LABOR'S ANTITRUST EXEMPTION AFTER *CONNELL*

I. INTRODUCTION

Connell Construction Co. v. Plumbers and Steamfitters Local 100[1] marks the most recent attempt by the United States Supreme Court to apply the standards of the Sherman Antitrust Act[2] to the activities of labor unions. The Court in *Connell* attempts to harmonize the anticompetitive policies of the Sherman Act with the policies of the federal labor statutes[3] favoring collective bargaining between unions and employers.[4] *Connell*, unfortunately, follows the pattern of

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

[2] 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §§ 1-7 (1970) [hereinafter cited as the Sherman Act]:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
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> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
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> § 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations [of this act]; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.
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> § 7. The word "person", or "persons", wherever used in [this act] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

[3] The National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* (1970) [hereinafter cited as the NLRA].

[4] *See* Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622 (1975). For extensive analyses of the history and application of the antitrust laws to labor activities, *see e.g.*, E. BERMAN, LABOR AND THE SHERMAN ACT (1930); F. FRANKFURTER AND N. GREENE, THE LABOR INJUNCTION (1930); Cox, *Labor and the Antitrust Laws—A Prelimi-*

earlier Court attempts in that it fails to articulate clear principles for the application of the Sherman Act within the context of union-employer agreements.[5]

This note gives a brief history of the Supreme Court decisions prior to *Connell*, a statement of that case, and finally, a discussion of the extent to which the *Connell* antitrust opinion departs from that of earlier cases.

II. Labor's Antitrust Exemption Before *Connell*

A combination of business organizations that attempts to set the terms by which a tradesman may have access to the business market constitutes a per se violation of the Sherman Act irrespective of the combination's ultimate purpose or effect.[6] Yet, this kind of restraint is the goal of every union organization engaged in primary or secondary activities in the course of a labor dispute.[7] Further, a successful union organizational campaign within a particular locale will make it increasingly difficult for nonunion firms to compete within the market.[8]

The Sherman Act by its terms does not exempt union activity or the mere existence of a union organization from its broad proscription of combinations in restraint of interstate commerce. Therefore, in determining whether particular union activity violated the Sherman Act, early Supreme Court decisions[9] frequently considered the extent to which interstate trade had been disrupted, based on a comparatively narrow concept of interstate commerce.[10] Local work stoppages in support of union demands were permissible to the extent that

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nary Analysis, 104 U. Pa. L. Rev. 252 (1955); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14 (1963) [hereinafter cited as Winter].

[5] *See generally*, Winter, *supra* note 4.

[6] Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

[7] Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 255-56 (1955).

[8] *See* Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 625 (1975).

[9] *E.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908).

[10] *E.g.*, Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933); Industrial Ass'n v. United States, 268 U.S. 64 (1925); United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

the union sought only to resolve a labor dispute with a particular employer.[11] However, the local dispute might blossom into a direct restraint in violation of the Sherman Act if evidence showed that the union's purpose was to eliminate the competitive threat posed by the presence of the employer's nonunion goods in the product market.[12]

In 1914 Congress passed the Clayton Act.[13] Section 6 provided

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[11] United Mine Workers v. Coronado Coal Co., 259 U.S. 346, 411 (1922).

[12] Coronado Coal Co. v. United Mine Workers, 268 U.S. 296, 310 (1925).

[13] 38 Stat. 730 (1914), *as amended* 15 U.S.C. §§ 12-27 (1970):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety [The Sherman Act] . . . .

§ 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

§ 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions or employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or

that "the labor of a human being is not a commodity or article of commerce," that the existence of a union was not a violation of the antitrust laws, and that the Sherman Act was not to be construed to prevent individual union members from "lawfully carrying out the legitimate objects thereof." What some observers saw as a victory for the union movement,[14] was soon transformed into a crushing defeat with the Supreme Court's decision in *Duplex Printing Press Co. v. Deering*.[15] In *Duplex* the court interpreted § 6 of the Clayton Act to be a mere codification of existing law, the terms "lawfully" and "legitimately" being interpreted as allowing only union activity in furtherance of objects that were legal under the Sherman Act.[16] Similarly, § 20 of the Clayton Act, which listed particular union activities deemed non-violative of federal law, was construed by the Court to apply only to actions involving an employer and his own employees.[17] Thus the application of the Sherman Act to union activities proceeded much as it had before, with *Duplex* effectively committing the federal courts to the role of arbiters of the propriety of the objects of union activity.[18]

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communicating information, or from peacefully persuading any person to work or abstain from working, or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

[14] Samuel Gompers, for one, had characterized the Clayton Act as the "Industrial Magna Charta." *See* E. WITTE, THE GOVERNMENT IN LABOR DISPUTES 68 (1932).

[15] 254 U.S. 443 (1921).

[16] *Id.* at 469.

[17] *Id.* at 471-72. Congress subsequently overruled the Court's narrow construction of § 20 with the passage of the Norris-LaGuardia Act in 1932 with its prohibition of injunctions in cases involving "labor disputes." 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1970).

[18] The situation had actually deteriorated from the union point of view, inasmuch as § 16 of the Clayton Act provided for private injunctive relief where none had been available before. Dissenting in *Duplex*, Mr. Justice Brandeis remarked:

> The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

The rule of the Court in formulating labor policy is roundly condemned in Winter, *supra* note 4.

