union interest in imposing them.

[52] 381 U.S. at 735. Justice Douglas, disagreeing with Justice White, believed that "in the circumstances of this case the collective bargaining agreement itself . . . was evidence of a conspiracy among the employers with the unions to impose the marketing-hours restriction on Jewel . . . ." *Id.* at 736. Justice Douglas argued that the multiemployer bargaining agreement alone was prima facie evidence of a Sherman Act conspiracy because it restrained competition on night meat sales. No other evidence of a union-employer conspiracy to impose the restraint was necessary.

[53] 391 U.S. 99 (1968). In *Carroll* a musician union's bylaws prescribed price lists for "club-date" (single night) engagements and imposed restrictions on band leaders preventing them from accepting bookings from agents unlicensed by the union.

[54] The majority in *Carroll* held that the direct market restraints were "necessary to assure that scale wages will be paid to the sidemen [union musicians] and the leader" and were therefore exempt from the antitrust laws. 391 U.S. at 112. Even though the union imposed direct market restraints by setting prices, it was established that in the "club date" field, the price was substantially equivalent to the wages paid when the band leader actually performed as a musician. However, the legitimate union interest test is distorted when the leader does not perform but only acts as an agent. Requiring minimum prices in such a situation leaves the leader unable to compete with other agents in the field by lowering his fee for entrepreneurial effort. Justice White, in dissent, pointed to this difference. *Id.* at 117. *Carroll* indicated a willingness on the part of the Court to extend the labor exemption to cover unilateral union restraints on product market competition that have a substantial effect on wages, hours, and working conditions. Justice White's dissent indicates that it went beyond his formulation of the legitimate union interest test and that the balance in *Carroll* was struck differently than it had been in *Jewel Tea.* The Court was not without some support, however, in upholding the restraints. A lower federal court had allowed a similar pricing device in Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681 (S.D.N.Y. 1959), *appeal dismissed,* 274 F.2d 430 (2d Cir. 1960).

principle which can be applied, notwithstanding the judiciary's subjective economic preferences, to reach similar results in similar cases. The failure of the Court to agree on a consistent approach to the question of labor's antitrust immunity in *Pennington* and *Jewel Tea* gave lower courts a choice of theories in labor-antitrust cases, thus maintaining the confusion in this area of the law.[55] The scope of labor's antitrust immunity and the conflict between the national antitrust and labor policies, therefore, remained unresolved issues when the *Connell* case arose.

II

CONFLICT WITHIN THE COURT IN *Connell*

In aid of its attempt to organize plumbing subcontractors in its geographical jurisdiction, Plumbers Local 100 requested that Connell Construction Company, a general contractor employing no plumbers, sign an agreement providing that it would subcontract its plumbing work only to firms with which the union had a current collective bargaining agreement.[56] Connell refused and the union picketed one of its construction projects causing a total work stoppage. Connell thereupon filed an antitrust action in a Texas state court, obtaining a temporary restraining order against the picketing. When Local 100 successfully removed the case to federal court, Connell signed the subject agreement under protest and amended its complaint to allege a Sherman Act violation.[57] The district court held that the agreement was exempt from federal antitrust law because it was permitted by the construction industry proviso to section 8(e) of the NLRA[58] and because federal labor legislation preempted state antitrust laws.[59] On appeal,[60] the Fifth

[55] Courts have confused the legitimate union interest test with the conspiracy theory of antitrust liability or have ignored the former where it would be relevant in determining immunity. *See, e.g.*, Webb v. Bladen, 480 F.2d 306 (4th Cir. 1973); Cedar Crest Hats, Inc. v. United Hatters I.U., 362 F.2d 322 (5th Cir. 1966).

[56] Local 100 had negotiated a Master Area-Wide Collective Bargaining Agreement with a multiemployer association of about 75 mechanical (plumbing) contractors in 1968 and 1971. The multiemployer agreement contained a "most favored nation" clause by which the union agreed that if it granted a more favorable contract to any other employer, it would extend the same terms to all members of the association. Brief for Petitioner at 4, 13-14, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975) [hereinafter cited as Brief for Petitioner].

[57] 15 U.S.C. §§ 1, 2 (1970); Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

[58] 29 U.S.C. § 158(e) (1970).

[59] Connell Constr. Co. v. Plumbers Local 100, 78 L.R.R.M. 3012 (N.D. Tex. 1971).

[60] Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154 (5th Cir. 1973). This case

Circuit affirmed with one judge dissenting. The Supreme Court, voting five to four, reversed on the question of antitrust immunity and unanimously affirmed the ruling that the national labor policy preempted state antitrust law in regulating labor union activities in aid of organization.

