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Connell Construction Company v. Plumbers Local 100: New Limits on Labor's Antitrust Immunity?

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CONNELL CONSTRUCTION COMPANY V. PLUMBERS LOCAL 100: NEW LIMITS ON LABOR'S ANTITRUST IMMUNITY?

Local 100 of the Plumbers and Steamfitters Union was a party to a multi-employer collective bargaining agreement with approximately 75 plumbing and mechanical subcontractors in the Dallas area.[1] The agreement contained a "most favored nation" clause which in effect guaranteed the same contract terms to all subcontractors who were parties to the agreement.[2] As part of its campaign to organize other subcontractors, the union demanded that Connell Construction Company, a general contractor (hereafter referred to as Connell), agree to subcontract all plumbing and mechanical work in its various construction projects to firms that had signed collective bargaining agreements with the union.[3] Connell was neither a party to any collective bargaining agreement with the union nor an employer of any union members, and the agreement in question expressly disclaimed any intent on the part of the union to seek to organize Connell's employees.[4] When Connell initially refused to sign the agreement, the union picketed one of its major construction sites. After the picketing stopped work at that

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1. Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 619 (1975).

2. *Id.*

3. The agreement provided:

> WHEREAS, the contractor and the union are engaged in the construction industry, and
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> 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;
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> 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
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> 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;
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> 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 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.

Id. at 619–20. At the time the union was attempting to secure this agreement with Connell, it was conducting similar campaigns with other general contractors in the Dallas area. *Id.* at 621.

4. *Id.* at 619. "[T]he contractor does not grant, nor does the union seek, recognition as the collective bargaining representative . . . ." *Id.* at 620, *quoting* the union-Connell subcontracting agreement.

job site, Connell signed the agreement under protest and sought to have it invalidated as a violation of sections 1 and 2 of the Sherman Act, which prohibit agreements that restrain trade or tend to create a monopoly.[5] The basis of the action was Connell's contention that the agreement restricted its business operations.[6]

The district court upheld the agreement as valid under section 8(e) of the amended National Labor Relations Act (hereafter NLRA).[7] That proviso specifically exempts subcontracting agreements in the construction industry from the Act's general prohibition of agreements by employers to cease doing business with other employers.[8] The court concluded that since the agreement was valid under the federal labor statutes, it was not subject to a challenge under the federal antitrust

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5. Section 1 provides: "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 . . . ." 15 U.S.C. § 1 (1970).

Section 2 provides: "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 . . . ." 15 U.S.C. § 2 (1970).

When the union initiated the picketing, Connell filed its initial suit in state court for an injunction under the state antitrust laws. When the union successfully removed the case to the federal district court, Connell signed the agreement and amended the complaint to frame it in terms of the Sherman Act. 421 U.S. at 620–21.

6. Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1165 (5th Cir. 1973), *rev'd in part*, 421 U.S. 616 (1975).

7. 421 U.S. at 621.

8. 29 U.S.C. § 158(e) (1970), which provides:

> 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 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) 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 a 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.

See text accompanying notes 20–27 *infra*.

laws.[9] The Fifth Circuit affirmed,[10] but on the ground that the union's activity was within the scope of a labor union exemption from the antitrust laws defined in earlier Supreme Court rulings.[11] In a 5–to–4 decision the Supreme Court, in *Connell Construction Co. v. Plumbers Local 100*,[12] reversed on the issue of federal antitrust immunity and found that, in addition to being outside the construction industry proviso of section 8(e), the union was subject to liability for possible violations of the federal antitrust laws.[13]

The agreement at issue was one form of what is commonly termed a "hot cargo" contract. The term was originally applied to an agreement by which employees could refuse to work with or handle goods produced by "unfair" employers, those with whom the union had a grievance.[14] Eventually a hot cargo contract came to refer to any agreement between an employer and a union under which the employer agreed to avoid doing business with any other person. Prior to the 1959 amendments to the NLRA,[15] such clauses were often incorporated into collective bargaining agreements—labor unions insisted on their inclusion because they provided a loophole in the ban on secondary boycotts contained in section 8(b)(4).[16] The belief that hot cargo clauses

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9. Connell Constr. Co. v. Plumbers Local 100, 78 L.R.R.M. 3012, 3014 (N.D. Tex. 1971), *aff'd*, 483 F.2d 1154 (5th Cir. 1973), *rev'd in part*, 421 U.S. 616 (1975). The district court also ruled that the agreement did not violate the state antitrust laws. *Id.* On appeal, this ruling was affirmed by the Fifth Circuit. Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1175 (5th Cir. 1973). The Supreme Court affirmed this part of the decision under the federal preemption doctrine stated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 635 (1975).

10. Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154 (5th Cir. 1973), *rev'd in part*, 421 U.S. 616 (1975).

11. The Fifth Circuit, citing United Mine Workers v. Pennington, 381 U.S. 657 (1965), and Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965), determined that absent a conspiracy with nonlabor groups to injure the business of other nonlabor groups, conduct involving legitimate union interests was entitled to exemption from the antitrust laws. 483 F.2d at 1162–65. *See* text accompanying notes 54–56 *infra*.

12. 421 U.S. 616 (1975).