Apex Hosiery Co. v. Leader[19] was a significant departure from preceding cases in terms of the Court's attempt to judicially reconcile labor and antitrust policies. Confronted with a situation in which union members had committed acts of violence against their struck employer's plant and had physically prevented the release of goods destined for interstate shipment, the Court dismissed any argument that unions enjoyed an absolute exemption from the Sherman Act.[20] However, the Court observed that inasmuch as the Sherman Act was not a tool for the regulation of the interstate transportation of goods, the question became:

> [W]hether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the *kind of restraint* of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer.[21]

A survey of the legislative history of the Sherman Act convinced the *Apex* Court that the antitrust laws were designed to prevent "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ."[22] But this formula, standing alone, would allow antitrust proscriptions to encompass virtually all union organizational and bargaining activity. It is elementary that the success of a strike or boycott depends largely upon the extent of economic injury such devices cause a particular employer. Thus, the struck employer is unable to compete as a result of decreased production; the boycotted employer may be able to produce, but his competitive position is damaged by his inability to market his goods. Similarly, the satisfaction of union demands for improved wages, hours and working conditions is generally manifested by an increase in the price of unionized goods.

However, the *Apex* Court observed that:

> [s]ince, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor stan-

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

[20] *Id.* at 487-88.

[21] *Id.* at 487 (emphasis added).

[22] *Id.* at 493.

> dards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.[23]

The Court's conclusion was supported by citations to various legislative schemes that indicated congressional approval for the elimination of labor market competition by establishing industry wide standards through collective bargaining and legislatively dictated minimum wages and hours.[24] "Such combinations and standards," said the Court, did not have the kind of effect on competition that was condemned by the Sherman Act.[25]

Yet the Court determined that no antitrust violation was involved in *Apex* since the object and purpose of the union was not to restrain competition in the employer's product,[26] suggesting that union intent was somehow material. Despite the Court's acknowledgement of congressional approval for collective bargaining combinations, earlier cases involving unlawful combinations of businessmen using a labor organization as a means of suppressing competition[27] were carefully distinguished.

Questions of union intent were apparently disregarded in the following year by the Court's decision in *United States v. Hutcheson*.[28] The union in *Hutcheson* had resorted to strikes against several employers and encouraged product boycotts in an effort to support its position in a jurisdictional dispute. In determining that the union's activities did not violate the Sherman Act, the Court could have exclusively employed the *Apex* standard.[29] Instead the Court fashioned a broad labor exemption from antitrust sanctions by reading the Sherman, Clayton, and Norris-LaGuardia Acts "as a harmonizing text of outlawry of labor conduct."[30] The result was that:

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

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[23] *Id.* at 503-04.

[24] *Id.* at 504 n. 24.

[25] *Id.*

[26] *Id.* at 506.

[27] Local 167, Teamsters v. United States, 291 U.S. 293 (1934); United States v. Brims, 272 U.S. 549 (1926). *See* notes 41-46, 91-96 and accompanying text, *infra*.

[28] 312 U.S. 219 (1941).

[29] *See* Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094, 1096 (1962). Justice Stone would have relied exclusively on *Apex* for the *Hutcheson* result. 312 U.S. at 242.

[30] 312 U.S. at 231.

> unselfishness of the end of which the particular union activities are the means.[31]

The Court cited *United States v. Brims*[32]—as it had in *Apex*[33]—as an example of the kind of combination of labor and nonlabor interests that would still constitute an unlawful restraint of trade under the Sherman Act. The "conspiracy"[34] in *Brims*, however, appeared to be little more than a "hot-cargo" agreement between union and employer that union employees were not to work on nonunion goods.[35] Further, the agreement employed by the union to protect its wage scale against the competitive pressures created by the presence of nonunion goods in the market was simply one means of achieving traditional union goals as recognized by the Court in *Apex*.[36]

The combination with the non-labor qualification of the *Hutcheson* standard was given substance in *Allen-Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*.[37] Local 3, in an effort to obtain improved wages and working conditions for its members, actively sought closed-shop agreements from electrical manufacturers and contractors within the New York City area. Under the union plan, electrical manufacturers agreed to sell and contractors agreed to install only electrical goods that were within the jurisdiction of Local 3. These union demands were enforced by such conventional union methods as strikes and boycotts.[38] The effect of the campaign was to wholly suppress the sale within the New York City area of electrical equipment by non-local manufacturers.[39] The business of local manufacturers and contractors grew substantially, as did the wages of the union employees. Labor prices for electrical goods and services were substantially increased as well.

Despite the fact that the impetus for the *Allen-Bradley* scheme was largely the result of union pressures,[40] the Supreme Court chose

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[31] *Id.* at 232 (citation omitted).

[32] 272 U.S. 549 (1926).

[33] 310 U.S. 469, 501 (1940).

[34] "Conspiracy" was the characterization made by the *Hutcheson* Court. 312 U.S. at 232 n. 3.

[35] *See* United States v. Brims, 272 U.S. 549, 552 (1926). As characterized by the *Brims* Court, the exclusionary agreements were apparently instigated by the defendant-manufacturers, and not the union. *Cf.* Allen-Bradley Co. v. Local 3, Electrical Workers, 325 U.S. 797, 800-01 (1945). *Cf.* National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (1970).

[36] Winter, *supra* note 4, at 41.

[37] 325 U.S. 797 (1945).

[38] *Id.* at 799.

[39] *Id.* at 800.