A. *Analysis of Potential Antitrust Liabilities*

Speaking for a divided court, Justice Powell[61] addressed himself first to the union's claimed antitrust immunity. After briefly discussing the statutory and nonstatutory basis of the labor exemption, Justice Powell stated that labor policy does not require that a union have the freedom to impose direct restraints on competition among those who employ its members, even though that policy requires tolerance for the reduction of business competition based on wages and working conditions.[62] Here, according to the majority, the agreement went beyond that "tolerance": it not only restrained subcontractor competition based on wages and working conditions, but also "indiscriminately excluded" from competition those subcontractors who derived a competitive advantage by more efficient operating methods rather than by paying lower salaries or providing substandard working conditions. This agreement, the Court continued, would have the

is noted at 15 B.C. IND. & COM. L. REV. 595 (1974); 43 U. CIN. L. REV. 416 (1974); 52 TEXAS L. REV. 170 (1973). The opinions below in *Connell* reflect the confusion of lower federal courts in the labor-antitrust area. The district court reached the labor law question and held that the agreement was exempt from the antitrust laws because it fell within the construction industry proviso to § 8(e) of the NLRA. It therefore held that the union's picketing to coerce Connell's acceptance was not an unfair labor practice in violation of § 8(b)(4). The Fifth Circuit, however, without deciding whether the "hot cargo" agreement or the coercive picketing was illegal under the NLRA, held that the union retained its antitrust immunity for two reasons. First, the union was acting unilaterally and not in conspiracy with a nonlabor group, and second, the agreement furthered a legitimate union interest because it was directed at the elimination of competition among plumbing firms on the basis of wages and working conditions. Connell argued that the agreement fell outside the § 8(e) proviso for want of a collective bargaining relationship between it and Local 100. Therefore, it maintained that the union's picketing to coerce the agreement was an illegal secondary boycott under § 8(b)(4). The court refused to decide this labor law question, deferring to the jurisdiction of the NRLB. The court, however, did hold that the labor law status of the agreement and the coercive picketing to obtain it were irrelevant to the question of the union's antitrust immunity. The agreement furthered the legitimate union interest of extending subcontractor organization; its anticompetitive effects (which the court held were outweighed by the union's interest) would not change depending on whether or not Connell employed union members. *See* 483 F.2d at 1168-69. Therefore, in the court's opinion, a union could pursue a legitimate union interest by means of an unfair labor practice without losing its antitrust immunity.

[61] Justice Powell was joined by the Chief Justice and Justices White, Blackmun, and Rehnquist.

[62] 421 U.S. at 622.

actual and potential anticompetitive effect of allowing Local 100 to control access to the mechanical subcontracting market, which in turn would have adverse effects on consumers. Furthermore, it would ultimately allow Local 100 to create a geographical enclave for local contractors by refusing to bargain with "travelling" subcontractors.[63] The union's goal of organizing as many subcontractors as possible was legitimate; the Court, however, held that this fact would not make the union's methods of reaching that goal exempt from the antitrust laws. Subcontractors organized by another union or nonunion subcontractors paying union scale wages and providing comparable working conditions were also excluded from the market by the agreement. Consequently, a "restraint of this magnitude" would not be entitled to an antitrust exemption even if included in a lawful collective bargaining agreement.[64] Therefore, whether or not Connell employed Local 100 members was irrelevant to the question of antitrust immunity.[65] The agreement in question would apparently have resulted in a loss of that immunity in either case.

The Court then turned to the union's contention that the agreement was protected by the construction industry proviso to section 8(e) of the NLRA.[66] Connell argued that the proviso was

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[63] Connell did not allege a conspiracy between Local 100 and the unionized subcontractors bargaining association. The Court found no evidence of agreement between the two groups to coerce the "hot cargo" agreement in question other than the multiemployer contract's "most favored nation" clause. *Id.* at 625 n.2. Ironically, the anticompetitive effects listed by the Court in *Connell* are the same as those that were actually accomplished in *Allen Bradley* and potentially accomplished in *Pennington*. Both of those cases, however, were argued on the "conspiracy with a nonlabor group" theory and had considerably more evidence from which to infer such a conspiracy than the present case. *See* UMW v. Pennington, 381 U.S. 656, 659-61 (1965); Allen Bradley Co. v. IBEW Local 3, 325 U.S. 797, 800 (1945). Connell did allege that it was an "unwilling" conspirator in the union's attempt to impose restraints on mechanical subcontractor competition. Brief for Petitioner at 10-11.

[64] 421 U.S. at 625-26.

