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CONNELL: ANTITRUST LAW AT THE EXPENSE OF
LABOR LAW

Theodore J. St. Antoine *

A PERSONAL NOTE

TO lose a man of Bernie Dunau's talents and accomplishments is always saddening. To lose him when he still had so much left to do, so much left to say, is truly tragic. I wish we could have heard him on *Connell Construction Co. v. Plumbers Local 100*,¹ the Supreme Court's latest attempt to grapple with the old, intractable problem of reconciling union restrictive practices and the strictures of the antitrust laws. Bernie was a craftsman in the noblest sense of the word; and doughty advocate though he could be, he was also a person who would not let partisanship keep him from forming a detached opinion on a legal issue. *Connell*, to say it straightaway, is an example neither of sound craftsmanship nor of balanced judgment. Bernie would have descended upon it with gusto, and dismantled it piece by piece.

When Bernie and I were in harness together,² some dozen years ago, he invariably lightened my load by producing an exhaustive 100-page principal brief that dealt thoroughly and artfully with every issue in the case. This left me free to glide in with a slender amicus presentation and merely highlight such matters as seemed to me of greatest moment. I hope it will not be thought amiss if, in this tribute to Bernie, I assume my accustomed role in our former collaboration. My aim will be to set in bold relief the outlines of antitrust law as it relates to the labor field, not to provide the comprehensive, meticulously detailed study Bernie would have given us. I can pay his memory no higher honor than to say I shall write easier, knowing I am not trying to step into his place.

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¹ 421 U.S. 616 (1975), *rehearing denied*, 423 U.S. 884 (1975).

² I like to think that my intervening years in the academic world have expunged any taint of client interest. But for the record I should note that two of the cases on which Mr. Dunau and I worked were the companion antitrust decisions in *UMW v. Pennington*, 381 U.S. 657 (1965), and *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965). He briefed and argued the latter for the union, and I briefed and argued the former for the AFL-CIO as *amicus curiae*.

I. EARLY APPLICATIONS OF ANTITRUST TO LABOR

From the outset, the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it. According to classical trade union theory, the objective is the elimination of wage competition among all employees doing the same job in the same industry.³ Logically extended, the policy against restraint of trade must condemn the very existence of labor organizations, since their minimum aim has always been the suppression of any inclination on the part of working people to offer their services to employers at different prices. Indeed, the initial reaction of the common law was to brand the concerted activities of labor unions, even those we today would term primary strikes, as criminal conspiracies.⁴ If labor organizations were to be legitimated despite our usual policies favoring wide-open competition, it would have to be on the basis of other, quite different societal values. By the time the Sherman Antitrust Act⁵ was passed in 1890, the courts had come to recognize the existence of those other, collective values, and had generally accepted the legality of peaceful strikes by employees against their employer for such purposes as higher wages and shorter hours.⁶

The Sherman Act was intended to deal primarily with business monopolies and trade restraints, and there is a very real question whether Congress meant it to apply to labor combinations at all.⁷ In *Loewe v. Lawlor*, the famous and badly argued *Danbury Hatters* case,⁸ the Supreme Court held that labor unions were not

³ See, e.g., S. & B. WEBB, *INDUSTRIAL DEMOCRACY* 173-79 (1920).

⁴ E.g., *Philadelphia Cordwainers' Case* [*Commonwealth v. Pullis*] (Philadelphia Mayor's Ct. 1806), reported in 3 *A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 59 (J. Commons & E. Gilmore eds. 1910).

⁵ Sherman Act, ch. 647, 26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1-7 (1970).

⁶ E.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 38 Am. Dec. 346 (1842).

⁷ See, e.g., E. BERMAN, *LABOR AND THE SHERMAN ACT* 3-54 (1930); A. MASON, *ORGANIZED LABOR AND THE LAW* 120-31 (1925); Boudin, *The Sherman Act and Labor Disputes* (pts. 1-2), 39 *COLUM. L. REV.* 1283 (1939), 40 *COLUM. L. REV.* 14 (1940); Emery, *Labor Organizations and the Sherman Law*, 20 *J. POL. ECON.* 599 (1912).

⁸ 208 U.S. 274 (1908). The Hatters Union and the AFL instituted a nationwide boycott of nonunion hats. The unions defended on the ground the restraints were local in nature, and did not affect interstate commerce. No serious effort was made to argue that the restrictions imposed were not of the kind covered by the Sherman Act. See E. BERMAN,

automatically excluded from the ambit of antitrust regulation. Thereafter, the Court had to embark on the task of deciding which union activities were restraints of trade, and which were not. Undoubtedly influenced by the later common law precedents and the growing importance of unions in our society, the Court concluded that labor's basic weapon, the primary strike, ordinarily constituted only an indirect restraint on competition, and thus was not an antitrust violation.⁹ But the boycott, in all its manifestations, was something else. If a union persuaded its members and friends throughout the country not to buy nonunion hats (a primary consumer boycott), or not to patronize merchants handling such hats (a secondary consumer boycott), the union was guilty of a direct restraint of trade.¹⁰ The same finding of illegality followed if a union persuaded employees in another state to refuse to transport, install, or work on such nonunion products as printing presses¹¹ or cut stone¹² (classic secondary strikes or boycotts).

A curious paradox thus developed. If a strong union, through a successful strike, totally cut off a supply of goods at its source, that was lawful as nothing more than an indirect restraint on interstate commerce. But if a weaker union failed to halt production and had to turn to the more unwieldy boycott to inhibit the sale and use of goods at their destination, that would be an unlawful direct restraint. Perhaps the Supreme Court was trying to face up to this anomaly in *Coronado Coal Co. v. UMW*,¹³ the second *Coronado* case, when it pinpointed the union's subjective intent as the crucial element in determining the existence of a Sherman Act violation. Even a primary strike would be unlawful if it could be shown that the union leadership in fact intended to keep a nonunion product out of the interstate market.¹⁴

supra note 7, at 86: "An adequate presentation of the Hatters' case to the Supreme Court might have greatly changed the history of labor cases since 1908."

⁹ *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922).

¹⁰ *Loewe v. Lawlor*, 208 U.S. 274 (1908).

¹¹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). In 1914 Congress had apparently sought to remove traditional trade union activity, such as picketing, from the coverage of the antitrust laws, when carried on in the course of a labor dispute. Clayton Act §§ 6, 20, ch. 323, §§ 6, 20, 38 Stat. 731, 738 (1914) (codified in 15 U.S.C. § 17, 29 U.S.C. § 52 (1970)). But the Supreme Court narrowly restricted this statutory exemption to disputes between employers and their own immediate employees thus leaving "stranger" picketing subject to antitrust bans. 254 U.S. at 471-76.

¹² *Bedford Cut Stone Co. v. Stone Cutters' Ass'n*, 274 U.S. 37 (1927).

¹³ 268 U.S. 295 (1925).

¹⁴ *Id.* at 310.

While the Court may have been headed toward a consistent theory for assessing union activity under the Sherman Act—was there an intent to suppress competition?—it was also treading on highly dangerous ground as a practical matter. Surely it can be argued that the primary strike, at least the primary organizational strike, nearly always involves an intent to suppress competition by eliminating the employer's product from the market until the employer bows to the union's demands. The only difference in the Court's treatment of the secondary boycott in these earlier cases would appear to be that the Court was prepared to infer the forbidden anticompetitive purpose from the boycott itself, without any proof of subjective intent.