[40] *See* Allen-Bradley Co. v. Local 3, Electrical Workers, 41 F. Supp. 727, 728, 741-43,

to characterize the resulting economic restraints as a *business* monopoly in violation of the Sherman Act. The question was whether the union's involvement and the scope of the union's exemption from the antitrust laws were sufficient to immunize *all* the parties to the scheme.[41] The Court observed that, had there been no combination with the New York manufacturers and contractors, the Clayton and Norris-LaGuardia Acts would have precluded a finding that Local 3 had violated the Sherman Act. But this was not the case when unions "aid[ed] and abet[ted] business men who [were] violating the Act:"[42] "we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."[43]

The determination that Local 3 had violated the Sherman Act resulted from the Court's attempt to reconcile congressional policies seeking to "preserve a competitive business economy" as well as to "preserve the rights of labor to organize to better its conditions through the agency of collective bargaining."[44] The *Allen-Bradley* opinion, while mentioning the importance of collective bargaining in the federal labor scheme, did virtually nothing to delineate the nonviolative scope of such agreements. This question was of crucial importance in view of the Court's holding 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,"[45] and the fact that, acting pursuant to the provisions

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750 (S.D.N.Y. 1941).

[41] 325 U.S. at 800-01 (footnote)

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

The *Allen-Bradley* Court's mischaracterization of the facts apparently led some to conclude that an independent *business* conspiracy, directed towards employer benefit, was necessary before a union could be subjected to antitrust liability. *See* United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957); California Sportswear & Dress Ass'n, 54 F.T.C. 835, 839 (1957). *See also* Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094, 1098-1000 (1962).

[42] *Id.* at 807.

[43] *Id.* at 808.

[44] *Id.* at 806.

[45] *Id.* at 810.

of a collective bargaining agreement, a union is never acting "alone."[46]

Union-employer agreements were attacked again in *United Mine Workers v. Pennington*[47] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[48] Three groups of three justices each wrote three opinions in arriving at the plurality decisions in *Jewel Tea*, and in *Pennington*.[49]

The controversy in *Pennington* arose following alleged attempts by the UMW and large coal producers to force smaller coal operators from the market. The result of this drive was to reduce competition and enable the large producers to institute more efficient and profitable production techniques. The union was to realize coincidental gains in the form of increased wages for its members, even though the elimination of the marginal producers and the institution of streamlined production techniques would result in an actual reduction in the number of available jobs. In furtherance of the plan, the union agreed to impose the terms of its wage agreement on all industry operators irrespective of their ability to pay.[50]

The Court,[51] through Mr. Justice White, held that the union's conduct was not exempt from antitrust liability. Justice White reaffirmed the *Hutcheson-Allen-Bradley* principle that unions became subject to Sherman Act liability when they combined with nonlabor groups.[52] He further suggested that even if a union were pursuing its own self-interest, the union could not require an employer to agree to terms that amounted to a direct restraint on the product market

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[46] *Compare* Hunt v. Crumboch, 325 U.S. 821 (1945); Weir v. Chicago Plastering Institute, 272 F.2d 883 (7th Cir. 1959), *with* American Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968). The *Carroll* case is the most current example of unilateral—and therefore, antitrust-exempt—union conduct. *See* Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975). But the result in *Carroll* turned, in part, on the characterization of orchestra leaders as a labor group for purposes of applying the *Hutcheson-Allen-Bradley* standard. 391 U.S. at 105-06. Mr. Justice White, dissenting, pointed out that the leaders, because of the nature of their work, could easily have been characterized as a nonlabor group, which in turn would have raised questions as to the legality of the minimum-price floor and other restrictions imposed on them by the union under the Sherman Act. 391 U.S. at 114-22.

[47] 381 U.S. 657 (1965).

[48] 381 U.S. 676 (1965).

[49] However, the opinions of Mr. Justice White's group and Mr. Justice Douglas' group, which constituted the opinion of the *Pennington* Court, appeared to rest on substantially different theories. *See* Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 720 (1965).

[50] 381 U.S. 657, 659-61 (1965).

[51] *See* note 49, *supra*. Chief Justice Warren and Justice Brennan joined in the opinion.

[52] 381 U.S. at 662.

and that yielded comparatively little in the way of union benefits.[53] Finally, Justice White found that national labor policies offered no protection for union-employer agreements within a single "bargaining unit" that attempted to establish standards for other units.[54]

In his concurring opinion, Mr. Justice Douglas felt that *Pennington* was a reaffirmation of the business-conspiracy theory of *Allen-Bradley*. However, he then broadly asserted that an industry-wide agreement involving a wage scale that exceeded some operators' ability to pay would establish a prima facie violation of the antitrust laws. Emphasizing this standard, Justice Douglas pointed out that an unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators.[55]

The employer-plaintiff in *Jewel Tea* originally had been a member of a multi-employer group involved in contract negotiations with representatives of the Chicago Area Meat Cutters Union. After the multi-employer unit acceded to union demands that the employers strictly limit the hours of operation of local markets, Jewel Tea and another firm left the unit. Later, when faced with a strike vote by the union, Jewel agreed to the marketing hours restrictions. Soon thereafter, Jewel brought suit against the union and the multi-employer unit, charging that the two groups had conspired to prevent the night sale of meat by Jewel and had thereby deprived the company of the

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[53] *Id.* at 666. In reaching this conclusion Justice White sought to distinguish a union-imposed agreement fixing wages from one fixing prices, and suggested that the former was protected from antitrust attack inasmuch as it had a direct and concrete effect in the elimination of competition based on labor standards, as approved in *Apex Hosiery Co. v. Leader*. *Id.* at 664. *See* notes 19-27, *supra*, and accompanying text. However, the test of validity of such a provision was not its form but whether it represented a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690 n. 5 (1965), *citing* Teamsters Union v. Oliver, 358 U.S. 283, 294 (1959). *See* American Fed'n of Musicians v. Carroll, 391 U.S. 99, 115-18 (1968) (White, J., dissenting). In both *Carroll* and *Oliver*, the Court upheld agreements establishing minimum prices to be charged to customers. The pricing agreements were seen as the only effective method of protecting the wage scales of union members. *Cf.* Meat Drivers Union v. United States, 371 U.S. 94, 98 (1962); Milk Wagon Drivers' Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940).