[65] *Id.*

[66] Section 8(e) provides in part:

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

29 U.S.C. § 158(e) (1970).

limited to "hot cargo" agreements between employers and employees in a collective bargaining relationship. The Court agreed with Connell despite the unqualified language of the statute.[67] Connell was held not to be an employer within the meaning of section 8(e). In so deciding the Court relied on *National Woodwork Manufacturers Association v. NLRB*[68] which had held that a section 8(e) agreement was valid where it was entered into by parties in a primary relationship to protect the employees' work opportunities. Connell had argued that it was a neutral party as between Local 100 and the mechanical subcontractors it sought to

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[67] Congress enacted the Landrum-Griffin amendments to the NLRA in an effort to plug "technical loopholes" in § 8(b)(4)'s general prohibition of secondary activities. The Supreme Court in Carpenters Local 1976 v. NLRB, 357 U.S. 93 (1958) (*Sand Door*), held that § 8(b)(4)'s general prohibition of secondary boycotts did not prevent an employer from voluntarily agreeing to boycott another's products or services. The legislative history of § 8(e), the section of the Landrum-Griffin amendments designed to cure the loophole exposed in *Sand Door,* contains statements to the effect that the construction industry proviso's purpose was to maintain the "status quo" of collective bargaining in the construction industry. For a discussion of the legislative history of § 8(e), see National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). The issue was of great importance in *Connell* as both Connell and Local 100 admitted that the antitrust case turned on the meaning of the § 8(e) proviso. The NLRB and the courts of appeals which had considered the issue held that picketing to obtain an agreement valid under the proviso was legal. *See* District Council of Carpenters v. NLRB, 332 F.2d 636 (3d Cir. 1964); Painters Local 48 v. NLRB, 328 F.2d 534 (D.C. Cir. 1964); Laborers Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963); Los Angeles Bldg. & Constr. Trades Council (B. & J. Investment Co.), 214 N.R.L.B. No. 86, 87 L.R.R.M. 1424 (1974); Northeastern Ind. Bldg. & Trades Council (Centilivre Village Apts.), 148 N.L.R.B. 854 (1964), *enforcement denied on other grounds,* 352 F.2d 696 (D.C. Cir. 1965).

[68] 386 U.S. 612 (1967). In determining whether the agreement was authorized by the § 8(e) proviso, the Court stated that "the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contractor vis-à-vis his own employees." *Id.* at 645. In *National Woodworkers* a contractor agreed with his own employees that he would not use prefabricated doors in construction jobs. The agreement amounted to a union boycott of work done off the jobsite—prefabrication—but was upheld because of the primary relationship between the agreeing parties.

The NLRB had taken the position that a union did not violate §§ 8(b)(4)(A) or 8(e) when it obtained an otherwise valid subcontracting clause under the § 8(e) proviso from a contractor who did not employ employees of the craft represented by that union. *See, e.g.,* Northeastern Ind. Bldg. & Constr. Trades Council (Centilivre Village Apts.), 148 N.L.R.B. 854, *enforcement denied on other grounds,* 352 F.2d 696 (D.C. Cir. 1965). Furthermore, the General Counsel of the NLRB had refused to issue complaints in cases similar to *Connell,* because he was of the opinion that the § 8(e) construction industry proviso permitted "hot cargo" agreements between parties not in a bargaining relationship. *See* QUARTERLY REPORT OF THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD (Jan. 1 — Mar. 31, 1974), 5 CCH LAB. L. REP. ¶ 9045 (1974). A detailed analysis of the purpose and scope of the § 8(e) proviso as construed by the NLRB and the courts is beyond the purpose of this Note. The *Connell* court, however, has established a new component of a valid subcontracting clause. *See* note 71 *infra.* The *General Counsel's Quarterly Report, supra,* contains a history of the § 8(e) construction industry proviso litigation.

organize.[69] In addition, the Court held that the agreement was outside the proviso because it "was not limited to jobsites on which [Local 100's members] were working."[70] Later in his opinion, Justice Powell stated that the agreement could be the basis for an antitrust suit because it was "outside the context of a collective-bargaining relationship *and not restricted to a particular jobsite.*"[71] Since the union's purpose was not to protect Connell's employees or its own members from working alongside nonunion men and since it was not trying to organize the plumbing subcontractor on the job site it picketed, the union activity fell outside the section 8(e) proviso.[72] To agree that the proviso authorized such an agreement with a stranger (*i.e.*, neutral) general contractor "would give the construction unions an almost unlimited organizational weapon."[73] The Court thought it "highly improbable" that Congress intended such a result given the NLRA's restrictions on primary organizational campaigns.[74] Consequently, absent a "clear

[69] Brief for Petitioner 10-11. In NLRB v. Denver Bldg. and Constr. Trades Council, 341 U.S. 675 (1951), the Court held that a general contractor and his subcontractors on the same jobsite were separate legal entities. Therefore, picketing at the site to force a general to compel his subs to sign union contracts was secondary boycott activity in violation of § 8(h)(4)(A) of the NLRA. Since the Court in *Connell* presumed that the construction industry proviso to § 8(e) was intended to maintain the "status quo" of collective bargaining in that industry (*see* note 67 *supra*) the Court apparently saw *Sand Door* as representative of that "status quo" in the absence of legislative action to overrule the *Denver Building Trades* holding that general contractors and their subs on a common jobsite are separate legal entities for picketing purposes. The Court also found support for its interpretation of the § 8(e) construction industry proviso by comparing it to the garment industry proviso to § 8(e). 421 U.S. 628-30 & 633 n.13 (1975). *See* Danielson v. ILGWU Joint Board, 494 F.2d 1320 (2d Cir. 1974).