13. 421 U.S. at 635. The Court remanded for a determination of whether any violation of the Sherman Act had, in fact, occurred. *Id.* at 637.

14. NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23, 31 (9th Cir. 1964). *See generally* 3 CCH LAB. L. REP. ¶ 5222 (1972).

15. Act of Sept. 14, 1959, Pub. L. No. 86–257, 73 Stat. 519.

16. Section 8(b)(4) provided in relevant part that it was unlawful for a union

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of

provided a loophole in section 8(b)(4) stemmed mainly from the position adopted initially by the National Labor Relations Board that section 8(b)(4) contained no prohibition against voluntarily entering and honoring such an agreement.[17] Thus, the same type of activity made illegal by section 8(b)(4) was legal if provided for by contractual arrangement. The legality of hot cargo contracts became a source of conflict among the circuit courts and the Board as they became more widespread.[18] The conflict culminated in a 1958 Supreme Court decision that although a hot cargo clause was not a valid defense to a section 8(b)(4) action against a union for illegal secondary activity, the clause itself was not illegal.[19] Congress, apparently believing the Court's limitations insufficient to close the loopholes in secondary boycott legislation, enacted section 8(e) just 1 year later to totally outlaw hot cargo agreements.[20] In addition, section 8(b)(4) was amended to make

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any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 158(b)(4)(i) (1970)).

17. Teamsters Local 294, 87 N.L.R.B. 972 (1949), *aff'd sub nom.* Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); Chauffeurs Local 135, 105 N.L.R.B. 740 (1953); Burstein, *A Decisional History of the "Hot Cargo" Clause*, 26 I.C.C. PRAC. J. 292 (1958); Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724 (1960).

18. *See, e.g.*, Teamsters Local 294, 87 N.L.R.B. 972 (1949), *aff'd sub nom.* Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952) ("hot cargo" clauses valid and operate as a defense to a § 8(b)(4) charge); Truck Drivers Local 728, 119 N.L.R.B. 399 (1957) *modified*, 265 F.2d 439 (5th Cir. 1959), *cert. denied*, 361 U.S. 917 (1959) ("hot cargo" contracts involving common carriers repugnant to the policy of the act and void at their inception); General Drivers Local 886, 115 N.L.R.B. 800 (1956) *modified*, 247 F.2d 71 (D.C. Cir. 1957), *rev'd sub nom.* Carpenters Local 1976 v. NLRB, 357 U.S. 93 (1958) (the Act does not forbid execution of "hot cargo" clauses but does preclude their enforcement by means of concerted activity prohibited in § 8(b)(4)); Teamsters Local 554, 110 N.L.R.B. 1769 (1954) ("hot cargo" clauses invalid as contrary to public policy).

One author breaks the varying viewpoints into three categories:

> (1) [T]he liberal approach, and the one first adopted by the NLRB, that a "hot-cargo" contract in a collective bargaining agreement removed from the statutory prohibition union activity, which, absent the contract, would clearly be a violation of Section 8(b)(4) of the act, (2) the strict view, that a "hot-cargo" clause was illegal per se, the mere execution of such a clause constituting an unfair labor practice, and (3) the compromise position, and the one finally approved by the Supreme Court in the *Sand Door* case, that the clause itself was valid, but that it could not serve to immunize from the reach of Section 8(b)(4) a strike, or inducement of employees to engage in a work stoppage, for an object proscribed by the law.

Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724, 740 (1960) (footnotes omitted).

19. Carpenters Local 1976 v. NLRB, 357 U.S. 93 (1958) (commonly known as the *Sand Door* case).

20. 29 U.S.C. § 158(e) (1970). The full text of § 158(e) is reproduced in note 8 *supra*. The *Sand Door* decision failed to consider pressures that could be exerted upon an employer to voluntarily enforce such clauses contained in collective bargaining agreements.

the use of coercive methods to obtain such an agreement with any employer an unfair labor practice.[21]

However, Congress specifically exempted from section 8(e) union-employer agreements in the garment industry, and union-employer agreements relating to the contracting or subcontracting of work to be done on the jobsite in the construction industry.[22] The inclusion of

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For example, the Taft-Hartley Act gave the union legal recourse for the employer's breach of the collective bargaining agreement. 29 U.S.C. § 185(a) (1970). Furthermore, employers in most cases honor the clause rather than face a new round of negotiations with the unions, negotiations which would be necessary if the contract became void as a result of the employer's breach. *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634–35 (1967); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270–72 (1959); Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1178 (1964); Comment, *supra* note 18, at 741.

In addition, it appeared likely that employers would be under pressure from unions to include hot cargo clauses in contracts. These possibilities, coupled with concern over the ineffectiveness of secondary boycott legislation, probably pushed Congress to enact the broad prohibition against hot cargo agreements. "The only way of dealing with such pressures is to nip them in the bud by prohibiting the agreements." Cox, *supra* at 272.