One major difficulty with Justice White's approach is that it requires courts to supplant the union's judgment regarding the effectiveness of a particular union demand in protecting its wage scale. This judgment, in turn, would appear to depend on a determination of the reasonableness of the particular restraint. Yet it was this very kind of judicial balancing which, within the context of a union acting alone, was expressly prohibited by *Hutcheson*. *See* Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317, 327 (1966).

[54] 381 U.S. at 666.

[55] *Id.* at 672-73, *citing* Schenck v. United States, 253 F. 212, 213 (E.D. Pa.), *aff'd* 249 U.S. 47 (1919); Levey v. United States, 92 F.2d 688, 691 (9th Cir. 1937). Justice Douglas was joined by Justices Black and Clark.

benefits of its self-service operations.[56]

The trial court specifically found that absent the marketing hours restriction, union butchers would have been required to work longer hours or relinquish traditional work to unskilled labor.[57] Accepting this finding, Justice White saw the restriction as so "intimately related" to the mandatory bargaining subjects of wages, hours, and working conditions[58] as to fall within the protection of the national labor policy favoring collective bargaining.[59] But he added that the product market restraint resulting from the exclusion of self-service markets from night operations would not necessarily be held exempt from antitrust liability had it been shown that the marketing hours restriction was unnecessary for the protection of the butchers' interests.[60]

The plurality decision in *Jewel Tea* was obtained with the concurring opinion of Mr. Justice Goldberg's group. After reviewing the history of labor's exemption from the antitrust laws, Justice Goldberg criticized Justice White's opinion as a narrow judicial limitation on the importance of mandatory bargaining subjects based on their supposed importance to individual workers. Justice Goldberg favored allowing an exemption for all collective agreements dealing with mandatory subjects in view of the overriding union interest in these subjects. But he indicated that no exemption should be extended to agreements covering nonmandatory subjects.[61]

III. *Connell*

A. The Facts

Plumbers and Steamfitters Local 100 represented workers in the plumbing and mechanical trades in Dallas, Texas. Local 100 was party to a collective bargaining agreement with the Mechanical Contractors Association, a multi-employer "bargaining unit" representing about seventy-five area mechanical contractors. Included in the collective agreement was a "most favored nation" clause, whereby the union agreed that, should it enter into a more favorable agreement with any other employer, it would extend the same terms to all

[56] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 680-82 (1965).

[57] Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 215 F. Supp. 839, 846 (N.D. Ill. 1963).

[58] *See* 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1970).

[59] 381 U.S. at 689-90.

[60] *Id.* at 692-93. *See* note 53, *supra.*

[61] 381 U.S. at 732-33. Justice Goldberg was joined by Justices Harlan and Stewart.

members of the Association.[62]

As part of its efforts to organize mechanical subcontractors in the area,[63] Local 100 approached the Connell Construction Company, a general building contractor in Dallas. The Local requested Connell to agree that, when subcontracting work fell within the jurisdiction of the union, Connell would subcontract such work only to firms party to a current collective bargaining agreement with Local 100.[64] The union, however, expressed no interest in representing Connell's employees. Connell refused to agree, and the union picketed one of the contractor's major construction sites, causing many of the workers to leave the job and thereby halting construction. Connell subsequently signed the agreement, under protest, and sought a federal court declaration that the agreement violated §§ 1 and 2 of the Sherman Act. But the District Court[65] found the agreement exempt from antitrust attack, inasmuch as such an agreement appeared to be authorized by the express terms of the construction industry proviso in § 8(e)[66] of the National Labor Relations Act. The Fifth Circuit

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[62] Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 619 (1975).

[63] *Id.* at 618.

[64] *Id.* at 619-20. The subcontracting agreement provided as follows:

> WHEREAS, the contractor and the union are engaged in the construction industry, and WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act; WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms; THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of the construction, alteration, painting or repair of any building, structure, or other works, that [if] the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, *said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100* of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. (emphasis added).

[65] Connell Construction Co. v. Plumbers and Steamfitters Local 100, 78 L.R.R.M. 3012 (N.D. Tex. 1971).

[66] 29 U.S.C. § 158(e) (1970):

> 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 unenforcible and void: *Provided, That nothing in this subsection shall apply to an agreement*

affirmed.[67]

The Supreme Court reversed. In a five to four decision and an opinion that established no clear rationale for the result reached, the Court held that Local 100's activities were not exempt from the Sherman Act. The Court acknowledged the statutory exemption accorded unions under *Hutcheson* by virtue of the interaction of the Clayton and Norris-LaGuardia Acts. *Pennington* was cited for the broad proposition that those statutes "do not exempt concerted action or agreements between unions and non-labor parties." This characterization of *Pennington* was tempered by the Court's citation to *Jewel Tea* for the further proposition that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."[68]

The nonstatutory exemption, said the Court, was grounded upon the recognition that a labor policy favoring the organization of employees to eliminate wage competition would ultimately affect price competition as well. However, this was not to say that a union had freedom to impose "direct restraints on competition among those who employ its members."[69] The Court observed that:

> In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages or working conditions but rather from more efficient operating

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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; Provided further. That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of the jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. (emphasis added).