[70] 421 U.S. at 631.

[71] *Id.* at 635 (emphasis added). This second requirement—restriction of the agreement to a particular jobsite—is new to § 8(e) litigation and appears to have originated with the opinion of Justice Powell. Whether nonrestriction to a particular jobsite would, in itself, remove a "hot cargo" agreement from the § 8(e) proviso is unclear, but Justice Powell's use of the conjunctive "and" in holding that the agreement may be the basis of an antitrust suit seems to indicate that this component must exist along with the lack of a collective bargaining relationship.

[72] Justice Powell, citing Drivers Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966), agreed with dictum in that case that the purpose of the construction industry proviso to § 8(e) was to prevent situations in which union men had to work alongside nonunion men on the same construction site. As a result, he determined that the agreement was outside the proviso because it would prevent neither Connell's employees nor Local 100's members from having to work alongside nonunion men.

[73] 421 U.S. at 631.

[74] 29 U.S.C. § 158(b)(4), (7) (1970). *See* Dallas Bldg. Trades Council v. NLRB, 396 F.2d 677 (D.C. Cir. 1968). In that case, the court opined that coercive picketing would be permissible if the coverage of the proposed agreement were limited to the type of work never performed by the general contractor's own employees. The agreement in this case, however, unlike that in *Connell*, covered work done by the general's own employees. The

indication" that Congress intended the section 8(e) construction industry proviso to apply to secondary relationships, the Court refused to so read the proviso.

Finally, Local 100 argued that the agreement, even if outside the section 8(e) proviso, could not be the basis for antitrust liability because the NLRA remedies for such a violation were exclusive. Rejecting this contention, the Court noted that in the Taft-Hartley amendments to the NLRA, Congress had chosen to regulate secondary activities by creating special remedies under the NLRA, and in so doing had rejected attempts to regulate those activities by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts.[75] The Court, however, found this legislative choice irrelevant because it dealt only with secondary activities prohibited by section 8(b)(4). This case, on the other hand, involved a "hot cargo" agreement which Congress outlawed in 1959. Because the Landrum-Griffin amendments to the NLRA did not amend section 303 expressly to provide a remedy for violations of section 8(e) alone, the Court maintained that

> [t]here is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.[76]

Finally, the Court held that federal labor policy preempts state antitrust law in the regulation of union organizational activities.

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court, therefore, held that picketing to coerce acceptance of the agreement had a recognitional objective and consequently violated the general prohibition of recognitional picketing found in § 8(b)(7). Local 100 relied on this distinction in contending that picketing to coerce acceptance of its "hot cargo" agreement was legal because Connell did not employ any plumbers.

[75] Labor-Management Relations Act, 1947, ch. 120, 61 Stat. 136, (codified in scattered sections of 18, 29 U.S.C.). By adding NLRA § 303, 29 U.S.C. § 187 (1970), Congress provided an action for actual damages sustained as a result of union secondary activity. In addition, the Taft-Hartley amendments added NLRA § 10(l), 20 U.S.C. § 160(l) (1970), which authorized the NLRB, but not private parties, to sue in the federal courts for injunctive relief against union secondary activity.

[76] 421 U.S. at 634. Justice Stewart, on the other hand, found "considerable evidence in the legislative materials" for the contention that Congress intended § 303 to provide the exclusive private remedy for violations of § 8(e). *Id.* at 650. His argument was solidly based on the legislative history of both the Taft-Hartley and Landrum-Griffin amendments to the NLRA. *See* notes 84, 89 *infra.* The *Connell* majority, however, referred to this argument in a footnote, and then only to state its disagreement. Since the relevant legislative history is unclear on the subject, congressional intent is highly debatable. Four members of the Court, however, interpreted it to mean that Connell should not have an antitrust action against Local 100. Given that a contrary interpretation was critical to the Court's decision, perhaps a more detailed rebuttal to Justice Stewart's argument was required.

The Texas antitrust laws created too great a risk of conflict with the NLRA to be allowed to operate in the area of union organizational activity. However, the Court left open the possibility that "other agreements between unions and nonlabor parties may yet be subject to state antitrust laws."[77] The Court did not elaborate on this point.