At this juncture Justice Stone stepped in to rewrite the Supreme Court's antitrust teachings. The actual holding in *Apex Hosiery Co. v. Leader*¹⁵ was that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike. Much more important are the famous dicta that the Sherman Act, as written, was aimed only at "some form of restraint upon commercial competition in the marketing of goods or services,"¹⁶ and that it was not directed at "an elimination of price competition based on differences in labor standards."¹⁷ By my lights, Stone thus swept away the underpinning of all the earlier boycott cases and the second *Coronado* case as well, although he did not expressly acknowledge this fact.

Stone was careful to say, however, that his test did not vary depending on the nature of the alleged wrongdoer, whether union or management.¹⁸ The *Apex Hosiery* approach was not a matter of a statutory union exemption; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in wage differentials.¹⁹ In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken.

¹⁵ 310 U.S. 469 (1940).

¹⁶ *Id.* at 495.

¹⁷ *Id.* at 503.

¹⁸ *Id.* at 512.

¹⁹ On the immunity of agreements among employers dealing with labor standards, see *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

Further refinement of the *Apex Hosiery* doctrine might have been the soundest course for the Court to follow in dealing with labor and the antitrust laws. But that was not to be. A year after *Apex Hosiery*, Justice Frankfurter produced his great tour-de-force in *United States v. Hutcheson*,²⁰ and we had a whole new theory of union antitrust immunity. *Hutcheson* started with a jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The union that did not get the assignment organized a strike among the employees of certain contractors erecting a building for Anheuser-Busch, and organized a boycott of Anheuser-Busch beer by union members and friends. Under existing precedent, this was a Sherman Act violation. But Justice Frankfurter examined the anti-injunction provisions of the Clayton²¹ and Norris-La Guardia²² Acts, and pronounced the startling conclusion that activity immunized against injunctive relief by those two statutes, read together, was not to be deemed a substantive offense under the Sherman Act.²³ The effect was to exempt from antitrust regulation peaceful, nonfraudulent union conduct in the course of a labor dispute, as long as a union acts in its own interest and does not combine with nonlabor groups. Unlike Stone, who declared in *Apex Hosiery* that the Sherman Act as such did not cover restraints in the labor market whether imposed by labor or capital, Frankfurter created in *Hutcheson* a genuine exemption from the antitrust laws for unions "acting alone."

The corollary to this, as *Allen Bradley Co. v. IBEW Local 3*²⁴ subsequently made clear, was that labor organizations lose their immunity when they "aid nonlabor groups to create business monopolies and to control the marketing of goods and services."²⁵ In *Allen Bradley* the electrical manufacturers, the electrical contractors, and the electrical workers' union in New York City de-

²⁰ 312 U.S. 219 (1941). A perceptive and provocative analysis of *Hutcheson* is provided by C. GREGORY, *LABOR AND THE LAW* 269-79 (2d rev. ed. 1958).

²¹ 15 U.S.C. § 17, 29 U.S.C. § 52 (1970).

²² 29 U.S.C. § 101 (1970).

²³ 312 U.S. at 232-36.

²⁴ 325 U.S. 797 (1945). Excellent analyses of the development of labor antitrust law during this period include Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Smith, *Antitrust and Labor*, 53 MICH. L. REV. 1119 (1955); Sovern, *Some Ruminations on Labor, the Antitrust Laws and Allen Bradley*, 13 LAB. L.J. 957 (1962); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

²⁵ 325 U.S. at 808.

vised a simple scheme for establishing a complete monopoly over the electrical business in the city. The manufacturers agreed they would make local sales only to union contractors, and the contractors agreed they would purchase and install only the products of local union manufacturers. The effect could be described as a secondary boycott squared. The combination, needless to say, produced a bonanza for all hands: more sales, higher prices, and better wages. At the suit brought by out-of-town manufacturers, however, the Supreme Court declared the whole arrangement violative of the Sherman Act, with the union guilty along with the employers. As the Court viewed the situation, the manufacturers and contractors had violated the Act by uniting with one another to monopolize all the electrical business in New York City. And even though the union by itself could have struck to enforce a union boycott of goods without violating the Sherman Act, its participation in an unlawful combination of businessmen deprived the union of its antitrust exemption and made it equally liable.²⁶

Allen Bradley has stood unchallenged for over thirty years. Thus, a boycott which directly restricts competition in the product market, and which is brought about by a combination of union and employers, is a violation of the Sherman Act. *Apex Hosiery* does not apply because the restraint is not confined to the labor market, and *Hutcheson* does not apply because the union is not acting alone.

II. PENNINGTON AND JEWEL TEA

After twenty years of relative quiescence, labor antitrust issues again claimed the Supreme Court's attention in two major decisions of 1965, *UMW v. Pennington*²⁷ and *Meat Cutters Local 189 v. Jewel Tea Co.*²⁸ In *Pennington* it was alleged that the United Mine Workers and the major coal producers had conspired to drive smaller, less efficient operators out of business by establishing a uniform industry-wide wage rate higher than the small producers could afford. If true, the allegation would have made it hard for the UMW to rely on the *Hutcheson* exemption for a union acting

²⁶ *Id.* at 809-10.

²⁷ 381 U.S. 657 (1965).

²⁸ 381 U.S. 676 (1965). See generally Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317 (1966); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965).

alone. Yet the competition that was to be eliminated was competition "based on differences in labor standards," and thus arguably the *Apex Hosiery* doctrine would come into play. Moreover, wages are at the core of those subjects about which unions and employers are required to bargain under the National Labor Relations Act. These so-called "mandatory bargaining subjects," the unions argued, should be equated with Justice Stone's "labor standards." Surely a matter on which the labor laws compelled bargaining, they contended, could not be the basis of a prosecution under the antitrust laws.

Inherent in this argument, of course, was the notion that the purpose of any wage pact is irrelevant, even if the purpose is to liquidate the employer's competitors. This proved the fatal flaw. But the flaw is perhaps more apparent in the abstract than in the concrete; it is probably easier to say a union and employers may not have a predatory purpose in a wage agreement than to determine, in any given case, what the purpose might be. And the history of judicial assessment of union purpose is hardly reassuring.

At any rate, Justice White, in delivering the opinion of the Court in *Pennington*, was plainly troubled by the union argument, though he did not buy it. He conceded that the bounds of the duty to bargain under the National Labor Relations Act have "great relevance" in considering the scope of labor's antitrust immunity.²⁹ He then proceeded, however, to turn the union argument into a boomerang by introducing the new concept that the statutory duty to bargain exists only on a unit-by-unit basis. Unions and employers must negotiate about the wages and employment standards of workers in a particular bargaining unit, but apparently not about the standards outside that unit. Thus, a union "forfeits" its antitrust "exemption" when it is "clearly shown" that it has agreed with one group of employers "to impose a certain wage scale on other bargaining units."³⁰ Moreover, a union is "liable" if it becomes a party to an employer conspiracy to eliminate competitors, even though the union's role is limited to securing certain wages, hours, or working conditions from the other employers.³¹

This approach raises a fistful of new questions. Justice White suggested a distinction between the union's loss of antitrust im-

²⁹ 381 U.S. at 665.

³⁰ *Id.*

³¹ *Id.* at 665-66.

munity and its commission of a substantive violation.³² Does this mean an agreement with extra-unit implications merely removes the exemption, without necessarily resulting in a per se violation? If so, what added elements must be shown to establish an offense? The Supreme Court long ago declared that only "unreasonable" restraints of trade run afoul of the Sherman Act.³³ It may well be that resort to the rule of reason will enable the courts to exercise considerable flexibility in dealing with extra-unit agreements. A substantive violation might require a predatory intent, a definite purpose to impede or destroy business competitors. The trial court on the remand in *Pennington* in effect so held.³⁴ I would contend this result is supported by the practical demands of meaningful collective bargaining; it is simply unrealistic to insist that an employer has no valid interest in the union wage scale to be paid by the employer's competitors.