[67] Connell Construction Co. v. Plumbers & Steamfitters Local 100, 483 F.2d 1154 (5th Cir. 1973).

[68] 421 U.S. at 622.

[69] *Id.*

> methods. 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.[70]

In addition, the "most favored nation" agreement between Local 100 and the multi-employer unit, although not directly attacked, was deemed relevant by the Court in determining the effect that the subcontracting agreement would have on the business market. By giving the members of the multi-employer unit a contractual right to insist that the union impose comparable terms on competitors, members of the unit were assured that no subsequent agreement would give other employers a competitive advantage. Further, the method of Local 100's organization had the effect of sheltering members of the unit from outside competition in that portion of the market covered by subcontracting agreements between general contractors and the union.[71]

The Court also found objectionable the apparent power of the union, pursuant to the subcontracting agreement, to control access to the mechanical subcontracting market:

> The agreements with general contractors did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that signed these agreements. Such control could result in significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goal of organizing workers and standardizing working conditions.[72]

Despite its disapproval, however, the Court was quick to recognize that there had been no indication that the union's goal was anything other than organizing as many subcontractors as possible. Although this goal was legal, and although the effect of any successful organizational campaign would reduce the competition from nonunion firms, the Court nevertheless found Local 100's *methods* subject to antitrust attack. That is, by agreement, the union had made non-union subcontractors ineligible to compete for available work.[73]

Finally, accompanied by citations to the opinion in *Pennington* and *Jewel Tea*, the Court said:

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[70] *Id.* at 623.
[71] *Id.* at 625.
[72] *Id.* at 624.
[73] *Id.* at 625.

> 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 . . . . 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.[74]

B. *The Section 8(e) Question*

The District Court had agreed with Local 100's contention that its subcontracting agreement was within the express terms of the construction industry proviso to § 8(e) of the NLRA. The Supreme Court, after giving that proviso a narrow construction, disagreed. The Court was concerned that a literal adherence to the proviso's language could provide unions with a powerful organizational tool that would violate the spirit, if not the express terms, of other provisions of the NLRA.[75] Rather than allow the construction industry proviso to be used to frustrate the organizational policy expressed by the other provisions, the Court said:

> [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships and . . . *possibly* to common-situs relationships on particular jobsites as well.[76]

What the Court termed a possibility apparently became a certainty in that the Court ultimately held that Local 100's subcontracting agreement, which was "outside the context of a collective-bargaining relationship *and not restricted to a particular jobsite*," failed to conform to the § 8(e) proviso.[77]

By so construing the § 8(e) proviso, the Court limited its application to agreements between contractors and unions entered into for the purpose of alleviating the conflicts created by the presence of union and nonunion workers on the same construction site.[78] Local

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[74] *Id.* at 625-26.

[75] *Id.* at 632-33. Specifically, § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970), prohibits "top-down" organizational campaigns whereby unions picket an employer to force recognition, regardless of the wishes of his employees. *See also* 29 U.S.C. § 158(b)(4)(B) (secondary tactics in organizational campaigns). *Cf.* 29 U.S.C. § 158(f) (allowing "prehire" agreements in the construction industry). *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634 (1967).

[76] 421 U.S. at 633 (emphasis added).

[77] *Id.* at 635 (emphasis added).

[78] *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 638-39 (1967); NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 692-93 (1951) (Douglas, J., dissenting); Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966); Essex County &

100's subcontracting agreement with Connell, however, was found to be unrelated to the objective of insulating its members against a nonunion presence. The agreement was not limited to jobsites on which union members were working; it allowed free subcontracting of work not performed by its members, without regard for the possibility that other work might be done by nonunion subcontractors. The union was not trying to organize a nonunion subcontractor on the site it picketed.[79] Finally, Local 100 had admitted that the sole purpose of the agreement was the organization of other mechanical subcontractors.[80]

Although the agreement constituted a violation of § 8(e), the Court refused to restrict Connell's remedies to those exclusively provided in the NLRA.[81] The Court found unpersuasive the argument of the four dissenting justices[82] that congressional rejection of legislative attempts to impose antitrust sanctions for union secondary activity indicated a congressional intent to make the NLRA remedies exclusive.[83] Instead, the majority found no indication that "Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA."[84]

IV. *Connell* AND PRIOR LAW

Although *Connell* gives literal effect to the combination with nonlabor exception of *Hutcheson*, the case fails to establish reliable criteria for defining the magnitude of market restraints that are sufficient to allow antitrust policy to override the regulatory scheme of the federal labor statutes. Further, given the fact that *Connell* does not preclude the possibility of antitrust liability for market restraints that coincidentally involve violations of the NLRA, it is clear that the Court is not giving the provisions of the NLRA and other federal labor provisions the kind of conclusive effect given the Norris-LaGuardia Act in *Hutcheson*.[85] Indeed, prior to *Connell*, at least one commentator had observed that despite Congress' apparent attempt to allow NLRA provisions to regulate certain labor conduct, which

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Vicinity District Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964).

[79] 421 U.S. at 631.

[80] *Id.*

[81] *See* 29 U.S.C. § 187(b) (1970) (providing action to recover actual damages for injury resulting from violation of secondary-boycott provisions).

[82] Justices Stewart, Douglas, Brennan, and Marshall.

[83] *See* 421 U.S. at 645-46.

[84] *Id.* at 634.