B. *The Position For Antitrust Immunity*

Speaking for four members of the Court,[78] Justice Stewart maintained that Congress had intended the additions and amendments to the NLRA in 1947[79] and 1959[80] to provide the exclusive remedy for illegal union secondary boycott activity. Unlike the majority, Justice Stewart believed that the legislation clearly warranted this conclusion:

> The relevant legislative history unmistakably demonstrates that in regulating secondary activity and "hot cargo" agreements in 1947 and 1959, Congress selected with great care the sanctions to be imposed if proscribed union activity should occur. In so doing, Congress rejected efforts to give private parties injured by union activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws.[81]

Discussing the legislative history leading to the enactment of section 303 of the NLRA,[82] Justice Stewart argued that the

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[77] *Id.* at 637.

[78] Justice Stewart was joined by Justices Douglas, Brennan, and Marshall.

[79] Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 18, 29 U.S.C.).

[80] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

[81] 421 U.S. at 639.

[82] In the form in which it passed the House, § 12(c) of the Hartley Bill, H.R. 3020, 80th Cong., 1st Sess. (1947), 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 205 [hereinafter cited as 1947 LEGISLATIVE HISTORY], provided that the Norris-LaGuardia Act should not apply in private suits for relief from "unlawful concerted activities" which were defined as "illegal boycotts . . . designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time." H.R. REP. No. 245, 80th Cong., 1st Sess. 24, 44, 1 1947 LEGISLATIVE HISTORY 315, 335. However, the Senate refused to adopt the House's removal of antitrust immunity for prohibited secondary activity, accepting instead Senator Taft's compromise proposal for a private damage remedy. 93 CONG. REC. 4874-85 (1947), 2 1947 LEGISLATIVE HISTORY 1399-1400. In conference, § 12(c) of the Hartley Bill was eliminated. *See* H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 58-59 (1947), 1 1947 LEGISLATIVE HISTORY 562-63. Senator Taft's compromise proposal became § 303 of the NLRA, 29 U.S.C. § 187, when Congress enacted the Taft-Hartley amendments.

The Supreme Court in Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), held that the § 303 compensatory damage remedy preempted state law that provided punitive damages for injury sustained by a secondary boycott. In discussing the nature of the § 303 remedy, the Court said:

majority had misinterpreted congressional intent by holding that Congress had not meant section 303 to be the exclusive private remedy for violations of the section 8(e) prohibition of "hot cargo" agreements. Thus, in outlawing those agreements in 1959, Congress had also amended section 8(b)(4) to make it an unfair labor practice for a labor organization to threaten or coerce a neutral employer, either directly or indirectly through his employees, where an object of the secondary pressure is to force an employer to enter into an agreement prohibited by section 8(e).[83] Concurrent with the amendment of section 8(b)(4), Congress expanded section 303 to allow recovery of actual damages sustained as a result of "any activity or conduct defined as an unfair labor practice in section 8(b)(4)."[84] Therefore, since the Court held the agreement outside the construction industry proviso to section 8(e), Local 100's coercive picketing was a section 8(b)(4) unfair labor practice against which Congress had already provided Connell with a fully effective damage remedy.[85] In concluding that Connell did not have an antitrust case against Local 100, Justice Stewart opined that a nonunion mechanical contractor who had been excluded from the market as a result of a voluntary "hot

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> The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity "describes and condemns specific union conduct directed to specific objectives." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98. In selecting which forms of economic pressure should be prohibited by § 303, Congress struck the "balance . . . between the uncontrolled power of management and labor to further their respective interests," *id.*, at 100, by "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and [by] shielding unoffending employers and others from pressures in controversies not their own." *Labor Board v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692.

Id. at 258-59 (footnote omitted).

[83] 29 U.S.C. § 158(b)(4) (1970) now provides in part that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by subsection (e) . . . .

[84] 29 U.S.C. § 187(a) (1970).

[85] Justice Stewart did not decide whether the agreement was within the § 8(e) proviso and, if so, whether Local 100 could picket to obtain it, because in his view Connell could not maintain an antitrust suit in either case. 421 U.S. at 648 n.8.

It is questionable whether Connell would be able to prove any monetary damage as a result of being forced to use only union mechanical subcontractors. It was established below that Connell used both union and nonunion subcontractors through the competitive bidding process. Indeed, Connell had not sought treble damages in the action, but only injunctive and declaratory relief. *See* Connell Constr. Co. v. Plumbers Local 100, 78 L.R.R.M. 3012 (N.D. Tex. 1971). It is at least a plausible inference that the union subcontractors were competitive with their nonunion counterparts.

cargo" agreement between Connell and Local 100 might well have a valid antitrust claim.[86]

Justice Stewart found further support in the legislative history of the Landrum-Griffin Act for his contention that Congress intended to make the NLRA remedies for proscribed union secondary activity exclusive. He noted that Congress, in 1959 as in 1947, rejected amendments to the NLRA which would have imposed antitrust liability on unions for engaging in illegal secondary activity.[87]

Finally, in agreeing with the majority that the NLRA and federal labor policy preempts state antitrust law from regulating union organizational activity, Justice Stewart cautioned that