The practical implications of *Pennington's* unit-by-unit bargaining rule are illustrated by the so-called "most favored nation" clause. This is a fairly common provision in labor contracts, especially in the construction industry, requiring the union to give the signatory employer the benefit of the most favorable terms the union subsequently accords any other employer. In actual operation, naturally, the usual effect is to freeze labor standards at the level of the initial contract. In the language of *Pennington*, the union has agreed, at least implicitly, "to impose a certain wage scale on other bargaining units." This undoubtedly is a form of restraint, but is it not just another way of advancing the accepted labor policy of taking wages out of competition? In any event, the National Labor Relations Board has declared a "most favored nation clause" to be a mandatory subject of bargaining, which an employer may insist upon in the absence of a "predatory pur-

³² See also *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 688-89 (1965).

³³ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); cf. *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) (trading rules for commodity exchanges).

³⁴ *Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd in part, rev'd in part*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968). Other similarly situated coal operators prevailed, however, against the UMW in their treble damage antitrust suits. *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971) (damages of \$7,231,356 plus \$335,000 in attorneys' fees recovered); *Tennessee Consol. Coal Co. v. UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) (damages of \$1,432,500 plus \$150,000 attorneys' fees recovered).

pose.”³⁵ The NLRB distinguished *Pennington* on the ground that the clause sought by the employer in the case before the Board did not obligate the union to impose the same standards on the employer’s competitors.³⁶ I find this an unrealistic assessment of the practicalities of the situation, even though I approve the result. Ultimately, I should hope that the presence of a predatory purpose would be recognized as the critical factor, rather than the phraseology of the clause itself.³⁷

What, after all, is more natural than for an employer to want assurance that its competitors will have to match any concessions it gives the union? As long as we endorse the policy of eliminating competition based on wage cutting, I see no reason to boggle at a means so well adapted to attaining that end. Indeed, I find it difficult to imagine how collective bargaining could stay healthy if discussion were choked off on some of the most vital subjects, such as the competitive position of various firms in an industry and the demands the union will make in other negotiations. And I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of destroying competition. I find unpersuasive Justice White’s argument that a union cannot be allowed to “straitjacket” itself in subsequent bargaining by commitments to favored employers in earlier negotiations. Those commitments may be the price the union has to pay to get the concessions in the first place. The employees in the original unit will hardly complain, and the employees in the other units are more likely to gain than to lose when a floor is placed under their wages. In the long run, upholding “most favored nation” provisions would probably do no more than hasten what the labor economists tell us is a frequent result of union organiza-

³⁵ *Dolly Madison Indus., Inc.*, 182 N.L.R.B. 1037 (1970).

³⁶ *Id.* at 1038.

³⁷ The NLRB explained the differences in phraseology:

In *Pennington*, the contractual clause provided that the union would impose upon all other coal operators in the area the terms of the agreement without regard to their ability to pay, but the contractual provision herein imposes no such mandate. . . . In contrast to *Pennington*, the MFNC provision . . . was manifestly not an effort to impose wages and working conditions on other employers or employees in other bargaining units but was designed only to assure that this Employer could be relieved of any disadvantage that it might otherwise suffer if the Union subsequently negotiated more favorable wage and benefit levels with other employers.

Dolly Madison Indus., Inc., 182 N.L.R.B. 1037, 1038 (1970).

tion anyway, namely the gradual leveling of wage rates throughout an area or an industry.³⁸

The plight of the employer charged with an unfair labor practice because of *Pennington* underscores another important aspect of this decision: its impact falls not so much upon organized labor as upon the institution of collective bargaining. Indeed, Justice White stressed that a union acting unilaterally, in furtherance of its own policies, still has the right to seek uniform wages in an industry.³⁹ Only when this is done pursuant to a union-employer agreement do antitrust issues arise. But *Pennington* applied literally may seriously hamstring collective bargaining as an instrument for coping with today's critical problems in industrial relations. For example, management's need to introduce technological improvements to increase productivity and meet competition is countered by labor's anxiety over the possible loss of job security and craft skills. Reconciliation of these opposing interests through means such as attritional reductions in force or retraining allowances may be severely hampered if employers cannot be reassured of the demands that will be made of their competitors.

The "most favored nation" clause can stand as a symbol of a whole range of activities which may be classified broadly as pattern bargaining—efforts by either unions or employers to obtain uniform labor contracts governing separate bargaining units. Two typical issues left in the wake of *Pennington* are whether it is an antitrust violation or an unfair labor practice (1) for two or more unions to coordinate bargaining policy with respect to different units of the same business or, (2) for employers, in the absence of a formal multiemployer unit, to adopt common bargaining strategy or tactics, such as joint lockouts in the event one employer is struck.

Another question raised by *Pennington* has been laid to rest. The Court explicitly refrained from passing on the sufficiency of the evidence. Yet in declaring that the extra-unit agreement had to be "clearly shown," Justice White seemed to be suggesting the possibility of a special evidentiary standard. In *Ramsey v. UMW*,⁴⁰ however, a five-to-four majority of the Court held that the ordinary preponderance of evidence standard is applicable to substantive violations in civil antitrust actions against labor unions. Only in

³⁸ *E.g.*, L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 647-57 (5th ed. 1970).

³⁹ 381 U.S. at 665 n.2.

⁴⁰ 401 U.S. 302 (1971).

proving the authority of individual members, officers, and agents of a union to act on its behalf must the clear proof test of Section 6 of the Norris-La Guardia Act be met.⁴¹ Perhaps it would be more straightforward to say that a proper reconciliation of antitrust and labor policies calls for an interpretation of the Sherman Act, without reference to Norris-La Guardia, requiring evidence of an explicit union-employer agreement to force competitors out of business before a case could go to a jury. Mere knowledge that some marginal operators could not pay the prescribed industry wage scale would not, in itself, be sufficient.⁴² Otherwise, local juries in passing on whether a particular wage scale is too high could easily undercut the national policy of promoting free collective bargaining.

In *Pennington* the key question was whether a labor agreement dealing with wages would violate the antitrust laws if its purpose was to put certain competitors out of business. The answer was "yes." In *Jewel Tea* the question was quite different: was it a violation of the Sherman Act for a butchers' union to compel a grocery chain to agree to limit the hours fresh meat could be sold (9:00 a.m. to 6:00 p.m.), after the union had entered into a multi-employer contract containing such a restriction? As viewed by a majority of the Court, the problem was one of characterization: did this clause involve wages, hours, or working conditions, legitimate subjects of collective bargaining, or did it constitute a forbidden restraint on the product market?

The Court split three ways, with three Justices in each group. Justice White, Chief Justice Warren, and Justice Brennan found that the marketing hours restriction, which in effect defined the butchers' working hours and their job content, was "intimately related" to labor conditions. Thus the union's effort to secure the provision through arm's-length bargaining in pursuit of its own labor policies, and not in furtherance of a union-employer conspiracy, was exempt under the Sherman Act.⁴³ Justices Goldberg,

⁴¹ *Id.* at 311.

⁴² Justices Douglas, Black, and Clark, concurring in *Pennington*, would apparently regard the wage agreement under such circumstances as prima facie evidence of a violation. 381 U.S. at 673. The three concurring Justices made no mention of unit-by-unit bargaining, and simply declared that a union-employer agreement to set a high wage scale for the purpose of forcing marginal producers out of business would be in violation of the antitrust laws. *Id.*

⁴³ 381 U.S. at 689-90.