Initially, union leaders were concerned about the potentially broad scope of § 8(e) as it applied to subcontracting clauses. Read literally, the provision seemed to prohibit all clauses relating to or limiting subcontracting "because, in some measure, each subcontracting clause requires the general employer to promise to cease or refrain from doing business with subcontractors." Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1179 (1964). Early cases generally determined the relationship of § 8(e) to subcontracting clauses on the basis of whether the clause had a primary or secondary effect. *See, e.g.*, NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23, 28 (9th Cir. 1964); Meat & Highway Drivers Local 710 v. NLRB, 335 F.2d 709, 713–16 (D.C. Cir. 1964); Truck Drivers Local 413 v. NLRB, 334 F.2d 539, 548 (D.C. Cir. 1964) *cert. denied*, 379 U.S. 916 (1964); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964). It appears, then, that § 8(e) was not the "death knell for the subcontracting clause." Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1179 & n.16 (1964). The construction industry received special treatment in § 8(e); see text accompanying notes 22–25 *infra*.

21. Section 8(b)(4)(ii)(A) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
> (4) . . . (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 or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section [.]

29 U.S.C. § 158(b)(4)(ii)(A) (1970).

22. 29 U.S.C. § 158(e) (1970). The Board initially took the position that § 158(b)(4)(ii)(A) proscribed picketing or other secondary pressure to secure a "hot cargo" agreement even if the clause itself was valid under the construction industry proviso to § 158(e). Building & Constr. Trades Council, 139 N.L.R.B. 236, 239 (1962); Construction Local 383, 137 N.L.R.B. 1650, 1651–52 (1962). Following reversals on this position by the Ninth Circuit, Construction Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963), the District of Columbia Circuit, Painters Local 48 v. NLRB, 328 F.2d 534 (D.C. Cir. 1964), and the Third Circuit, Council of Carpenters v. NLRB, 332 F.2d 636 (3d Cir. 1964), the Board

the construction industry proviso was a formal recognition of the unique relationship between contractors and subcontractors on a single jobsite and the difficulty of distinguishing between primary and secondary employers.[23] Prohibiting the subcontracting agreements in the construction industry under section 8(e) would have done little to further the purpose of secondary boycott legislation, that is, of protecting neutral secondary employers from involvement in disputes between unions and primary employers.[24] Moreover, permitting such agreements promoted labor peace in the construction industry by helping to avoid the inevitable tensions resulting from the employment of union and nonunion labor on the same construction site.[25]

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formally adopted the position that economic force may be used to secure agreements valid under the construction proviso to § 158(e) notwithstanding § 158(b)(4), because § 158(b)(4) incorporates the § 158(e) proviso by reference. Building & Constr. Trades Council, 148 N.L.R.B. 854, 856 (1964). *See also,* Grove, *Obtaining and Enforcing Hot-Cargo Contracts in the Construction Industry,* 51 A.B.A.J. 732, 734 (1965); Brinker, *Hot Cargo Cases in the Construction Industry Since 1958,* 22 LAB. L.J. 690, 698–99 (1971); Batlett, *The Hot-Cargo Clause,* 12 ALBERTA L. REV. 378, 392-93 (1974); Note, *The Effect of the 1959 Amendments to the National Labor Relations Act,* 44 ORE. L. REV. 301, 314–15 (1965).

23. The construction industry proviso to § 158(e) was at least in part an effort to offset the Supreme Court decision in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). In *Denver,* the Court asserted that general contractors and subcontractors on a common jobsite were secondary employers as to each other and thus action taken against one employer that caused a work stoppage on the jobsite could be deemed unlawful secondary activity as to the other employers on the jobsite. *Id.* at 689–90. Congress recognized that the integrated nature of the construction industry made this reasoning inapplicable—employers on a jobsite were extremely unlikely to be disinterested neutral employers with respect to labor disputes between a union and other employers on the site. *See* 105 CONG. REC. 17881 (1959) (remarks by Senator Morse); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 633–39 (1967); Brinker, *supra* note 22, at 691.

24. "The overriding purpose of these secondary boycott provisions is to protect 'unoffending employers and others from pressures in controversies not their own.' " NLRB v. Local 3, IBEW, 477 F.2d 260, 264 (2d Cir. 1973). *See also* NLRB v. Local 825, Operating Engineers, 400 U.S. 297 (1971); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951); Carpet Layers Local 419 v. NLRB, 467 F.2d 392, 397 (D.C. Cir. 1972); NLRB v. Local 769, IBEW, 405 F.2d 159, 163 (9th Cir. 1968).

25. As stated by Justice Douglas:

> The employment of union and nonunion men on the same job is a basic protest in trade union history.
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> . . . .
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> . . . The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed.

NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692–93 (1951) (Douglas, J., dissenting). *See also* Acco Constr. Equipment, Inc. v. NLRB, 511 F.2d 848, 851 (9th Cir. 1975); Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966); Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964); Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott,* 45 CORN. L.Q. 724, 751–52 (1960).

The *Connell* Court suggested that these policy considerations might validate some subcontracting agreements if they were entered into outside the context of a collective bargaining relationship.[26] But the agreement in this case, entered into outside the context of a collective bargaining relationship, was unrelated to any of the policies and, therefore, was not entitled to an exemption from section 8(e).[27] Of particular significance to the Court was the union's admission that the picketing was conducted for the sole purpose of organizing subcontractors; sections 8(b)(4)(B) and 8(b)(7)[28] prohibit the use of most secondary tactics and primary picketing for organizational purposes.