> [t]he judicial imposition of "independent federal remedies" not intended by Congress, no less than the application of state law to union conduct that is either protected or prohibited by federal labor law, threatens "to upset the balance of power between labor and management expressed in our national labor policy."[88]

Although joining in Justice Stewart's dissent, Justice Douglas filed a separate opinion to point out what he considered to be the

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[86] 421 U.S. at 649 n.9. Such a claim would present an *Allen Bradley* fact situation. There, antitrust charges were brought by an electrical contractor who had been excluded from the electrical contracting market by the union-manufacturer-contractor combination. *See* note 23 *supra*. A similar situation would have presented itself in *Connell* had a plumbing contractor alleged that Local 100 and Connell had voluntarily agreed to exclude nonunion plumbing contractors from the market in plumbing subcontracts. The facts in *Connell*, however, show that Connell, unlike the willing employers in *Allen Bradley*, steadfastly opposed the agreement with Local 100. Indeed, Connell itself brought antitrust charges against the union for attempting to coerce the "hot cargo" agreement.

Although he would deny Connell an antitrust action, Justice Stewart stated that the general contractor would nevertheless have a damage remedy under § 303 if the union attempted to enforce a proscribed "hot cargo" agreement by picketing. On this point, Justice Stewart was in agreement with the majority opinion below. *See* 483 F.2d at 1174.

[87] Representative Hiestad of California introduced H.R. 8003, 86th Cong., 1st Sess. (1959), which was "in the nature of antitrust legislation, applied to labor unions." 105 CONG. REC. 12,135 (1959), 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1507 [hereinafter cited as 1959 LEGISLATIVE HISTORY]. The Landrum-Griffin Bill, H.R. 8400, 86th Cong., 1st Sess. (1958), on the other hand, provided that the new secondary boycott and "hot cargo" provisions were to be enforced solely through the NLRB and by use of the § 303 actual damage remedy. *See* 105 CONG. REC. 14,347-48 (1959), 2 1959 LEGISLATIVE HISTORY 1522-23. The House rejected an attempt to amend H.R. 8400 by inserting the antitrust provisions of H.R. 8003. Subsequently, the House-Senate conferees added the construction and garment industry provisos to § 8(e), and Congress thereafter enacted the Landrum-Griffin Bill without any provisions exposing proscribed union secondary activity or "hot cargo" agreements to antitrust liability. *See* H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. (1959), 1 1959 LEGISLATIVE HISTORY 934.

[88] 421 U.S. at 655, *quoting* Teamsters Local 20 v. Morton, 377 U.S. 252, 260 (1964) (footnote omitted).

"determinative feature of the case":[89] Connell had failed to allege a conspiracy between Local 100 and the unionized subcontractor's bargaining group to eliminate nonunion subcontractors from the market. Therefore, in Justice Douglas's opinion, Connell's complaint alleged unilateral union activity, the remedy for which was provided exclusively by the NLRA.[90]

III

ANTITRUST IMPACT FOR THE CONSTRUCTION INDUSTRY UNIONS

As the decision in *Connell* reversed the opinion of the General Counsel of the NLRB on the scope of the section 8(e) construction industry proviso,[91] it will have direct and immediate effect upon labor relations in the construction industry. Beyond that impact, however, it may open a floodgate of litigation on the scope of labor's antitrust immunity. Therefore, an understanding of the Court's analysis of antitrust liability is necessary to guide lower federal courts in this area. Unfortunately, apart from indicating a possible judicial trend toward expanding labor's antitrust liability, the Court provides little guidance for subsequent labor-antitrust cases.

It is not clear on what theory the Court decided that Local 100, in coercing the "hot cargo" agreement, forfeited its antitrust immunity. However, several lines of analysis suggest themselves from the majority opinion. To the extent that ambiguity in the Court's decision will prevent a clarification of the issue, *Connell* continues the trend of those precedents which have unsuccessfully attempted a clear and useful resolution of the labor-antitrust conflict.[92]

Initially, the Court may have looked beyond Connell's pleadings and found that the prima facie evidentiary test propounded by Justice Douglas in *Pennington* was met.[93] If this is what happened,

[89] 421 U.S. at 638.

[90] This failure of pleading and proof would appear to have been the only reason for Justice Douglas's conclusion that the union did not lose its antitrust exemption. The *Connell* case involved a multiemployer bargaining agreement with a "most favored nation" clause, a combination of economic weapons which he considered a prima facie antitrust conspiracy in *Pennington* and *Jewel Tea*. Unlike the majority, however, Justice Douglas did not consider the multiemployer bargaining agreement relevant here because Connell had failed to allege it as part of a conspiracy. *Id.*

[91] *See* note 68 *supra*.

[92] *See* note 33 *supra*.