[85] *Cf.* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 710-13 (1965) (Goldberg, J., dissenting); Apex Hosiery Co. v. Leader, 310 U.S. 469, 504 n. 24 (1940).

had been found to violate the Sherman Act in early Supreme Court cases, violations of the NLRA provisions were not dependent on the benefits received by employer groups, and § 8(e) in particular failed to reach practices constituting direct restraints on the product market.[86] The point is crucial since *Connell* deemed the remedial provisions of the NLRA irrelevant for purposes of allowing or disallowing a labor-business combination an exemption from the antitrust laws.[87] Rather, in cases involving such combinations—including collective-bargaining agreements—the test appears to be whether sufficient labor interests are involved so as to outweigh the anticompetitive restraints which may flow from such a combination.[88] The test of exemption does not depend upon whether the parties to the combination conspired among themselves to eliminate competition but whether the market restraints are justified. In contrast, the allegation in *Pennington*, along with Justice Douglas' concurrence, suggested that the answer to the exemption question was determined by the predatory intent of the parties.[89] A claimed purpose of the agreement between the UMW and the large coal producers was the elimination of marginal producers through the union's imposition of contract terms which the smaller producers would be unable to meet. How-

[86] Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 702 (1965). Thus in regulating secondary activities by a union § 8(b)(4) and § 8(e) reach only those union-employer agreements the tactical objective of which reaches beyond the immediate employer-employee relationship. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644-45 (1967). *See* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1040 (1965). However, these regulatory provisions do not directly address themselves to questions of economic benefit to employer groups. *But see* Sovern, *Some Ruminations on Labor, The Antitrust Laws and Allen-Bradley*, 13 LAB. L.J. 957, 963 (1962).

In this regard, compare those applications of § 8(b)(4) to union attempts to obtain concessions for a specific group of employees from an employer with whom it has no bargaining relationship relating to those specific employees. *See, e.g.*, NLRB v. Local 825, Operating Engineers, 400 U.S. 297, 303-04 (1971); Local 814, Teamsters v. NLRB, 512 F.2d 564 (D.C. Cir. 1975); Carpet Layers Local 419 v. NLRB, 467 F.2d 392 (D.C. Cir. 1972); Retail Clerks Local 1288 v. NLRB, 390 F.2d 858 (D.C. Cir. 1968). *See* Plumbers and Steamfitters Local 638 v. NLRB, 89 LRRM 2769, 2786-89 (D.C. Cir. July 1, 1975) (Bazelon, J., concurring). *See* notes 93-101 and accompanying text, *infra*.

[87] Thus, in juxtaposing the questions of whether an antitrust exemption existed and whether § 8(e) had been violated, the *Connell* Court's order of reasoning was (1) no antitrust exemption exists in this case, and then (2) the union violated § 8(e). Arguably, judicial deference to the NLRA would have required that the order of the conclusions be reversed. *See also* Mr. Justice White's *Pennington* opinion, wherein he concludes that even agreements on mandatory bargaining subjects might not be exempt from the antitrust laws. United Mine Workers v. Pennington, 381 U.S. 657, 664-65 (1965).

[88] *See* notes 93-109 and accompanying text, *infra*.

[89] *See* Lewis v. Pennington, 257 F. Supp. 815, 829 (E.D. Tenn. 1966). *Cf.* Embry-Riddle Aeronautical University v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974).

ever, the "most favored nation" agreement between the Contractors Association and Local 100, which arguably might have been the subject of Connell's antitrust attack,[90] was only of secondary importance to the Court, which saw the clause as relevant in determining the anticompetitive effects of the subcontracting agreement between the union and Connell.[91]

More peculiar is the fact that, in denying Local 100 an antitrust exemption, the Court invoked the combination with nonlabor formula within a factual context markedly different from that of prior cases. Connell was attacking its *own* agreement with the union, an agreement from which Connell was obviously receiving nothing of economic benefit. However, since *Apex*, Supreme Court decisions justified the condemnation of union-employer combinations in part because of the fear that employers would use the union and its antitrust immunity to achieve anticompetitive ends which the employer acting alone could not legally effect.[92] This concern over the potential for employer abuse of the union's exemption was also manifested by Justice White's disapproval in *Pennington* of the extent to which the UMW had conditioned its independence upon the desires of the major coal producers.[93]

And yet the Court in *Connell* was willing to disallow an antitrust exemption absent any claim of conspiracy or other conduct indicating some nexus between the union's conduct and a corresponding employer benefit. Rather, the mere act of combining was sufficient to allow an inquiry into the anticompetitive aspects of the subcontracting agreement. But to the extent that the facts in *Connell* fail to support either an inference of benefit to the nonlabor party to the agreement or an indication that the union had somehow bargained

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[90] At the trial, Local 100's business agent testified that the effect of the clause was to preclude the union from entering an agreement with terms differing from those of the agreement between the union and the contractors' association. 421 U.S. at 623-24 n.1. At the very least such a contractual restriction would appear to subject the union to antitrust liability based on the *Pennington* Court's disapproval of union-employer agreements to impose pre-arranged standards on employer-employee units which were not represented during the original negotiations. United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965). *Pennington* would also render the clause suspect in that the union had arguably bargained away its ability to respond on a "unit by unit" basis to the needs of its members. *Id.*

[91] Indeed, the absence in Connell's complaint of any allegation of a conspiracy involving the members of the Contractors' Association and Local 100 moved Justice Douglas to especially dissent. 421 U.S. 616, 638 (Douglas, J., dissenting).

[92] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 501 (1940); Allen-Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 800-01 (1945); United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965). *Cf.* Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 623-24 (1975) ("most-favored-nation" clause).