Harlan, and Stewart concurred for the same reasons that led them to dissent in *Pennington*. They accepted the union argument that agreements dealing with mandatory subjects of bargaining are wholly outside the antitrust laws.⁴⁴ Justices Douglas, Black, and Clark dissented in *Jewel Tea* on the ground the operating hours limitation was an obvious restraint on the product market, and was not needed to fix employees' working hours. The multiemployer collective agreement itself was considered sufficient to show an illegal union-employer conspiracy to impose the marketing hours restriction on the holdout chain.⁴⁵

No single opinion in *Jewel Tea* represents the views of a majority of the Court. Rather than focus on the decision itself, therefore, I should like to examine two long-standing legal issues on which *Jewel Tea* revived debate.

First, if a union is protected by *Hutcheson's* exemption for a union acting alone when it strikes an employer over a particular bargaining demand, does it follow that a collective agreement granting that demand, even an agreement by a group of employers, is likewise immune to antitrust scrutiny? It has been argued that it would be an intolerable paradox to sanction economic warfare while outlawing the peace treaty.⁴⁶ This anomaly will probably not be decisive; the Supreme Court accepts, for example, the anomaly that state right-to-work laws may be invoked against union security agreements but not against strikes to obtain them.⁴⁷ As will be discussed later,⁴⁸ *Connell* points in the same direction in the antitrust area. On the other hand, certain language in *Allen Bradley* could be read to mean that a union commits a violation only when it participates in a preexisting employer conspiracy.⁴⁹ Although Justice White would not have immunized the agreement in *Jewel Tea* merely because it was between a union and a single employer, he emphasized that the union was acting in pursuit of its own labor policies and not at the behest of any employers.⁵⁰ This adds some weight to the notion that the source of the impulse

⁴⁴ *Id.* at 711-13, 731-35.

⁴⁵ *Id.* at 735-36.

⁴⁶ COX, *supra* note 24, at 271. See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 297-99 (1955).

⁴⁷ Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 105 (1963).

⁴⁸ See note 65 *infra* and accompanying text.

⁴⁹ Allen Bradley Co. v. IBEW Local 3, 325 U.S. 797, 809 (1945).

⁵⁰ 381 U.S. at 688-90.

for a particular provision may be crucial. A clause which would be barred by the antitrust laws if sought by employers may remain within the union exemption if sought by a labor organization. My difficulty with this is that I am skeptical about maintaining a neat dichotomy between union-motivated and employer-motivated contract provisions. One side raises a problem in negotiations, the other proposes a solution, the first party modifies the suggestion. To whom do we ascribe the final product? I doubt whether the "source" test can be conclusive, although evidence of the source of a clause may occasionally aid in determining its relation to working conditions.

The second problem spotlighted by *Jewel Tea* is the standard which should be used to distinguish between agreements properly concerned with wages, hours, and other components of the labor market, and agreements improperly concerned with the product market. Unlike the wage contract in *Pennington*, which in and of itself involved only a restraint on the labor market, the contract in *Jewel Tea* involved both a restraint on the labor market (defining the butchers' working hours and job content) and a restraint on the product market (restricting the hours for selling fresh meat). Justice White assumed that if the agreement had dealt directly only with the product market (for example, fixing a price schedule for the meat), with any benefit to the employees merely an indirect consequence, it would not have been immune to the antitrust laws.⁵¹ What saved the *Jewel Tea* provision in his eyes was that the marketing-hours restriction was "intimately related" to wages, hours, and working conditions. The trial court had found as a fact that self-service meat sales were unfeasible, and therefore a limitation on operating hours was necessary to preserve the butchers' jobs and working hours.⁵²

In sustaining the agreement's exemption from the antitrust laws in this situation, Justice White at one point seemed to be "weighing" the employees' interests in labor standards against the admittedly adverse effects on product competition.⁵³ Apparently for Justice White, any showing of an "immediate and legitimate" employee concern would be enough to tip the scales to the side of the union. My reaction to this approach is rather mixed. Any

⁵¹ *Id.* at 689.

⁵² *Id.* at 694.

⁵³ *Id.* at 691.

reintroduction of the pre-Norris-La Guardia judicial technique of balancing the social pluses and minuses of union objectives must be viewed with some apprehension. But if such balancing is to be indulged in, it should not be just an armchair exercise. Twenty years ago Archibald Cox observed that there was "no reliable information on the extent or economic importance of union efforts to shelter employers from competition in the product market."⁵⁴ As best I can tell, things stand today as they stood then.⁵⁵ If *Pennington*, *Jewel Tea*, and *Connell* presage a resurgence of labor antitrust litigation (so far there has been surprisingly little), it would indeed be unfortunate for the Court to have to resolve some of the legal issues posed without more enlightenment on the economic realities. This is especially true in view of the improved tools for empirical research that have been developed in recent decades.

III. CONNELL CONSTRUCTION

A. *The Decision*

The Supreme Court's latest effort to harmonize labor and anti-trust policies was *Connell Construction Co. v. Plumbers Local 100*.⁵⁶ Plumbers Local 100, which represents workers in the plumbing and mechanical trades in Dallas, requested Connell, a general contractor, to agree to subcontract mechanical work only to firms that had a collective bargaining agreement with the union. Since Connell subcontracts all plumbing and mechanical work, Local 100 expressly disclaimed any interest in representing Connell employees. When Connell refused to agree, Local 100 placed a single

⁵⁴ Cox, *supra* note 24, at 272.

⁵⁵ There is at least some reputable economic thinking that such restrictive union practices as limiting output, fixing prices, and dividing markets have a significant adverse effect on the economy. See, e.g., A. REES, *THE ECONOMICS OF TRADE UNIONS* 140-42 (1962). But cf. W. HABER & H. LEVISON, *LABOR RELATIONS AND PRODUCTIVITY IN THE BUILDING TRADES* 191-93, 250 (1956). On the other hand, several post-World War II studies lead me to conclude that industry-wide bargaining and multiemployer bargaining are economically more beneficial than harmful. R. LESTER & E. ROBIE, *WAGES UNDER NATIONAL AND REGIONAL COLLECTIVE BARGAINING: EXPERIENCE IN SEVEN INDUSTRIES* (1946); Dunlop, *Economic Aspects of Industry-Wide Collective Bargaining: Allocation of the Labor Force*, in *PROCEEDINGS OF THE CONFERENCE ON INDUSTRY-WIDE COLLECTIVE BARGAINING* 34 (1949); KETT & FISHER, *Multiple-Employer Bargaining: The San Francisco Experience*, in *INSIGHTS INTO LABOR ISSUES* 25 (R. Lester & J. Shister eds. 1948).

⁵⁶ 421 U.S. 616 (1975).

picket at one of Connell's major jobsites, thereby halting construction. Connell filed suit in state court to enjoin the picketing as a violation of Texas antitrust law. After Local 100 removed the case to federal court, Connell signed the subcontracting agreement under protest. It then amended its complaint to allege that the agreement violated Section 1 of the Sherman Act, forbidding contracts in restraint of trade, and Section 2 of the Act, forbidding monopolies.⁵⁷

The federal district court held that the subcontracting agreement was exempt from the federal antitrust laws because it was authorized by the construction industry proviso to Section 8 (e) of the National Labor Relations Act (NLRA).⁵⁸ The court also held that federal labor legislation preempted the state's antitrust laws.⁵⁹ The Court of Appeals for the Fifth Circuit affirmed without reaching the Section 8 (e) issue, on the ground that the local's goal of organizing nonunion subcontractors was a legitimate union interest, and therefore its efforts toward that goal were exempt from the federal antitrust laws.⁶⁰ The court of appeals agreed that state law was preempted.⁶¹ In a five-to-four majority opinion by Justice Powell, the Supreme Court reversed on the question of federal antitrust immunity and affirmed on the question of state law preemption. The Court remanded for consideration of the claim that the agreement violated the Sherman Act.⁶²

Justice Powell acknowledged that a labor organization may avail itself of either of two types of exemptions from the operation of the antitrust laws. First, there is the statutory exemption provided by the Clayton and Norris-La Guardia Acts, as interpreted in *Hutcheson*, covering unilateral union activity like secondary picketing and boycotts.⁶³ Second, there is a nonstatutory exemption, applied in *Jewel Tea*, which "has its source in the strong labor policy favoring the association of employees to eliminate competi-

⁵⁷ 15 U.S.C. §§ 1-2 (1970).