The Court found that permitting subcontracting agreements under these circumstances would do nothing to further the policies behind the construction industry proviso to section 8(e) and would create a dangerous loophole in restrictions on organizing tactics established in other sections of the NLRA.[29]

Because of the union's unfair labor practice, then, it was clear that

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26. 421 U.S. at 633. The Court indicates that any agreement relating to the subcontracting of work in the construction industry in the context of a collective bargaining agreement will be valid under § 158(e), but that without that relationship the agreement must be justifiable in terms of the policy behind § 158(e). It is clear from earlier Board decisions that this distinction has not been drawn in the past. Building & Constr. Trades Council (B & J Investment Co.), 214 N.L.R.B. 562, 87 L.R.R.M. 1424 (1974); Building & Constr. Trades Council, 148 N.L.R.B. 854, 857 (1964). The union in *Connell* relied on the *B & J Investment* case, *supra*, in which a general contractor who was not signatory to any collective bargaining agreement was pressured to sign an agreement to cease doing business with nonunion subcontractors. The Board upheld the agreement as valid. The *Connell* Court rejected the argument, noting that it was not ascertainable whether the Board had considered the absence of a collective bargaining relationship. 421 U.S. at 631–32 n.10. It seems clear that the *Connell* decision will cause subcontracting agreements in the construction industry to be subjected to a closer examination for validity under § 158(e) if they are entered into outside of a collective bargaining relationship.

27. The Court noted that the union activity did not amount to a labor dispute with one employer at a construction site. This eliminated the policy justification for the application of § 158(e) that all employers on the site were involved in a labor dispute with the union. *See* note 20 *supra*.

28. 29 U.S.C. §§ 158(b)(4)(ii)(B), (7) (1970). A § 158(b)(7) violation takes place when the picketing is designed to pressure the employer into recognizing the union or to pressure employees into joining the union. It is not necessary that this be the primary object; it must only be one of the objects. NLRB v. Council of Carpenters, 387 F.2d 170, 173 (2d Cir. 1967); NLRB v. Teamsters Local 182, 314 F.2d 53, 58–59 (2d Cir. 1963); Local 840, AFL-CIO, 135 N.L.R.B. 1153, 1167 n.28 (1962).

29. 421 U.S. at 631–32. On December 22, 1975, President Ford announced his intention to veto H.R. 5900, known as the common situs picketing bill. House Bill 5900 had been introduced to amend § 158(b)(4) and permit picketing at the common site of a construction project, thus negating the effect of the *Denver* decision. The bill would have abolished any distinction between primary and secondary employers among the general contractors and subcontractors at a single jobsite. H.R. REP. No. 697, 94th Cong., 1st Sess. 13 (1975).

Connell had a claim against the union under federal labor laws.[30] The Court went beyond an unfair labor practice theory of liability, however, and held that Connell was entitled to bring an action under the Sherman Act.[31] By doing so, the Court raised the long-standing conflict between labor policies encouraging the organization of labor and collective bargaining and antitrust policies promoting a competitive atmosphere in business markets. The conflict is inevitable, for as one author notes, "[t]he factor of restraint is inherent in collective bargaining upon both the employer and union; the elimination of restraint is the primary task of the antitrust laws."[32]

The Sherman Act, passed in the early days of the labor movement, immediately became a primary weapon for opponents of organized labor.[33] Congress attempted to alleviate the wide-spread prosecution of labor unions under the Sherman Act by establishing in the Clayton and Norris-LaGuardia Acts[34] antitrust immunity for many labor union

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30. Section 303 of the Labor Management Relations Act (Taft-Hartley), as amended by the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), provides that any one injured by reason of the commission of an unfair labor practice may sue in any federal district court for compensatory damages. 29 U.S.C. § 187 (1970).

31. 421 U.S. at 635. Relevant parts of the Sherman Act are reproduced at note 5 *supra*.

32. Willis, *In Defense of the Court: Accommodation of Conflicting National Policies, Labor and the Antitrust Laws*, 22 MERCER L. REV. 561 (1971). *See also* Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965).

33. Numerous authors have discussed the widespread antitrust prosecution of labor unions that took place before 1941. *See, e.g.*, Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963); Meltzer, *supra* note 32, at 661–70; Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966).

34. Section 6 of the Clayton Act provides:

> 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 . . . organizations . . . 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.

15 U.S.C. § 17 (1970). Under § 20 of the Act, certain activities by labor unions, including striking, picketing, boycotting and peacefully persuading others to strike, picket or boycott, will not be "considered or held to be violations of any law of the United States." 29 U.S.C. § 52 (1970).

The above sections of the Clayton Act, passed in 1921, were strictly construed by the Supreme Court in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The Court, seizing upon the portion of § 6 which frees labor organizations from the antitrust laws for lawfully carrying out their legitimate objects, held that the exemption would be allowed only where the methods and objectives of the union were deemed to be lawful. *Id.* at 469–74. This amounted to an independent judicial determination of the social desirability of particular union goals and effectively limited the force of §§ 6 and 20. In 1932, the Norris-LaGuardia Act was passed to limit the power of federal courts to issue injunctions

activities. The actual scope of this exemption for labor has been a matter of controversy since its origin; the *Connell* decision represents another chapter in the efforts of the courts to define that scope.