[93] *See* text accompanying note 44 *supra*. Unlike the situation in *Pennington*, however, the instant case did not present an antitrust complaint by a party threatened with exclusion from the product market.

the multiemployer bargaining agreement, with a "most favored nation clause," must have been itself, regardless of motive, an antitrust conspiracy violation. Connell, it should be noted, alleged a conspiracy insofar as it claimed that it was coerced into "conspiring" with Local 100 to exclude unorganized mechanical subcontractors from the market; it did not allege a conspiracy between the union and the plumbing subcontractors.[94] Although not relied on by Connell as a conspiracy in itself, the multiemployer bargaining contract with the "most favored nation clause" was nevertheless seen by the Court as "relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market."[95] Such an agreement existed in *Pennington* but was challenged there by a party allegedly excluded from competition with the multiemployer bargaining unit. The plaintiff in *Allen Bradley* was similarly situated.[96] Connell, on the other hand, did not compete with the plumbing contractors in Local 100's Master Area-Wide Bargaining Agreement,[97] and therefore could not have been excluded from competing with them by the multiemployer contract. In this respect, Connell's complaint was materially different from those filed in *Allen Bradley* and *Pennington.* Justices Douglas[98] and Stewart[99] pointed to this difference in their respective opinions. This factual distinction would appear to render inapposite the conspiracy analysis apparently applied by the *Connell* majority.

A further indication that the Court applied this "combination with a nonlabor group" theory in *Connell* is Justice Powell's consideration of the actual and potential anticompetitive effects of the "hot cargo" agreement—effects which bear striking resemblance to those that had been actually imposed in *Allen Bradley,*[100] the archetypal "combination with a nonlabor group" case. The Court may have found any one of three possible liability-producing conspiracies on the facts: the Connell-Local 100 agreement alone;

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[94] 421 U.S. at 625 n.2.

[95] *Id.* at 623.

[96] *See* text accompanying note 24 *supra.*

[97] *See* note 56 *supra.*

[98] *See* note 90 and accompanying text *supra.*

[99] *See* note 86 *supra.*

[100] The anticompetitive effects projected by the Court are only speculative. There was no indication in the record or briefs that Local 100 had refused to bargain with any mechanical subcontractors, or that there was any evidence of conspiracy between Local 100 and the multiemployer bargaining group other than the existence of the multiemployer contract including the "most favored nation" clause. *Cf.* UMW v. Pennington, 381 U.S. 657 (1965).

the Local 100-multiemployer bargaining group contract; or the Connell-Local 100 agreement as augmented by the Local's multiemployer contract. It is conceivable that the Court viewed the third situation as a per se unlawful combination in restraint of trade. If so, the Court went beyond *Pennington.* A per se view would explain the Court's ambivalence toward Local 100's otherwise legal objective of organizing as many subcontractors as possible because such analysis would render motive irrelevant. An underlying theory of labor-nonlabor conspiracy would also explain the majority's projection of the agreement's potential anticompetitive effects.

Another possibility is that the Court applied Justice White's *Jewel Tea* legitimate union interest test to Local 100's activity.[101] Apparently the Court struck the balance in the following fashion: Local 100 has a direct interest in eliminating nonunion competition based on wages and working conditions. However, its agreement goes beyond eliminating that type of competition and excludes from the business market both subcontractors organized by other unions and nonunion subcontractors, even though those excluded may pay union scale wages and provide comparable working conditions. Because the product market effect is much broader than the interest of the union members in obtaining the agreement (as the Court weighs that interest) the balance falls in favor of encouraging product market competition: "Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect."[102]

The balancing test appearing in *Connell,* however, bears little resemblance, if any, to that purportedly applied in *United Federation*

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[101] *See* notes 47-51 and accompanying text *supra.*

[102] 421 U.S. at 623. The Court, however, may be taking an unduly narrow view of the union interest in extending its organization to all subcontractors in its geographical jurisdiction. The extension of collective bargaining is a recognized means whereby union members also derive nonwage, nonworking condition benefits to the extent that it provides the union members with a larger share of the "social sovereignty." *See generally,* Perlman, *The Principle of Collective Bargaining,* in UNIONS, MANAGEMENT AND THE PUBLIC 45 (Bakke, Kerr & Anrod ed. 1960).