⁵⁸ 78 L.R.R.M. 3012, 3014 (N.D. Tex. 1971). Section 8 (e), 29 U.S.C. § 158 (e) (1970), forbids an employer to agree with a union not to do business with any other person. A proviso applicable to the construction industry permits agreements relating to work "to be done" at a jobsite. See note 71 *infra*.

⁵⁹ 78 L.R.R.M. at 3014.

⁶⁰ 483 F.2d 1154, 1169-71 (5th Cir. 1973).

⁶¹ *Id.* at 1175.

⁶² 421 U.S. at 637.

⁶³ *Id.* at 621-22.

tion over wages and working conditions.”⁶⁴ Justice Powell pointed out, however, that the statutory exemption does not apply to concerted action or agreements between unions and nonlabor parties. Moreover, “while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.”⁶⁵

In the eyes of the Court, Local 100 had used direct restraints on the commercial market to achieve its concededly lawful organizational objective. The restrictive agreements with Connell and other general contractors were designed to force nonunion subcontractors out of the market, “even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods.”⁶⁶ Although the multiemployer contract between Local 100 and the Mechanical Contractors Association of Dallas had not been challenged in the suit,⁶⁷ Justice Powell was prepared to examine it to determine the effect of the agreement between Local 100 and Connell on the business market. The multiemployer contract contained a “most favored nation” clause. To the Court this meant that subcontractors in the Association would be sheltered from competition in that portion of the market covered by Local 100’s subcontracting agreements with general contractors, with respect to all subjects included in the multiemployer contract, even subjects unrelated to wages or working conditions.⁶⁸ Next, the Court speculated that the subcontracting agreements with general contractors could give Local 100 control over access to the mechanical subcontracting market, since the union might refuse to sign contracts with

⁶⁴ *Id.* at 622. Curiously, Justice Powell did not cite *Apex Hosiery*, where the nonstatutory exemption apparently originated and where it received its fullest explication. See notes 15-19 *supra* and accompanying text. Perhaps Justice Powell wished to limit the nonstatutory exemption to situations involving union activity, rather than embrace Justice Stone’s more expansive concept that the Sherman Act simply does not reach a certain class of labor market restraints, whether imposed by unions or management.

⁶⁵ 421 U.S. at 622-23.

⁶⁶ *Id.* at 623.

⁶⁷ *Id.* There was no evidence that Local 100’s organizing campaign resulted from any agreement with employers, and Connell had not argued the case on a theory of conspiracy between the union and the unionized subcontractors. *Id.* at 625 n.2.

⁶⁸ *Id.* at 623-24. There was no indication that the multiemployer contract contained provisions dealing with anything but mandatory subjects of bargaining.

marginal or nonresident firms.⁶⁹ Finally, since Local 100 had no interest in representing Connell's employees, it could not rely on the federal policy favoring collective bargaining to save its campaign to exclude nonunion subcontractors from the market.⁷⁰

The Court then rejected the union's contention that the Connell agreement was explicitly authorized by the construction industry proviso to Section 8 (e) of the NLRA.⁷¹ Justice Powell granted that the literal language of the statute lent support to the union's position,⁷² but declared that the proviso was intended to deal with only a limited range of "special problems" in the construction industry.⁷³ These included the difficulties of organizing a nonunion subcontractor on a picketed multiemployer building project, and the friction that arises when union men have to work alongside nonunion men at a jobsite. The Court concluded that the Section 8 (e) proviso "extends only to [subcontracting] agreements in the context of collective bargaining relationships, and . . . possibly to common-situs relationships on particular jobsites as well."⁷⁴ Since Local 100's subcontracting agreement met neither condition, the Section 8 (e) proviso conferred no antitrust immunity.

⁶⁹ *Id.* at 624-25. As long as it acts in its own interest, a union may decline to contract with anyone for any reason. *Hunt v. Crumboch*, 325 U.S. 821, 824-25 (1945). Nothing in the record, however, suggests that Local 100 meant to scorn any contractors willing to sign union agreements.

⁷⁰ 421 U.S. at 625-26.

⁷¹ Section 8 (e) provides in pertinent part:

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

29 U.S.C. § 158 (e) (1970).

⁷² 421 U.S. at 626-28.

⁷³ *Id.* at 629-31.

⁷⁴ *Id.* at 633. Logically, under the majority's rationale, either the existence of a collective bargaining relationship or the limitation of the agreement to particular jobsites (where union men are working?) would appear to be a separate, independent basis for Section 8 (e) proviso coverage and concomitant antitrust immunity. The *Connell* opinion is not clear on these points.

Lastly, the Court disposed of the union argument that even if the subcontracting agreement violated Section 8 (e), the remedies under the NLRA would be exclusive. Justice Powell recognized that in 1947 Congress rejected attempts to regulate union secondary activities by repealing the statutory antitrust exemptions,⁷⁵ and instead made them unfair labor practices under Section 8 (b) (4),⁷⁶ subject to injunctions under Section 10 (l) ⁷⁷ and to actual damages under Section 303.⁷⁸ But he emphasized there was no comparable legislative history in the 1959 Congress, which enacted Section 8 (e) to outlaw so-called "hot-cargo" clauses. The majority of the Court was thus satisfied that the NLRA remedies for Section 8 (e) violations did not preclude antitrust remedies in cases like *Connell*.⁷⁹ Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented, primarily on the issue of the exclusivity of NLRA remedies.⁸⁰

B. Critique

In terms of previous antitrust rulings, the central issue in *Connell* would seem to be whether Local 100's subcontracting agreement dealt with wages, hours, and working conditions, or whether it constituted only a direct restraint on the product market. Since the parties had obviously executed an agreement, Justice Powell was apparently correct that *Hutcheson's* statutory exemption for a union acting alone did not apply.⁸¹ And since there was no showing of a union-employer conspiracy with the predatory purpose of driving out competition,⁸² there was only a minor role for the *Pennington* principle that even contracts covering wages and working conditions are subject to the antitrust laws if their pur-

⁷⁵ 421 U.S. at 634.

⁷⁶ 61 Stat. 141 (1947), as amended 29 U.S.C. § 158 (b) (4) (1970).

⁷⁷ 61 Stat. 149 (1947), as amended 29 U.S.C. § 160 (l) (1970).

⁷⁸ 61 Stat. 158 (1947), as amended 29 U.S.C. § 187 (1970).

⁷⁹ 421 U.S. at 634-35.

⁸⁰ 421 U.S. at 638-39. The dissenting Justices were also less certain than the majority about whether Local 100's subcontracting agreement was invalid under Section 8 (e)'s proviso. *Id.* at 648 n.8.

⁸¹ See notes 20-23 *supra* and accompanying text. This assumes, of course, that a union-employer agreement is not necessarily insulated from antitrust sanctions merely because the union's unilateral action to secure it was so insulated. See notes 46-48 *supra* and accompanying text.

⁸² See note 67 *supra*.

pose is to eliminate competition.⁸³ Thus the key precedents in the effort to distinguish between lawful labor market restraints and unlawful product market restraints are such decisions as *Jewel Tea* and *Allen Bradley*.