[93] United Mine Workers v. Pennington, 381 U.S. 657, 668 (1965).

away its independence,[94] the existence of the Connell-Local 100 combination became a mere technicality to justify the Court's scrutiny of the union imposed subcontracting agreement. Thus, the Court in *Connell* arguably did little more than adopt a balancing test to determine the desirability of the union's conduct, a test which *United States v. Hutcheson* supposedly precludes.[95]

After a union-employer combination was established, the Court deferred to the federal policy favoring collective bargaining to determine whether an exemption would be allowed.[96] The Court indicated that, had Local 100 been interested in representing Connell's employees, the presence of a collective bargaining relationship might have allowed an exemption from the antitrust laws.[97] This qualifying "maybe" is troublesome, for both *Pennington* and *Allen-Bradley* made it clear that mere representational status is insufficient to protect a union from antitrust attack. *Connell*, therefore, indicates that the kind of representational relationship between a union and an employer will determine whether an exemption exists.

The opinions of Mr. Justice White and Mr. Justice Goldberg in *Pennington* and *Jewel Tea*, to which the *Connell* Court referred, offer some guidance on this point. In *Pennington*, Justice White observed that a union might conclude a wage agreement with a multi-employer unit without violating the antitrust laws. However,

> [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, regardless of the subject or the form and content of the agreement . . . . [T]here are limits to what a union or 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.[98]

The notion that a statutorily compelled union-employer agreement on mandatory subjects might simultaneously violate the Sherman Act disturbed Mr. Justice Goldberg, who would have allowed an exemption to flow naturally from bargaining activity concerning

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[94] For example, the only arguable restriction imposed by the subcontracting agreement on Local 100's conduct was an understanding that the union was not seeking to represent Connell's employees. *See* note 64, *supra*.

[95] *See* United States v. Hutcheson, 312 U.S. 219, 232 (1941).

[96] 421 U.S. at 625-26.

[97] *Id.*

[98] United Mine Workers v. Pennington, 381 U.S. 657, 664-65 (1965) (emphasis added).

mandatory subjects.[99] However, the opinions of the two justices appear reconcilable to a limited degree. Justice White in *Pennington* addressed himself to the impact of an agreement concerning wages, which by its terms would be applied not only to the immediate union-employer "unit" but others as well, even though the employers and their employees in the other "units" had not been parties to the original agreement. Justice White observed:

> [T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to settle these matters for the entire industry. On the contrary, *the duty to bargain unit by unit* leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant without being straitjacketed by some prior agreement with the favored employers.[100]

Justice White's suggestion that the individual interests of union members were undercut by the union's "extra unit" agreement with the large coal producers was similar to the approach taken by Justice Goldberg in extending an exemption to mandatory bargaining subjects. Justice Goldberg indicated that the "direct and overriding interest of unions"[101] in the subject of wages, hours, and working conditions prompted Congress to specifically recognize them as subjects of mandatory bargaining. As such, agreements involving nonmandatory subjects, in which unions had no such interest, were beyond the congressional bargaining mandate and thus not entitled to an antitrust exemption.[102]

The *Connell* Court cited the opinions of both justices in discussing the effect of a collective bargaining relationship in sheltering union-employer agreements from antitrust attack. Taken together, the White and Goldberg opinions indicate that collective agreements on mandatory subjects, negotiated by an employer (or multi-employer unit)[103] and a union representing an identifiable "unit"[104]

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[99] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 710 (1965) (Goldberg, J.).

[100] 381 U.S. at 666 (emphasis added).

[101] *Id.* at 732-33 (emphasis added).

[102] Further, a union commits an unfair labor practice when it insists on bargaining over nonmandatory subjects. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

[103] *See* 381 U.S. at 664, 665.

[104] "Unit" as it appears in quotes refers to an individual labor-management bargaining group and is to be distinguished from the technical meaning of that term as defined in the

of employees, are exempt from the Sherman Act to the extent that the terms of the agreement apply only to the negotiating employers and the employees making up the identifiable "unit." This result is suggested in that, while Justice White recognized the interests of union *members* in unit by unit bargaining and mandatory bargaining subjects, Justice Goldberg focused on the interests of the *union* in mandatory subjects. Presumably, the interests of both unions and union members would be satisfied within the context of an individual bargaining unit comprised of the employers who are party to the agreement and their employees, whose interests will be immediately affected by the terms of an agreement on mandatory subjects. Thus since Local 100 was not seeking to represent Connell's employees, and since the subcontracting agreement incidentally constituted a direct restraint on competition, no antitrust exemption was available.

This analysis of the antitrust exemption also seems consistent with the narrow reading which the *Connell* Court gave to the construction industry proviso of § 8(e) and the Court's holding that remedies for a violation of that section were not limited to those provided by the NLRA.[105] Just as mandatory subjects of bargaining protect employee interests in general, the construction industry proviso was deemed to protect the interests of unionized construction workers in not having to work alongside nonunion workers at the same construction site. However, the subcontracting agreement in *Connell* failed to recognize these interests and, further, was organizational in its purpose. Thus not only did Local 100 fail to represent employee jobsite interests as recognized by the § 8(e) proviso; the union was also unable to protect any organizational interests manifested by the NLRA since that Act is neutral with respect to the desirability of unionization.[106]

NLRA, 29 U.S.C. § 159(a), (b) (1970).

[105] *See* notes 81-84 and accompanying text, *supra*.

[106] Thus § 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1970) (emphasis added).