On the other hand, the Court may be intimating that organizing as many subcontractors as possible is not a legitimate union interest where unilaterally-pursued objectives transcend the elimination of wage and working condition differentials. Thus, if the union is also seeking job security, work preservation, and work opportunities for its members, the Court may find these interests illegitimate. This finding, however, exhibits nothing other than the economic predelictions of the *Connell* majority. It also presumes that the Court is in a position to know better than the union what is in the latter's best interests.

of Musicians v. Carroll.[103] These cases, in reaching such divergent results from the legitimate union interest test, suggest that the test produces an unprincipled approach to the labor-antitrust conflict, which is incapable of consistent and rational application through the judicial process.[104]

The majority's holding that the section 8(e) construction industry proviso is applicable only in the context of a collective bargaining relationship is justified on the basis of *NLRB v. Denver Building & Construction Trades Council.*[105] Nevertheless, this result seems reminiscent of *Duplex Printing Press Co. v. Deering*[106] and an era in which courts determined "what public policy in regard to the industrial struggle demands."[107] Furthermore, since antitrust liability results from the agreement being outside the proviso (for want of a primary relationship), it must be asked how this criterion for immunity is related to the anticompetitive effects of the agreement itself. Presumably the construction industry proviso would shield an agreement to exclude a third party from competition if the agreement was between a contractor and his own employees. Yet such an agreement would have the same anticompetitive effects as did the "hot cargo" agreement in *Connell.* Basing the union's liability on the lack of a primary relationship, however, could mean that a legislative reversal of *Denver Building Trades* would also weaken *Connell*'s foundation for imposing antitrust liability.[108]

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[103] 391 U.S. 99 (1968); *see* notes 53-54 and accompanying text *supra.* The *Carroll* Court applied the *Jewel Tea* balancing test in holding that a union had a legitimate interest in imposing price lists and other direct restraints upon band leaders. Perhaps the significant difference between the tests imposed in *Carroll* and *Connell* is the composition of the Court. *Cf.* Di Cola, *supra* note 6, at 756 n.237.

[104] *See* note 6 *supra.*

[105] 341 U.S. 675 (1951); *see* notes 69-74 and accompanying text *supra. See also* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).

[106] 254 U.S. 443 (1921); *see* notes 11-13 and accompanying text *supra.*

[107] *Id.* at 485 (Brandeis, J., dissenting opinion). *See* Winter, *supra* note 6.

[108] The *Duplex* decision was in part responsible for the Norris-LaGuardia Act. Congress attempted to legislatively overrule *Denver Building Trades* in 1975. *See* H.R. REP. No. 155, 94th Cong., 1st Sess. (1975). H.R. 5900, 94th Cong., 1st Sess. (1975), if enacted, would have authorized "hot cargo" agreements between general contractors and the employees of subcontractors working on the same construction site, and would also have sanctioned "common situs" picketing (picketing of the entire job site by one subcontractor's employees). In effect the proposed bill would have been a recognition of the "close community of interest" between all parties on a common construction site. *See* Comment, *The Impact of the Taft-Hartley Act on the Building and Construction Industry,* 60 YALE L.J. 673, 684-89 (1951). President Ford, although previously indicating his intention to sign the bill into law (*see* N.Y. Times, Nov. 20, 1975, § 1, at 1, col. 6), vetoed it on January 2, 1976, as a result of heavy pressure from so-called right-to-work factions, contractors, and conservatives. N.Y. Times, Jan. 3, 1976, § 1, at 7, col. 3. As both the House and Senate votes on the picketing measure of the bill fell far short of a two-thirds majority, it was extremely unlikely that the veto would

Finally, the majority determined that Congress did not intend to make the NLRA remedies for section 8(e) violations exclusive. This conclusion does not comport with the congressional pattern of dealing with unfair labor practices through amendments to the NLRA rather than by imposing antitrust sanctions. Justice Stewart argued quite forcefully that the Court should not impose sanctions which Congress had previously rejected.[109]

CONCLUSION

The extent to which labor unions, in their self-interest, should be allowed to restrict employer competition is an emotional issue. The very nature of a labor union is anticompetitive insofar as it restricts employer competition based on wages and working conditions. Given union organization along product market lines, such restriction must affect prices and production. Congress, however, has proscribed certain union activities by amending the NLRA. In so doing, it has chosen to remedy abuses of labor power through the imposition of labor law sanctions and not by application of the antitrust laws. Furthermore, in the past, judicial imposition of the Sherman Act to regulate union activity has aroused public ire and resulted in a loss of judicial prestige. Additionally, the courts have proved incapable of arriving at a definition of the scope of labor's antitrust immunity. The divergent opinions of the majority and dissent in *Connell,* as to whether or not Congress intended the labor law remedies for unfair labor practices to be exclusive, highlights the confusion of the judiciary on the labor-antitrust issue. The need for explicit legislative guidance in this area is clear. This fundamental question of labor policy must be left to the political process because it calls for the drawing of arbitrary lines in effecting compromise between the national labor and antitrust laws. Only Congress, not the courts, can resolve this conflict.

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be overridden. Although this might have overruled the *Connell* majority's requirement of a primary relationship, the implications of the Court's second requirement, limitation to a particular jobsite, would remain unclear. It will be the task of lower federal courts to construe this second component of a § 8(e) violation.

[109] 421 U.S. at 646-55 (Stewart, J., dissenting opinion).