Jewel Tea established that agreements "intimately related" to working conditions are exempt from antitrust regulation, even though they may also directly affect the product market.⁸⁴ It is difficult to see how any union objective, on its face, could be more a matter of working conditions than organizing employees and securing recognition as their bargaining representative. Indeed, the standard union recognition clause is a mandatory subject of bargaining.⁸⁵ On the other hand, *Allen Bradley* makes clear that the basic union goal of raising workers' wages does not justify a union-employer combination to exclude the products of all employers, union and nonunion, located outside a union's geographical jurisdiction.⁸⁶ Is this because secondary agreements to exclude firms from the market can never escape antitrust scrutiny? Evidently not. On the same day *Allen Bradley* was decided, the Supreme Court declared in *Hunt v. Crumboch*⁸⁷ that a union's contracts with various employers to use only trucking firms organized by the union were not subject to antitrust strictures. Several factors may distinguish *Allen Bradley* from *Hunt*. First, although the record suggests that the union in *Allen Bradley* actually masterminded the combination, the Court treated the situation as if the union had merely joined an employer conspiracy already in existence.⁸⁸ Second, by the very terms of the agreement in *Allen Bradley*, the electrical manufacturers of New York City were to be sheltered against competition in the product market from out-of-city manufacturers, regardless of how eager the latter might be to sign a union contract. Finally, the restraint in *Allen Bradley* went beyond the bounds of any immediate, legitimate union demands, organizational or otherwise. Any wage gains that accrued to the union's members could have been only the by-product of a scheme to provide monopoly profits for the local manufacturers.⁸⁹

⁸³ See notes 30-31 *supra* and accompanying text.

⁸⁴ 381 U.S. at 689-91.

⁸⁵ Cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁸⁶ 325 U.S. at 799-801.

⁸⁷ 325 U.S. 821, 823 (1945).

⁸⁸ 325 U.S. at 799, 809; see note 49 *supra* and accompanying text.

⁸⁹ See *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 234, 241-42 (1975); cf.

The *Connell* majority erred in failing to realize that under established precedents, the antitrust laws exempt agreements, whether primary or secondary, that are aimed at promoting union organization, as well as agreements that are aimed at eliminating competition over labor standards. The principal qualification, as *Allen Bradley* suggests, is that the restriction must not be broader than the objective requires.⁹⁰ Perhaps Justice Powell had something like this in mind when he commented in *Connell* that the challenged agreements "did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100."⁹¹ But in the parlance of the building trades, a "nonunion" firm in the jurisdiction of Local 100 would have meant any employer not having a contract with Local 100. Certainly there is nothing in the record to indicate that Local 100 was seeking to use the subcontracting clause to establish the sort of "geographical enclave" involved in *Allen Bradley*. Thus, without ever undertaking the critical inquiry into the extent to which the subcontracting agreement was related to union organizational objectives, the *Connell* majority arrived at the conclusion that the union had lost its antitrust immunity.⁹²

While *Connell* seems plainly at odds with the more enlightened labor antitrust trends of recent years, the Sherman Act's Delphic phraseology compels its decipherers to fall back on their own philosophies of competition. In an earlier day, the Court's decision

Winter, *supra* note 24, at 21. The former is a sharp, constructive analysis of recent labor antitrust developments, somewhat marred, in my view, by a failure to pay sufficient heed to the implications of the two separate bases for antitrust immunity, the statutory exemption proclaimed in *Hutcheson* and the nonstatutory exemption enunciated in *Apex Hosiery* and *Jewel Tea*.

⁹⁰ The notion that a union's direct, contractual restraint of the product market can be justified only to the extent that it is necessary to further a union's lawful objectives in the labor market casts doubt on Justice White's handling of the facts in *Jewel Tea*, if not his rationale. If any weight at all is to be given to the consumers' interest in having meat available for sale after 6:00 P.M., it would seem that the employees' interest could have been adequately protected by the clause expressly defining their working hours and job content. See 381 U.S. at 738 (Douglas, J., dissenting). *Jewel Tea* stands as a tribute to the power of Mr. Dunau's advocacy in persuading the Supreme Court to accept as binding the trial court's factual finding that the marketing-hours limitation was necessary to police the guarantee of specified working hours and job content.

⁹¹ 421 U.S. at 624.

⁹² The Court has stressed that it is up to Congress to deal with secondary arrangements for organizational purposes. See, e.g., *Alleu Bradley Co. v. IBEW Local 3*, 325 U.S. 797, 803-10 (1945); *Hunt v. Crumboch*, 325 U.S. 821 (1945).

would have been regarded as wholly in keeping with the congressional design. Far more disturbing, as a matter of statutory interpretation, is the majority's handling of the construction industry proviso to Section 8 (e) of the NLRA. The general prohibitory language of Section 8 (e) was written in 1959 to plug a loophole in the original secondary boycott ban in Section 8 (b) (4). According to the Supreme Court, Section 8 (b) (4) forbade union concerted action to force one employer to cease doing business with another, but did not forbid a union-employer agreement to secure the same result.⁹³ Section 8 (e) was the legislative response to this anomaly. At the same time, however, it was recognized that the interlocking relationships of contractors and subcontractors in the construction and garment industries called for special treatment. Two different provisos were therefore inserted to deal with these industries. Senator Kennedy, the floor manager of the bill in the Senate, explained the building industry proviso as follows:

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8 (e).⁹⁴

The House Conference Report was similarly sweeping:

The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement. . . . To the extent that such agreements are legal today under section 8 (b) (4) . . . , the proviso would prevent such legality from being affected by section 8 (e).⁹⁵

Nothing in the legislative history section directly supports the position of the *Connell* Court that the Section 8 (e) proviso was limited to collective bargaining contexts, or to particular jobsites. The majority opinion did not quote the unqualified statements of Senator Kennedy and the House conferees which clearly cut the other way, but instead buried ambiguous references to them in the

⁹³ *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

⁹⁴ 105 CONG. REC. 17900-01 (1959), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1433 (1959) [hereinafter cited as LEGIS. HIST.].

⁹⁵ H.R. REP. NO. 1147, 86th Cong., 1st Sess. 39 (1959), reprinted in 1 LEGIS. HIST. 943.

middle of a long footnote.⁹⁶ The Court's insistence on restricting subcontracting agreements to particular jobsites, and its rejection of the notion that the jobsite requirement merely excludes agreements covering subcontractors "who deliver their work complete" to the site,⁹⁷ also fly in the face of legislative declarations on this specific point.⁹⁸ In terms of policy, the most significant aspect of the Court's approach to the Section 8 (e) proviso may have been its pronouncement that to permit subcontracting agreements with "stranger" contractors, without limitation to particular jobsites, "would give construction unions an almost unlimited organizational weapon."⁹⁹ Rendering judgments of this nature, about the appropriate economic weapons to be allowed the parties in an organizational campaign or other industrial combat, has long been thought to be the province of the Congress, not the courts.¹⁰⁰

The *Connell* decision also fails to square with two other lines of authority. First, as contended by Local 100, the Labor Board and its General Counsel had apparently resolved the Section 8 (e) proviso issue in the union's favor.¹⁰¹ The majority of the Court attempted to dispose of this argument by asserting that the Board precedent may have involved no more than an employer challenge

⁹⁶ 421 U.S. at 629 n.8. Justice Powell commented that "the Committee may have intended the § 8(e) proviso simply to preserve the status quo under *Carpenters Union v. NLRB (Sand Door)* . . . pending action on the *Denver Building Trades* [common-situs picketing] problem in the following session." Does this suggest the novel concept of a statutory provision that lapses of its own accord, when subsequent legislative plans go awry?