The broad scope of the Clayton and Norris-LaGuardia exemption first received formal recognition by the Supreme Court in *United States v. Hutcheson.*[35] Writing for the majority, Justice Frankfurter stated: "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 unselfishness of the end of which the particular union activities are the means."[36] The *Hutcheson* requirements for inclusion in the Clayton Act exemption—that the union act alone and only in its self-interest—received further emphasis in *Allen Bradley Co. v. Local 3 IBEW.*[37] That case held that even where the labor union acted to increase wages and job security, it violated the antitrust laws by combining with employees and manufacturers to restrain trade.[38]

The next major attempt to define the antitrust exemption for labor activity came in two landmark cases decided on the same day in 1965, *United Mine Workers v. Pennington*[39] and *Amalgamated Meat Cutters v. Jewel Tea Co.*[40]

In *Pennington,* Justice White's majority opinion noted that the union had conspired with one group of employers to impose fixed wage requirements on all employers in the area, including some that were not parties to the agreement. In addition, the union did not consider the employer's ability to pay the fixed wage. On this basis, the Court

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in cases arising out of labor disputes and to give a broader meaning to the term "labor dispute." 29 U.S.C. §§ 101–15 (1970). The Norris-LaGuardia Act effectively restored the intended power of §§ 6 and 20 of the Clayton Act. United States v. Hutcheson, 312 U.S. 219, 233–34 (1941); Siegel, Connolly & Walker, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?,* 13 DUQ. L. REV. 411, 437–39 (1975).

35. 312 U.S. 219 (1941).

36. *Id.* at 232.

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

38. *Id.* at 810. The Court noted that whether specific conduct on the part of a labor union was exempt from the antitrust laws depended upon whether the union acted alone or in concert with business groups. *Id.*

39. 381 U.S. 657 (1965). In the 20 years between the *Allen Bradley* decision and the *Pennington-Jewel Tea* decisions, the Supreme Court made no other rulings. Frequent attempts in Congress to pass legislation in the area failed. *See* Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea,* 66 COLUM. L. REV. 742, 746 & n.34 (1966). For an extensive analysis of the *Pennington-Jewel Tea* opinions, see Di Cola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering,* 33 U. PITT. L. REV. 705 (1972); Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea,* 46 BOSTON L. REV. 317 (1966).

40. 381 U.S. 676 (1965).

denied the union any exemption from the antitrust laws.[41] Justice White found the effect of the conspiracy to be clearly contrary to the policies behind the antitrust laws, and the resulting agreement to have no redeeming support from national labor policy.[42] The majority opinion in *Jewel Tea*, also written by Justice White, discussed more clearly the need implicitly suggested in *Pennington* for a balance between labor and antitrust policies.[43] After *Pennington* it was clear that the national labor policies were not strong enough to justify the restraint on trade caused by a conspiracy between a union and nonlabor groups to injure the business of other nonlabor groups. In *Jewel Tea*, however, no conspiracy was involved.[44] Justice White found that absent a *Pennington* conspiracy, the national labor policy will outweigh the national antitrust policy if the activity at issue is "intimately related" to the employees' wages, hours, and working conditions.[45]

Justice Douglas's concurring opinion in *Pennington* and dissenting opinion in *Jewel Tea*, both joined by Justices Clark and Black, relied heavily on *Allen Bradley* to argue that the presence of a conspiracy with a nonlabor group to restrict competition should be the determining factor.[46] Justice Goldberg, with Justices Harlan and Stewart, dissented in *Pennington* and concurred in *Jewel Tea*, asserting that "the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws."[47] In a sense, Justice Goldberg was arguing for a balancing test between labor and antitrust policies. But he rejected Justice White's "intimately related" standard as representing a "narrow, confining

41. *Id.* at 660–61.

42. *Id.* at 667–68. Justice White argued that the union surrendered its freedom in present or prospective collective bargaining negotiations with other employers by entering into such an agreement with one group of employers. This thwarted the whole purpose behind the national labor policy.

43. 381 U.S. 676, 689 (1965).

44. *Id.* at 688. The union was picketing to secure clauses which restricted the marketing hours of stores in collective bargaining agreements with several employers.

45. *Id.* at 689–90. But Justice White footnoted the "intimately related" language by saying that the "crucial determinant" was "not the form of the agreement . . . but its relative impact on the product market and the interests of union members." *Id.* at 690 n.5. This added ambiguity to the "intimately related" standard because it seemed to indicate that a significant amount of restraint on the market would in some instances warrant disregard of the union members' immediate and direct concerns. *See* Di Cola, *supra* note 39, at 721–22.

46. 381 U.S. 657, 672–74 (1965); 381 U.S. 676, 735–38 (1965).