In contrast, the garment industry proviso to § 8(e) 29 U.S.C. § 158(e) (1970) has been interpreted as manifesting the intent of Congress to allow garment workers' unions the use of subcontracting agreements as organizational weapons. Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 633 n.13 (1975); Danielson v. ILGWU Joint Board, 494 F.2d 1230 (2d Cir. 1974).

This balancing of employee interests against competitive restraints appears to explain the paradox of the Court's refusal in *Connell* to grant an antitrust exemption despite its recognition that a legal union organizational campaign would reduce competition as surely as one whose methods were illegal. In *Jewel Tea*, Justice White looked to the interests of union members in determining that the union-employer agreement limiting the marketing hours of self-service butcher shops was entitled to an exemption. His rationale for the exemption was that the marketing hours provision was essential to preserve union butchers' hours of work and to prevent butchers' jobs from being performed by unskilled labor.[107] As such, the marketing hours provision was "so intimately related to wages, hours, and working conditions" that it fell within the protection of the national labor policy and therefore was exempt from the Sherman Act.[108] This conclusion resulted from a consideration of the "relative impact" of the agreement on the product market and the "interests of union members."[109] Similarly, the denial of an exemption in *Connell* appears to have resulted from the Court's conclusion that the legitimate interests of union members were insufficiently represented by the subcontracting agreement in order to justify the anticompetitive restraints placed on nonunion subcontractors.[110]

The lack of justification compelled the Court to conclude that the restriction on subcontracting was directed not towards the removal of labor standards from competition but towards the use of labor standards in order to regulate competitive opportunities in the subcontracting market.[111] Similarly, *Apex Hosiery Co. v. Leader* recognized that the use of labor standards by a union-employer combination for the sole purpose of eliminating price competition was not exempt from antitrust attack.[112] But the difficulty with this justification approach based on a consideration of the interests of union members (as formulated by Justice White in *Pennington* and *Jewel Tea*) is that, in balancing those interests against the resulting anticompetitive restraints, the Court espouses the very objectives test specifically rejected in *Hutcheson*.[113]

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[107] 381 U.S. at 682-83.

[108] *Id.* at 689-90.

[109] *Id.* at 690 n. 5, 692-93.

[110] 421 U.S. at 625.

[111] *Cf.* Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317, 322 (1966).

[112] 310 U.S. 469, 501, 506, 511-12 (1940).

[113] *See* United States v. Hutcheson, 312 U.S. 219, 232 (1941). *Cf.* text accompanying notes 92-95, *supra*.

As such, *Connell's* holding that violations of § 8(e) may properly give rise to an antitrust action is most disturbing. It allows plaintiffs damaged by arguable § 8(e) violations to have the federal courts first balance competitive restraints against labor interests to determine whether the union-employer combination is entitled to an exemption and *then* to determine whether § 8(e) was violated.[114] This aspect of the *Connell* holding, coupled with the attraction of an award of treble-damages, could easily presage an influx to federal courts of cases which would otherwise be within the exclusive province of the National Labor Relations Board.

With respect to the construction industry itself, *Connell* gives little indication as to how unions may effectively prevent the encroachment of nonunion labor without sacrificing their exemption from the antitrust laws. Based on the Court's interpretation of the § 8(e) proviso, nonunion labor (and probably rival unions, as well) may be contractually excluded from particular jobsites if the terms of the agreement demonstrate an attempt to avoid jobsite frictions, based on the community of interests standard.[115] But beyond the particular jobsite situation, the standards become unclear. For example, within a particular locale, a union may often seek short form agreements from contractors' associations requiring that the association members subcontract work only to those firms which are signatories to a collective-bargaining agreement with the unions involved. Even though such agreements are not necessarily directed towards organizational ends, as was the case in *Connell*, they nevertheless make nonunion firms ineligible to compete for available work. Furthermore, such agreements are not directed to any particular group of union workers, and would thus appear to violate the *Pennington* duty to bargain unit by unit. The safest route for unions in the wake of *Connell* would be to enter into union standards agreements, by which contractors agree that they will subcontract only to firms whose employees enjoy wages, hours, and working conditions comparable to those of area union workers. Presumably a union and employer may still remove these labor standards from competition without risking antitrust sanctions.[116]

V. CONCLUSION

Connell's condemnation of combinations of labor and nonlabor

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[114] *See* note 86, *supra.*

[115] *See* 421 U.S. at 628-31.

[116] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940).

groups that restrain business market competition echoes the Court's opinions in *Hutcheson, Allen-Bradley*, and *Pennington*. Unfortunately, the opinion offers no clear standard for distinguishing illegal restraints from those that would occur as a result of legitimate union activity. Further, the Court's allowance of an antitrust action for a violation of § 8(e) would seem to frustrate the centralized regulation of labor relations by the National Labor Relations Board. And, while the *Hutcheson* standard is presumably still valid for cases involving unilateral union action, the opinion in *Connell* would nevertheless require federal courts to balance labor interests against competitive restraints in determining whether to allow a union-employer combination an exemption from the Sherman Act.

Further judicial clarification of *Connell* is essential. But a more desirable resolution of *Connell's* ambiguities would be congressional action to clearly delineate the extent to which antitrust law may invade the area of collective bargaining. Such legislative action has been long overdue, for the history of Supreme Court attempts to reconcile the broad proscriptions of the antitrust laws with the regulatory scheme of the labor statutes has demonstrated that the courts are ill-equipped to perform such a task.[117]

C. Douglas Lovett

[117] *See generally*, Winter, *supra* note 4.