⁹⁷ 421 U.S. at 632.

⁹⁸ The proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." 105 CONG. REC. 17900 (1959), reprinted in 2 LEGIS. HIST. 1433 (remarks of Senator Kennedy). See also H.R. REP. NO. 1147, 86th Cong., 1st Sess. 39 (1959), reprinted in 1 LEGIS. HIST. 943. The only significant debate over the jobsite limitation arose when two union sympathizers, in a bid at some post-legislative history, maintained that the proviso covered not only work to be done at the site, but also work which could be done there. Compare *id.* at A8141, 2 LEGIS. HIST. at 1815 (remarks of Senator McNamara) and *id.* at A8222, 2 LEGIS. HIST. at 1816 (remarks of Representative Thompson) with *id.* at A8611, 2 LEGIS. HIST. at 1861 (remarks of Representative Kearns).

⁹⁹ 421 U.S. at 631.

¹⁰⁰ See note 92 *supra*; cf. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644 (1967); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316-18 (1965); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 497-98 (1960).

¹⁰¹ 421 U.S. at 631-32 n.10; see *Los Angeles Bldg. & Constr. Trades Council (B & J Investment Co.)*, 214 N.L.R.B. No. 86, 87 L.R.R.M. 1424 (1974); *Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken, Inc.)*, 183 N.L.R.B. 1032 (1970); *NLRB General Counsel Memorandum*, Release No. R-1343 (July 2, 1974).

to a "prehire" agreement, which Section 8 (f) of the NLRA¹⁰² would have authorized even before the general contractor had any employees on the job. In addition, the Court concluded that the General Counsel was concerned only with the question whether a preexisting collective bargaining relationship was necessary for a permissible subcontracting clause. At least the General Counsel, however, seems to have had a *Connell*-type situation specifically in mind:

A number of cases have raised the issue of whether a construction union violates sections 8 (b) (4) (A) and/or 8 (e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8 (e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

. . . .

[I]t has been contended . . . that the union's conduct to obtain the agreement accordingly violated the Act, because the contractor did not employ employees of the craft represented by the union and had no collective-bargaining relationship with the union.¹⁰³

As the agency primarily charged with the interpretation and enforcement of the NLRA, the Labor Board was entitled to more deference than it was shown.

Second, *Connell* ignored an important parallel development in the law. In *Dallas Building & Construction Trades Counsel v. NLRB*,¹⁰⁴ the District of Columbia Circuit held that union action like that in *Connell* could violate the organizational picketing restrictions of Section 8 (b) (7) of the NLRA,¹⁰⁵ unless the "coverage of the proposed contract is limited to the type of work which is never performed by the general contractors' own employees."¹⁰⁶ The court of appeals in *Dallas* was plainly informing the union that, if it wished to escape the strictures of Section 8 (b) (7), it should seek the very sort of agreement that *Connell* would later say

¹⁰² 29 U.S.C. § 158 (b) (7) (1970).

¹⁰³ NLRB General Counsel Memorandum, *supra* note 101, at 1.

¹⁰⁴ 396 F.2d 677 (D.C. Cir. 1968).

¹⁰⁵ 29 U.S.C. § 158 (b) (7) (1970). With qualifications not here relevant, Section 8 (b) (7) forbids organizational or recognition picketing by an uncertified union in several different situations. Probably the most important limitation, as a practical matter, is that the picketing must not be carried on for more than a reasonable length of time (not to exceed thirty days) without a representation petition being filed under Section 9 (c), 29 U.S.C. § 159 (c) (1970).

¹⁰⁶ 396 F.2d at 682 n.8.

violated Section 8 (e) and perhaps the antitrust laws as well. The Court in *Connell* never addressed this dilemma. To the further contention in the *Connell* opinion that the union's proposed reading of Section 8 (e) would undermine Section 8 (b) (7)'s policy against "top-down" organizing campaigns,¹⁰⁷ Judge McGowan in *Dallas* had the short answer: "Sections 8 (b) (7) and 8 (e) are aimed at wholly different problems."¹⁰⁸

The most egregious failure of the *Connell* majority to take proper account of the policies of the labor laws in working out an accommodation with the antitrust laws came last, and Justice Stewart made it the principal focus of his dissent. As he pointed out, Local 100's secondary activity at the *Connell* site was subject to comprehensive regulation under Sections 8 (b) (4) and 8 (e) of the NLRA and Section 303 of the Labor Management Relations Act (LMRA). Congress, in his view, meant to impose carefully defined sanctions for union secondary violations, and in so doing, meant to exclude private antitrust suits as a remedy.

Justice Stewart first demonstrated that in passing the Taft-Hartley Act in 1947, Congress deliberately rejected a provision initially adopted by the House and advocated by Senator Ball and others, which would have authorized the antitrust remedies of treble damages and private actions for injunctions against secondary boycotts.¹⁰⁹ Senator Taft could not have been more explicit: "Under the Sherman Act the same question of boycott damage is subject to a suit for [treble] damages and attorneys' fees. In this case we simply provide for the amount of the actual damages."¹¹⁰ Justice Powell, writing for the majority in *Connell*, had no quarrel with this view of the 1947 legislative history.¹¹¹ Justice Stewart and Justice Powell parted company over the interpretation of the 1959 amendments.¹¹² While Justice Powell is correct that Taft-Hartley's

¹⁰⁷ 421 U.S. at 632-33.

¹⁰⁸ 396 F.2d at 682.

¹⁰⁹ 421 U.S. at 641-45; see H.R. REP. No. 245, 80th Cong., 1st Sess. 24, 44, 45-46 (1947); S. REP. No. 105, 80th Cong., 1st Sess. 7-8, 22, 54-55 (1947); 93 CONG. REC. 4838 (1947) (remarks of Senator Ball); *id.* at 4847.

¹¹⁰ 93 CONG. REC. 4872-73 (1947). Senator Taft's view prevailed. See *id.* at 4874-75. The compromise was to direct the NLRB to seek injunctions against secondary boycotts under Section 10 (d) of the NLRA, and to permit private parties to sue for actual damages under Section 303 of the LMRA. H.R. REP. No. 510, 80th Cong., 1st Sess. 57-59, 67 (1947). See also *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260 n.16 (1964).

¹¹¹ See notes 75-78 *supra* and accompanying text.

¹¹² 421 U.S. at 646-53 (Stewart, J., dissenting).

Section 303, providing for actual damages for violations of Section 8 (b) (4), was not amended in 1959 to cover Section 8 (e) violations as such, Justice Stewart is on much firmer ground in maintaining that the legislative history in general, and the treatment of Sections 8 (e) and 303 in particular, denote a congressional intent to eschew antitrust sanctions. During the House deliberations, Representatives Hiestand, Alger, and Hoffman made repeated efforts to impose antitrust restrictions on union activity, but all of these were defeated.¹¹³ Even more to the point are the words of Representative Griffin, in opposing Representative Alger's proposed amendment and urging adoption of his own bill instead:

There is no antitrust law provision in this bill.

. . . .