47. 381 U.S. 676, 710 (1965).

view of what labor unions have a legitimate interest in preserving . . . ."[48]

Thus, neither *Pennington* nor *Jewel Tea* presented a clear majority view as to the scope and application of the labor exemption. The lower courts which have addressed the issue since those decisions have understandably arrived at different interpretations. The Seventh Circuit, extending the exemption to mandatory subjects of bargaining, held that activity undertaken to secure a subcontracting agreement was exempt from the antitrust laws under Justice Goldberg's standard.[49] In a case in which the union had pressured the employer into agreeing to reserve certain work for union members, the Second Circuit stated a two-part test for determining the balance between labor and antitrust policies: "(1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers."[50] This test appears to restate Justice White's viewpoint in *Jewel Tea,* but the Second Circuit's "proper subject of union concern" standard is arguably somewhat broader than Justice White's "intimately related to wages, hours, and working conditions" standard. The Southern District Court of New York adopted the Second Circuit's test and noted that where the union's purpose was a legitimate union concern and not designed to eliminate an employer's competition, the fact that its actions constituted an unfair labor practice did not weaken its labor exemption.[51]

Prior to its decision in *Connell,* the Fifth Circuit, in *Cedar Crest Hats, Inc. v. United Hatters,*[52] had taken a view similar to that of the Second Circuit. The court held in *Cedar Crest* that in the absence of a conspiracy with nonunion groups to create a business monopoly, a union acting solely in its self-interest does not violate the antitrust laws.[53] Following this reasoning at the appellate level in *Connell,*[54] the

48. *Id.* at 727.

49. Suburban Tile Center, Inc. v. Rockford Bldg. & Constr. Trades Council, 354 F.2d 1, 3 (7th Cir. 1965).

50. Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970). "The Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern. Union activity having as its objective the preservation of jobs for union members is not violative of the antitrust laws." *Id.* (Citations omitted).

51. National Dairy Prods. Corp. v. Milk Drivers Local 680, 308 F. Supp. 982, 986–87 (S.D.N.Y. 1970).

52. 362 F.2d 322 (5th Cir. 1966).

53. *Id.* at 326.

54. 483 F.2d at 1166–68. The Court found that the evidence did not support the existence of a *Pennington*-type conspiracy and that therefore the *Jewel Tea* criteria were determinative of the case. "We are thus left with a situation quite similar to *Jewel Tea* in

Fifth Circuit determined that since there was no allegation of any conspiracy between the union and a nonlabor group and since the agreement related to the legitimate union interest of organizing subcontractors, the exemption was available to Local 100.[55] The court concluded that it was immaterial whether the activity of the union constituted an unfair labor practice.[56]

In a case decided after *Connell*,[57] the Fifth Circuit took the lenient position that union action remained outside of the antitrust laws even if the purpose was to injure or eliminate some employers' business—so long as the union did not combine with an employer or employer group to effectuate that purpose. In *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, the court feared that unless the presence of a conspiracy was the lower limit of the test for the labor exemption in cases involving union-employer agreements, employers would begin antitrust suits as a "routine response to union contract demands . . . ."[58] The Ninth Circuit, determining whether the labor union exemption extended to farmworkers' unions,[59] expressed the same view. In that case, the union was charged with boycotting the grapes of producers who did not recognize the union. Producers who recognized the union were not boycotted. Plaintiffs alleged that this constituted a combination between those employers and the union, resulting in an unfair advantage over producers who failed to recognize the union. In holding that this was not the type of combination condemned by *Pennington*,

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that, once the conspiracy to monopolize drops out, the only remaining claim of plaintiff is that the agreement interferes with his right to conduct his business as he wishes and that the contract requires him to forego certain methods of competition." *Id.* at 1166.

55. *Id.*

56. The Court noted that if the activity was legal under the labor laws, the union would not be subject to liability for an antitrust violation. If the union did commit an unfair labor practice, there were remedies available under the labor laws, "[b]ut no where has Congress ever said that a violation of the labor laws should give rise to treble antitrust damages, possible criminal punishments, and attorney's fees for plaintiffs." *Id.* at 1169–70.

57. Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896 (5th Cir. 1974).

58. *Id.* at 903.

59. Bodine Produce, Inc. v. United Farmworkers Org. Comm., 494 F.2d 541 (9th Cir. 1974). The question of the applicability of the labor exemption to farm workers unions arose, in the Court's view, because *Pennington* and *Jewel Tea* were decided against the total framework of national labor legislation, including the National Labor Relations Act and the 1947 and 1959 amendments to that Act. Agricultural employees were specifically excluded from coverage under these acts. The Ninth Circuit concluded that the exemption rested on the Supreme Court's decision in *Hutcheson*, which was based on the Clayton and Norris-LaGuardia Acts, which did not exclude agricultural employees. Without any indication by Congress that the labor exemption was to have a more limited application to farm worker unions, the Court concluded that such unions were not to be exempted. *Id.* at 553–56.

the Ninth Circuit reasoned that the restriction was designed to promote bargaining rather than to inhibit the union's ability to bargain.[60] The court further stated:

> The mere combination by a union with "non-labor groups" does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining. Whether the combination violates the antitrust laws turns on the purposes served thereby. Here it is clear that the overwhelmingly predominant purpose of the union was to secure the objective of recognition by the plaintiffs. This is enough to insulate the combination from laws designed primarily to proscribe combinations between business groups.[61]

The *Connell* decision appears to reject the notion that a union acting with no other objective than organization is insulated from the antitrust laws when it combines with other employers to effectuate that purpose.[62] Connell did not attempt to argue that there was a conspiracy between the union and the subcontractors it represented; there was no evidence of such a conspiracy.[63] Rather, the Court apparently based its decision on the restrictive nature of the agreement between the union and Connell and the other general contractors.[64]

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60. *Id.* at 560–61. Part of Justice White's rationale in *Pennington* was that the agreement to impose uniform terms on all employees restricted the unions' freedom in bargaining. *See* note 42 *supra.*

61. Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 558 (9th Cir. 1974). *See also* Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970), in which the Seventh Circuit rejected the contention that a union violates the antitrust laws when it agrees to impose the terms of a multi-employer agreement on other employers not party to that agreement ("most favored nation" arrangement, see text accompanying note 2 *supra*) without regard to the union's purpose for entering such an agreement. The court stated that "the actual holding of *Pennington* requires proof of the predatory purpose of the agreement between a union and the employers . . . . [T]he jury can find a violation only if it is proved that the agreement '. . . was made for the purpose of forcing some employers out of business.'" *Id.* at 553, *quoting* UMW v. Pennington, 381 U.S. 657, 673 (1965).

62. The Court stated:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal.

421 U.S. at 625 (footnote omitted).

63. 421 U.S. at 625 n.2. A footnote to the dissenting opinion of Justice Stewart points out that if Connell had voluntarily entered the agreement with the union, an injured subcontractor who was not a party to the multi-employer agreement with Local 100 might have a valid antitrust claim alleging the type of conspiracy condemned in Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). 421 U.S. at 649 n.9. *See* text accompanying note 38 *supra.*

64. 421 U.S. at 623–26.

The Court's approach is significant in that it chose to analyze the case under the *Pennington* model despite the absence of any conspiracy or motive to injure the business of any employer. The case seems more analogous to *Jewel Tea*[65] in that the union in *Connell* was unilaterally seeking these agreements from the area's general contractors. There the Court found that a union did not automatically lose its antitrust exemption for seeking and executing employer agreements.[66] Moreover, by taking the *Pennington* approach and stressing the union's combination with a nonlabor group, the Court may have changed the *Allen Bradley* criteria for determining which union-employer combinations will cost unions their antitrust exemption. If the mere "combination" between the union and the employer is the determining factor, an employer does not have to be motivated by a desire to injure the business of a competitor for the agreement to be condemned under a *Pennington* analysis.[67]

Although it was the agreement between the union and Connell that triggered the Court's application of *Pennington*,[68] the Court's real concern was probably the restrictive effect of the agreement in conjunction with the "most favored nation" clause contained in the subcontractors' multi-employer bargaining contract.[69] The Court acknowledged that the "most favored nation" clause itself was not under attack,[70] but it saw a potential for a conspiracy among the represented subcon-

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65. Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965). *See* note 44 *supra*. This apparently was the position taken by the Fifth Circuit in *Connell* at the lower appellate level. *See* note 54 and accompanying text *supra*.

66. *See* text accompanying notes 45–47 *supra*. If the *Connell* Court had applied the *Jewel Tea* test for balancing federal antitrust and labor policies, the immediate and direct concern of union members in organizing subcontracting firms might have brought the union's conduct within the exemption.

67. This possibility stands in sharp contrast to the approach taken by two circuit courts which weighed heavily the presence or absence of employer motivation to injure a competitor's business. *See* text accompanying notes 57–61 *supra*.

68. The Court cited *Allen Bradley* for the proposition that a union was not protected by any exemption from the antitrust laws if it entered an agreement with a nonlabor party to restrain competition. The Court said the agreement with Connell placed prohibited direct restraints on the business market. 421 U.S. at 622–23.

69. 421 U.S. at 623–25. *See* text accompanying note 2 *supra*.

70. *Id.* at 623. The Seventh Circuit rejected the contention that a "most favored nation" clause in labor contracts constituted a per se violation of the antitrust laws in Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970). *See also* Di Cola, *supra* note 39, at 741–42.

The NLRB has taken the position that "most favored nation" subcontracting clauses do not violate the antitrust laws because they are mandatory subjects of bargaining. Dolly Madison Indus., Inc., 182 N.L.R.B. 1037, 1038 (1970). The Board noted that, unlike the wage agreement in the *Pennington* case, subcontracting agreements with some employers do not bind the union's freedom of action in bargaining with employers outside the agreements. *Id.* at 1038. *See* note 60 *supra*.

tractors to monopolize the market through the union's agreements with the area general contractors. Since all of the subcontracting firms that were parties to the multi-employer contract had agreed not to compete on subjects covered by the contract, the union-general contractor agreements would have eliminated competition on those subjects by foreclosing all other subcontractors from the market. The Court noted that the union, and the subcontractors it represented through this arrangement, could effectively control the number of subcontractors competing for work in the area and could also exclude specific subcontractors.[71] The *Connell* Court concluded that the actual and potential anticompetitive effect of the arrangement could not be justified by any federal labor policy.[72]

In addition, two other factors appeared to have had considerable influence on the decision: first, the nature of the agreement imposed on Connell by the union, and second, the absence of a collective bargaining relationship between the union and Connell. The Court emphasized that the agreement foreclosed nonunion subcontractors from part of the market without regard to whether those subcontractors were operating under substandard wages and working conditions. Nonunion subcontractors that achieved a competitive edge through efficient operating methods would be unable to bid on subcontracting work in the area. The *Connell* Court asserted that federal labor policy offered no support for "[c]urtailment of competition based on efficiency . . . ."[73] Moreover, since the agreement was not entered into in the context of a collective bargaining relationship, it could not be justified on the basis of the federal policy favoring collective bargaining. The Court implied that the agreement may have been entitled to an anti-trust exemption had it been included in a collective bargaining contract, notwithstanding the potentially severe restraints it may have caused.[74]

CONCLUSION

Given its specific fact situation, *Connell* does not represent a substantial departure from earlier policy. The Court's analysis differs

71. 421 U.S. at 624–25. Notably, the Court condemned this power to restrict competition without any evidence of anticompetitive motivation on the part of Connell, the employer with whom the union had "combined," to injure its competitors.

72. *Id.* at 625, 631.

73. *Id.* at 623. The Court found competition based on efficiency to be a "positive value that the antitrust laws strive to protect." *Id.*

74. *Id.* at 625–26. The Court stated that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.*

somewhat from earlier decisions; its implicit synthesis of *Pennington* and *Jewel Tea* indicates that it is the severity of the restraint imposed by the union activity in question which will determine whether the union is exempt from the antitrust sanctions. Subsequent decisions may well limit the holding in *Connell* to union activity conducted outside the context of a collective bargaining relationship and which results in severe or potentially severe anticompetitive effects.

But the *Connell* decision left open several recurring questions about concurrent liability for antitrust violations and violations of the federal labor laws. After *Connell*, it is clear that conduct that may give rise to a violation of section 8(e) of the NLRA may also be grounds for antitrust liability. Justice Stewart, in his *Connell* dissent, cited legislative history indicating that Congress intended section 8(e) to be the sole sanction for such conduct.[75] The majority disagreed, however, asserting there was no indication the labor law remedies for section 8(e) violations were intended to be exclusive remedies.[76] The opinion itself does not indicate whether *any* violation of the labor laws which has a substantial anticompetitive effect on the product market will subject a union to antitrust liability; the decision may produce a wave of antitrust suits against labor unions.[77] Moreover, since there is an element of uncertainty in the area of unfair labor practices, the argument that the imposition of antitrust sanctions is too severe has some merit.[78] If the *Connell* decision indicates a desire of the Court to narrow the scope of labor's antitrust exemption, both the organizing and bargaining power of labor unions may be severely curbed.

While the potential repercussions of *Connell* may be viewed unfavorably by organized labor, they will be welcomed by those who have urged that labor's antitrust immunity be weakened or eliminated. Some commentators have suggested that organized labor has reached a level of strength at which it is no longer justifiable to perpetuate the ex-

75. *Id.* at 639–55. Justice Stewart concluded: "The judicial imposition of 'independent federal remedies' not intended by Congress . . . threatens 'to upset the balance of power between labor and management expressed in our national labor policy.'" *Id.* at 655, *quoting* Teamsters Local 20 v. Morton, 377 U.S. 252, 260 (1964).

76. *Id.* at 634–35 n.16.

77. Although the particular unfair labor practice in *Connell* involved an employer-union agreement, the mere fact of agreement has not in the past cost the union the antitrust exemption. As discussed above, however, it was the amount of restraint on the market, and not the fact of the agreement, that was the determining factor in *Connell.* Therefore, it is arguable that in subsequent cases conduct that constitutes an unfair labor practice but does not necessarily involve an employer-union agreement may give rise to antitrust liability if the restraints imposed on the product market by the union activity are severe enough.

78. There is some indication in the wording of the agreement at issue in *Connell* that the union believed its actions to be legitimate under § 8(e). *See* note 3 *supra.*

emption in the name of balancing the respective power of labor and management.[79] One notes:

> The predliction [*sic*] of courts to find immunity for union conduct that restrains trade, even where such conduct also subverts the national labor policy or violates other laws, must be reversed . . . . [T]he power and influence that labor unions have attained has created an imbalance in the relative power of the parties to the collective bargaining relationship. The nation's interest in stemming inflation demands that this imbalance be eliminated, and that the parties be returned to a status of equality. This, it is submitted, can best be accomplished by narrowing the labor exemption . . . .[80]

Regardless of whether these arguments in favor of limiting labor's exemption are compelling, it is unquestionable that some clarifying action is necessary. Throughout the history of labor's antitrust immunity, courts have been unable or unwilling to define its precise scope. Congress should decide whether the exemption should be eliminated or continued, and if it is to continue, should establish manageable standards for judicial application.

MARY APPLEGATE

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79. Siegel, Connolly & Walker, *supra* note 34, at 470; Note, *Secondary Boycotts Under Labor and Antitrust: A Choice of Policy*, 23 DRAKE L. REV. 653 (1974).

80. Siegel, Connolly & Walker, *supra* note 34, at 478–79.