. . . I believe I speak for the gentleman from Georgia [MR. LAN-DRUM], as well as myself when I say that if amendments are offered on the floor to add antitrust provisions or others that have been mentioned, I, for one, will oppose them.¹¹⁴

Technically, of course, there would have been no need for Congress to add antitrust provisions in 1959, if the Sherman Act had already applied, and if the only question were whether Congress was going to create a new exemption through the labor laws. It is exactly here, however, that the *Connell* majority failed to achieve a balanced appraisal by concentrating too much on the antitrust laws, and overlooking the obvious implications of the labor laws. As Justices Powell and Stewart observed, the 1959 congressional endeavor was to close certain "technical loopholes" in Taft-Hartley's original secondary boycott ban.¹¹⁵ To this end, Section 8 (e) was added to outlaw "hot-cargo" agreements, with the exceptions previously discussed, and Section 303 was amended to provide actual damages for secondary union activity to force an employer to execute an agreement in violation of Section 8 (e). But Section 303 was not amended to cover such an agreement in and of itself. Since the antitrust laws exempt the conduct of a union acting alone, even though the agreement sought may be subject to

¹¹³ See, e.g., 105 CONG. REC. 12135 (1959), reprinted in 2 LEGIS. HIST. 1507 (remarks of Representative Heistand); *id.* at 12136-37, 15532-35, 15858, 2 LEGIS. HIST. at 1507-08, 1569, 1690 (remarks of Representative Alger); *id.* at 15853, 15874, 2 LEGIS. HIST. at 1685, 1692 (remarks of Representative Hoffman).

¹¹⁴ *Id.* at 15535, 2 LEGIS. HIST. at 1572.

¹¹⁵ 421 U.S. at 628, 646.

antitrust regulation,¹¹⁶ it would not necessarily be inconsistent with antitrust theory to impose treble damages for a forbidden Section 8 (e) contract, while leaving a party victimized by the pressure tactics employed in pursuit of such a contract to the remedy of actual damages under Section 303. In the hierarchy of labor law values, however, coercive action is almost invariably subject to more severe sanctions than is an agreement.¹¹⁷ This treatment is specifically evident with regard to Section 8 (e). The Landrum-Griffin substitute provided that Section 303 should apply to conduct violative of Sections 8 (b) (4) and 8 (b) (7), but not to agreements violative of Section 8 (e).¹¹⁸ This was no oversight; prohibited Section 8 (e) agreements were made subject to Section 10 (l)'s mandatory injunction procedures.¹¹⁹ As a matter of labor policy, therefore, it would be incongruous for Congress to prescribe actual damages under Section 303 for secondary activity in violation of Section 8 (b) (4), but not for agreements in violation of Section 8 (e)—all for the purpose of subjecting the latter alone to the much harsher remedy of treble damages under the antitrust laws. Far more reasonable is the conclusion that Congress meant to provide only the usual cease-and-desist and Section 10 (l) injunctive relief for contracts forbidden by Section 8 (e), and no damage remedies at all.

C. Practical Observations

For all that it may say about the Burger Court's attitude toward the application of the antitrust laws to labor activity, *Connell* itself may have only a limited practical effect. Local 100's subcontracting arrangement was a relatively novel organizing tactic in the building trades, probably prompted by the broad hint furnished in the *Dallas* case.¹²⁰ There seem to be several different ways in which a union like Local 100 could pursue its organizational objectives within the parameters of Section 8 (e)'s proviso as interpreted by *Connell*. For example, if the requirements of a collective

¹¹⁶ See notes 46-49 *supra* and accompanying text.

¹¹⁷ See, e.g., *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93 (1958) (under pre-1959 law, hot-cargo agreement was permitted but coercive action to enforce it was prohibited).

¹¹⁸ H.R. 8400, 86th Cong., 1st Sess. § 705 (e) (1959), reprinted in 1 LEGIS. HIST. 685.

¹¹⁹ *Id.* at § 705 (d), 1 LEGIS. HIST. at 685.

¹²⁰ See notes 104-05 *supra* and accompanying text.

bargaining relationship and the limitation to particular jobsites are separate, independent grounds for proviso protection,¹²¹ a local union that does not represent employees of the general contractor might merely have to confine the subcontracting agreement to a list of specified jobs for which the general contractor has been engaged.¹²² I should also think that the policy apparently underlying *Connell* would not be offended if the subcontracting bar extended to all future projects undertaken by the general contractor within the jurisdiction of the local, but this is more problematical in light of *Connell's* "particular jobsites" language. If the Court's emphasis was on the notion that union men (or women) are entitled to protect themselves against having to work alongside non-union people,¹²³ a subcontracting clause may be valid if limited to jobsites at which union men would be working. Where the general contractor itself is organized, as was *Connell*, that could include all sites at which the general's own employees are at work, in addition to those at which the members of a union in the position of Local 100 are employed.

A collective bargaining relationship, either by itself or in conjunction with the particular jobsite limitation, may be an essential condition for a lawful subcontracting clause within the Section 8 (e) proviso. If so, it should still not be too difficult for building trades unions, without departing substantially from customary bargaining patterns in the construction industry, to comply with this requirement. Frequently, the crafts employed by a general contractor will designate the local building trades council, comprising the area's craft unions, as the official bargaining representative for all the general's craft employees. While individual craft arrangements are then usually worked out with the various participating locals, I do not see why they could not join in a single master contract that would include the desired subcontracting agreements covering the several crafts. A multicraft contract would have the advantage not only of promoting union organizational objectives within a collective bargaining context, but also of meet-

¹²¹ See note 74 *supra* and accompanying text.

¹²² A union picketing for such a clause would presumably have to disclaim any interest in ousting a nonunion subcontractor already under agreement for a particular job. Otherwise, the union could run afoul of Section 8 (b) (4) (B) 's ban on forcing one employer to "cease doing business" with another. See 29 U.S.C. § 158 (b) (4) (B) (1970).

¹²³ See notes 73-74 *supra* and accompanying text.

ing the subsidiary *Connell* test of protecting the union employees of the general contractor from being forced to work with non-union employees.

IV. CONCLUSION

The larger questions left by *Connell* concern its implications for the future direction of antitrust regulation of labor activity, without regard to the peculiar structure of the building industry. These are not easy to discern. *Connell* may foreshadow a stiffer standard for determining what constitutes wages and working conditions within the nonstatutory antitrust exemption of *Apex Hosiery* and *Jewel Tea*. It is surely not insignificant that Justice White, who wrote what is as close as anything we have to an opinion of the Court in *Jewel Tea*, provided the critical fifth vote in *Connell*. I would not be at all appalled at the idea of the Court's looking closer than it did in *Jewel Tea* at a union's supposed need for a restriction that both directly affects the product market and has some relation, intimate or otherwise, to wages and working conditions.¹²⁴ Yet if *Connell* is indicative of the Court's capacity for a balanced assessment in such circumstances, the litmus-like test of *Jewel Tea* is much to be preferred.

Inevitably, there will be an overlap between labor and antitrust regulation. Although we may assume that union activity protected under the NLRA will never be held violative of the antitrust laws, it does not follow that labor-management conduct is immune to antitrust remedies simply because it may also be subject to NLRA prohibitions and remedies. *Allen Bradley* involved labor activity that would obviously have been forbidden under Taft-Hartley's subsequently enacted Section 8 (b) (4) ban on secondary boycotts; nonetheless, *Allen Bradley* remains the paradigm union antitrust violation. Drawing the line between union activity that is subject to antitrust sanctions and union activity that is subject, if at all, only to labor law and remedies will continue to be one of the most delicate, demanding tasks confronting the judiciary. In my view, primary reliance should be placed on the labor laws. Unions and

¹²⁴ See note 90 *supra*; cf. notes 51-53 *supra* and accompanying text. Another example of a collective bargaining restraint that is likely to come under renewed scrutiny following *Connell* is the "most favored nation" clause, at least where it is not clearly limited to labor standards. See notes 67-68 *supra* and accompanying text.

the antitrust laws are premised on fundamentally opposing philosophies of competition. There will be anomalies at best, and grave distortions at worst, in attempting to regulate labor organizations through an instrument so at odds with their nature and purposes. We have long since concluded that the value of unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences.