1976

Congress and the Court at Cross Purposes: Labor's Antitrust Exemption

Jacalyn J. Zimmerman

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol7/iss3/10

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
Congress and the Court at Cross Purposes: Labor’s Antitrust Exemption

The application of antitrust laws to labor union activities requires the accommodation of two conflicting national policies. The antitrust laws seek to preserve a “competitive economy;” the national labor policy aims to preserve the “rights of labor to organize to better its conditions through the agency of collective bargaining.” The courts have long struggled to determine “how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.” The interface of labor and antitrust policies has been marked by scant congressional guidance, a handful of United States Supreme Court decisions, and much comment.

As recently as ten years ago, it was thought that the “labor exemption” from the antitrust laws protected virtually all union activity; only in a narrow and well-defined set of situations would a labor union be subject to the treble damage and injunctive provisions of the antitrust laws. However, the United States Supreme Court has

2. Id.
3. Id.
7. Timbers, supra note 6, at 546.
8. Id. at 550.
recently dealt that view a severe blow, and articulated its position that more and more labor activities fall within the purview of the antitrust laws. The vehicle for that position was Connell Constr. Co. v. Plumbers and Steamfitters, Local No. 100.9

THE HISTORY OF THE LABOR EXEMPTION

The antitrust laws reflect a national policy favoring competition, which is designed to promote economic efficiency, consumer welfare and a system of diffused power. Its primary feature is the elimination of restraint.10 On the other hand, national labor policy tolerates large-scale labor organizations despite their capacity to interfere with the objectives of the antitrust laws. The factor of restraint is inherent in collective bargaining affecting both employer and union. It is evident that labor and antitrust policies must conflict whenever they meet, and such has been the case.11

The Sherman Act,12 enacted to curb growing concentrations of corporate power and resulting anticompetitive effects, was immediately applied by lower federal courts to union activity.13 In 1908, the United States Supreme Court, in the Danbury Hatter's Case,14 read the Sherman Act literally and held that it applied to combinations by labor. Congress responded by seeking, in 1914, to exempt the existence of labor unions and certain labor activities from antitrust sanctions in the passage of sections 6 and 20 of the Clayton Act.15

However, the extent to which the scope of the antitrust laws was limited by these provisions was not clear. The exemptions were virtually destroyed when the Supreme Court declared in Duplex Printing Press Co. v. Deering16 that section 6 was a mere codification of existing law—an intent to restrain trade was not a "legitimate" object of a labor organization. Further, the Court stated that any...
exemption established by section 20 must be narrowly construed to apply only where there is a dispute over "terms or conditions of employment." 17 between the employer and his immediate employees.

The broad reach of the Sherman Act was not reduced until the enactment of the Norris-LaGuardia Act 18 in 1932. Congress explicitly overturned the Court's narrow construction of section 20 of the Clayton Act and prohibited the issuance of injunctions in all cases involving a "labor dispute." 19

A dramatic change in judicial attitude toward regulation under the Sherman Act of coercive union activities was evident in the next major decision in this area, Apex Hosiery Co. v. Leader. 20 The Supreme Court held that the antitrust laws were directed only at restraints which had an intended effect upon price strictures and competitive conditions in the product market. Apparently, the Court articulated a vague exception for union activities which were directed at the labor market, as opposed to the product market. 21

One year later, in United States v. Hutcheson, 22 the Court specifically considered the question of a union's antitrust liability:

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 are not to be distinguished by any judgment regarding the wisdom or un-wisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. 23

Following Hutcheson, courts primarily considered the existence of an improper combination between labor and nonlabor groups in determining the scope of labor's exemption. 24 The Supreme Court recognized an exception to labor's immunity arising from an improper business combination in Allen Bradley Co. v. Local No. 3, IBEW. 25 The union had obtained an agreement whereby all electrical contractors were to purchase electrical equipment exclusively from local manufacturers employing union labor. The manufactur-

17. Id. at 472.
20. 310 U.S. 469 (1940).
21. Id. at 505-13.
22. 312 U.S. 219 (1941).
23. Id. at 232.
25. 325 U.S. 797 (1945).
ers, in turn, agreed to sell only to contractors who employed union members. These agreements had led to an industry-wide understanding which proved highly successful in increasing both the price of electrical equipment and the wages of union members. The Court held that Congress never intended that unions should aid nonlabor groups to create monopolies or control the marketing of goods and services. The Court was careful to distinguish such aid from unilateral union activity which might achieve an end similar to that which results from labor and business acting in concert: unions that aid and abet business combinations violate antitrust laws; unions that unilaterally employ strikes, boycotts and other acts recognized by section 20 of the Clayton Act do not. This decision clearly indicated the limit of labor’s exemption: although goals pursued by the union had been legitimate, the combination with nonlabor caused the activity to exceed the exemption.

Construing the Apex and Allen Bradley decisions together, it appears that the Court attempted to reconcile the conflicting policies of the Sherman Act and the labor statutes. The labor statutes predominated when conduct related to labor standards, irrespective of any indirect effect on the pricing and marketing of goods. The Sherman Act governed when conduct directly regulated the pricing and marketing of goods.

For 20 years, neither Congress nor the Supreme Court acted upon labor’s antitrust exemption as set out in Apex, Hutcheson and Allen Bradley. However, in 1965, the Supreme Court decided the com-

---

26. Id. at 808.
27. Id. at 809-10.
28. Id. It has been suggested that Allen Bradley’s most serious flaw is that it makes union antitrust liability turn on an issue irrelevant to antitrust policy. In Allen Bradley, and again in Pennington, the Court admitted that the union, had it acted unilaterally, could have escaped antitrust liability. This test, turning on the existence of a combination with nonlabor, fails to take into account the anticompetitive nature of the conduct. See Di Cola, supra note 6, at 714-15. The Connell decision apparently cures this defect by holding, for the first time, that a union acting alone is not necessarily antitrust exempt.
29. It has been suggested that Apex and Allen Bradley together provide the following principles: (1) restraints relating to “labor standards” fall wholly outside the Sherman Act. They are lawful whether accomplished by a union alone, by a combination of unions and employers or by an association of employers alone; (2) restraints on the marketing and pricing of goods accomplished by a “combination” of unions and employers fall within the Sherman Act. They are unlawful, unless saved by the “rule of reason;” and (3) restraints on the marketing and pricing of goods accomplished by a union “acting alone” fall within section 6 and are therefore lawful. Bredhoff, supra note 6, at 262-63. But see Cheit, Public Policy Toward Trade Unions: Antimnonopoly Laws, 9 LAB. L.J. 705 (1958), where the author suggests that labor union activities are antitrust exempt only so long as they are confined to labor groups, labor disputes and labor markets. Thus, in this view, acts that fall outside labor market boundaries or that involve direct product market restraints will not be protected.
30. For an exhaustive review of lower court decisions during this period, see Labor’s
panion cases of *United Mine Workers v. Pennington* and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.* In *Pennington*, small coal producers alleged a Sherman Act violation because the union had agreed to a minimum wage scale with large coal producers. The agreement would have effectively forced small operators out of business. The Court held that unions forfeit antitrust immunity when

... it is clearly shown that it [the union] has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

However, the majority explicitly recognized that a union could properly enter into an agreement with a multi-employer bargaining unit which provided for wages that other employers would very likely be unable to meet, and that it could do so with the full intention of imposing similar terms on all such other employers. The limits of the exemption would be exceeded only where the union and the multi-employer group agreed that such terms would be secured from the other employers.

In the companion case, *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.* the employer challenged the validity of a clause in its collective bargaining contract which prevented it from operating its meat counters after 6:00 p.m. Jewel had agreed to sign the measure only under threat of strike. The trial court found that Jewel could not extend the marketing hours without either increasing the butchers' hours or using nonunion butchers. Further, the court found that the union had formulated the restriction and pursued its adoption unilaterally in order to serve its own interests. There was no evidence of a union-employer conspiracy, even though some 9,000 other employers had agreed to the concession. On these facts, the challenged activity was found protected by the labor exemption to the Sherman Act.

---

*Antitrust Exemption, supra note 24, at 746-49.*

32. 381 U.S. 676 (1965).
33. 381 U.S. at 665-66.
34. 381 U.S. 676 (1965).
35. 215 F. Supp. 839 (N.D.Ill.), rev'd, 331 F.2d 547 (7th Cir. 1963).
36. *Id.* at 845.
On review, the Supreme Court adopted the trial court’s findings, while reversing the Seventh Circuit. Justice White commented on the scope of legitimate union interests:

Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the union’s successful attempt to obtain that provision through bona fide, arm’s-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.37

This analysis has been labeled the test of “legitimate union interest.”38 Subjecting the Jewel agreement to this test, the Court weighed the agreement’s impact on the product market against its relevance to the interests of the union members and found the union activity protected by the exemption.39

In a single opinion, Mr. Justice Goldberg, with whom Justices Harlan and Stewart concurred, dissented from the Court’s Pennington judgment and concurred in the Jewel Tea opinion.40 He stated his position as follows:

Following the sound analysis of Hutcheson, the Court should hold

37. 381 U.S. at 689-90.

In a footnote immediately following this statement, Justice White declared that the “crucial determinant” was not the subject matter of the agreement, but rather was its “relative impact on the product market and the interests of union members.” It has been suggested that these formulations may give rise to several alternative constructions. In view of Justice White’s assumption that the questions of exemption and antitrust violation are separate, it appears that the “intimately related” test is based solely upon consideration of the benefit to labor. A finding of not “intimately related” would strip the union of its exemption, but the question would remain whether a substantive antitrust violation had occurred. This problem is discussed in Morse Bros. v. Local No. 701, International Union of Operating Engineers, 87 L.R.R.M. 2833 (D. Or. 1974). On the other hand, if Justice White’s balancing test is applied to determine exemption, it seems likely that a competitive restraint deemed sufficient to overrule labor’s exemption would also be held an antitrust violation. See Labor’s Antitrust Exemption, supra note 24, at 757-59.

38. In Justice White’s view, the agreement would not be antitrust immune if it produced an anticompetitive effect and benefited union members only indirectly. By tying the labor exemption to the “intimate relation” of the activities involved to mandatory subjects of bargaining, the Court has substituted its view of proper, i.e., legitimate, union interest for the “self-interest” concept of Hutcheson, 381 U.S. at 688-90.

39. 381 U.S. at 691. The Court stated:

[Al]though the effect on competition is apparent and real . . . the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work.

40. 381 U.S. at 697.
that, in order to effectuate congressional intent, collective bargain-
ing activity concerning mandatory subjects of bargaining under
the Labor Act is not subject to the antitrust laws. This rule flows
directly from the Hutcheson holding that a union acting as a
union, in the interests of its members, and not acting to fix prices
or allocate markets in aid of an employer conspiracy to accomplish
these objects, with only indirect union benefits, is not subject to
challenge under the antitrust laws.\textsuperscript{41}

Thus, it appears that the rule to be gleaned from the majority
opinions in Pennington and Jewel Tea is that a labor union is ex-
empt from the operation of the antitrust laws provided it acts uni-
laterally and in the pursuit of its own interests, rather than in com-
bination or conspiracy with nonlabor groups. Additionally, the ac-
tivities must be in furtherance of a subject matter of immediate and
legitimate union concern, such as wages, hours and working condi-
tions, and not in furtherance of matters which are of only indirect
concern to the union, such as prices and other marketing factors.\textsuperscript{42}

Subsequent to Pennington and Jewel Tea, the Court twice
avoided opportunities to state more clearly its approach to the labor
exemption question. No enlightenment was forthcoming.

In American Federation of Musicians v. Carroll,\textsuperscript{43} the union
sought to protect musicians' wages by imposing a detailed mini-
mum price list upon orchestra leaders, relative to "one-shot" en-
gagements. The orchestra leaders claimed that the list unnecessar-
ily stifled competition. The Court, however, held that the nature of
the industry was such that the musicians' product and labor were
the same item, so that an agreement as to the cost of labor necessar-
ily fixed prices. In so declaring, the Court obviated the necessity of
explicitly addressing the labor exemption question; however, the
Court found that the agreement was nevertheless in furtherance of
a legitimate union interest. The most significant aspect of the case,
as noted by Justice White in dissent,\textsuperscript{44} is that the Court abandoned
its Jewel Tea "balancing approach" for the determination of legiti-
mate union interest.

Ramsey v. United Mine Workers\textsuperscript{45} presented a fact situation al-

\textsuperscript{41} Id. at 710.
\textsuperscript{42} This statement of the Pennington-Jewel Tea holding was set forth by District Judge
1967).
\textsuperscript{43} 391 U.S. 99 (1968).
\textsuperscript{44} Id. at 116-17. The majority had stated that the crucial determinant was the impact
of the price setting on the union membership. Justice White, in contrast, urged that the
benefit to union members should be weighed against the anticompetitive impact.
\textsuperscript{45} 401 U.S. 302 (1971).
most identical to that of Pennington. Small coal miners, alleging an antitrust violation, sought to prove the existence of an express or implied agreement between the UMW, the sole defendant, and a multi-employer group. The alleged agreement imposed a certain wage scale on all coal mine operators, with the result that the smaller operators would be driven out of the market.

The Supreme Court, clarifying its Pennington holding that a union loses its exemption when "it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units," held that the usual preponderance of the evidence standard applies in determining substantive antitrust violation. No clarification, however, was forthcoming on the Court’s view of the scope of the labor exemption.

Predictably, the lower federal courts have had considerable difficulty in extracting much guidance from the fragmented Pennington and Jewel Tea opinions, which do not appear to have substantially altered lower courts’ treatment of the labor-antitrust dilemma.

Hutcheson has been referred to as the “prevailing view” of the labor exemption, with Jewel Tea being merely an application of the Hutcheson doctrine. Several opinions have addressed the question of the type of activity sufficient to bring a union into the “combination with nonlabor” situation. These opinions have universally ignored the implications of Jewel Tea that not all unilateral union activity is immune from antitrust prosecution. At least one court stated absolutely that a union has no antitrust liability so long as it acts alone; only the Connell appeals court recognized that Jewel Tea may have circumscribed the holdings of Allen Bradley and Hutcheson.

47. The clear proof standard, Justice White asserted, is limited to establishing the union’s participation in the antitrust violation. Only a preponderance of the evidence is required to establish whether the substantive violation had in fact occurred. 401 U.S. at 311.
48. Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541 (9th Cir. 1974).
49. Id.; Embry-Riddle Aeronautical Univ. v. Ross Aviation, 504 F.2d 896 (5th Cir. 1974); Webb v. Bladen, 480 F.2d 306 (4th Cir. 1973).
50. The Court suggested in Jewel Tea that it might be limiting the Hutcheson-Allen Bradley holdings that a union is antitrust exempt so long as it acts alone:
   It might be argued that absent any union-employer conspiracy against Jewel and absent any agreement between Jewel and any other employer, the union-Jewel contract cannot be a violation of the Sherman Act. The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy.
381 U.S. at 689.
52. 483 F.2d 1154, 1166 (5th Cir. 1973).
JEWEL TEA REFORMULATED

Connell: The Facts

Recently, the Court again undertook the task of attempting to reconcile conflicting labor and antitrust policies. The Connell Construction Company, a Texas general contractor, was contacted by the Plumbers and Steamfitters Union, and was asked to sign a contract whereby Connell agreed not to subcontract business to any plumbing or mechanical firm which did not have a current collective bargaining agreement with that union. When Connell refused to sign the contract within the union's ten-day deadline, the union placed a single picket at one of the contractor's projects in Dallas. Approximately 150 employees left the jobsite, effectively halting construction. The subcontractor engaged at that project did, in fact, have a current collective bargaining agreement with the union. None of Connell's employees were union members, and the union specifically denied any interest in organizing them.

Connell brought suit in a Texas state court alleging a violation of the Texas antitrust laws, and was granted a temporary injunction against the picketing. The union removed the case to federal court. Connell signed the subcontracting agreement under protest and amended its complaint, alleging that the agreement violated the federal antitrust laws and was therefore invalid.

The Connell district court reached the merits of the antitrust claim and found the union exempt. The district court thus adhered to the Seventh Circuit decision of Suburban Tile Center, Inc. v. Rockford Building and Constr. Trades Council. The district court opinion contained dictum concerning the union's freedom of action, either acting alone or in combination with employers, with respect to subjects outside the mandatory bargaining area. For example, the Court stated that if the union had insisted upon a price schedule and the employer had acquiesced, the agreement would be subject to antitrust challenge. 381 U.S. at 689. Professor Archibald Cox has suggested that this dictum either cuts back on the Hutcheson view of the labor exemption, or presages an interpretation of "labor dispute" in the Norris-LaGuardia Act that would render that statute inapplicable to concerted activities dealing with access to or competition in the product market which yield no direct benefits to the union members but only such returns as come from increasing the gross income of the employers.

Pennington and Jewel Tea, supra note 6, at 327. But such an interpretation of a labor dispute was previously rejected by the Court in Allen Bradley. See note 74 infra. 53. 78 L.R.R.M. 3012 (N.D. Tex. 1971). 54. Id. 55. 354 F.2d 1 (7th Cir. 1965), cert. denied, 384 U.S. 960 (1966). On facts very similar to those of Connell, the subcontractor-plaintiff brought an antitrust suit to challenge an agreement between a contractors' association and a building trades council. The agreement contained a provision precluding the signatory contractors from subcontracting to anyone who
Labor's Antitrust Exemption

held that Congress had, in amendments to the National Labor Relations Act, expressly recognized the validity of contracts such as the one challenged as a legitimate subcontracting agreement in the construction industry.56

The Fifth Circuit Court of Appeals affirmed the lower court's result without reaching the issue of the validity of the challenged contract under the National Labor Relations Act.57 Judge Morgan analyzed the Connell situation in view of Justice White's two-fold exemption test as expressed in Pennington and Jewel Tea. First, the court found no agreement sufficient to destroy antitrust immunity since the union had not conspired with a nonlabor group to injure Connell's business.58 The only nonlabor party to the agreement was the plaintiff; this, said the court, was "strong evidence" that the union was acting in its own self-interest and that no monopoly was being formed.59

The court proceeded to discuss Justice White's second test — whether the agreement furthered a "legitimate union interest."60 The agreement was viewed as a means of eliminating competition based on differences in labor standards and wages, and an attempt by defendant Local No. 100 to unionize as many subcontractors as possible. This, opined the court, was a legitimate union goal, antitrust exempt even though the conduct in question may have been pursued by means tantamount to unfair labor practices:

[F]or antitrust purposes the term "legitimate union interest" is not controlled by whether or not the goal sought or the methods used in attempting to reach that goal violate the ground rules for

---

57. 483 F.2d 1154 (5th Cir. 1973).
58. Id. at 1166.
59. Id. The Court recognized that lack of conspiracy was insufficient to merit exemption:
   From the thicket of Jewel Tea, a lower court is left with a feeling that mere failure to allege and prove conspiracy does not mean that labor's exemption from the antitrust laws automatically applies.
60. Id. at 1166-67.
labor relations set forth in the NLRA. If and when those ground rules are violated, punishment must come through the procedures and in the manner specified by Congress in the labor laws. Absent a viable conspiracy allegation, a union retains its exemption from antitrust attack so long as the terms of the agreement it seeks are designed to benefit its members in the hours, conditions, and other immediately relevant concerns of the working man.61

Connell: The Decision

In a 5-4 decision, the United States Supreme Court reversed the Fifth Circuit,62 holding that the agreement between the union and the general contractor, which was outside the collective bargaining relationship and not limited to a particular jobsite, and which obligated Connell to subcontract only to union signatories, could form the basis for a federal antitrust suit. The case was remanded for consideration of whether the agreement did, in fact, constitute a substantive antitrust violation.63

Justice Powell, writing for the majority, justified this conclusion by stating that the agreement, signed under protest by Connell, gave the union complete control over subcontracting work offered by the general contractor. This agreement constituted a direct restraint on the business market and indiscriminately excluded nonunion subcontractors from a portion of that market, even if their competitive advantages were derived not from substandard labor conditions but resulted from more efficient operating methods.64

Despite the Court’s finding that the union’s sole goal — organizing as many subcontractors as possible — was “legitimate,” the Court held that “the methods the union chose are not immune from antitrust sanctions simply because the goal is legal.”65 This type of direct restraint on the business market, Justice Powell reasoned, had substantial anticompetitive effects, both actual and potential, that would not “follow naturally from the elimination of competition over wages and working conditions.”66 The restraint, he added, “contravenes antitrust policies to a degree not justified by congressional labor policy.”67

Setting aside the question of labor’s antitrust exemption, the

61. Id. at 1170.
63. Id. at 637.
64. Id. at 623.
65. Id. at 625.
66. Id.
67. Id.
Court rejected the union’s alternative contention that the agreement was valid under the construction industry exception to the general interdiction against agreements not to deal in the goods or services of another expressed in section 8(e) of the National Labor Relations Act. The Court, however, declared that the section 8(e) proviso protects only those agreements which arise within the context of a collective bargaining relationship and which limit their coverage to a particular jobsite.

The Court dismissed the main argument of the dissenters with a footnote. Justice Stewart, joined by Justices Douglas, Brennan and Marshall, had found it unnecessary to decide whether the challenged agreement did in fact violate section 8(e). He cited extensively from the legislative history of the 1947 Taft-Hartley Act, the 1959 Landrum-Griffin amendments, and subsequent legislative antitrust proposals to demonstrate that Congress had specifically rejected efforts to extend antitrust liability to union secondary activity. The Court further rejected the dissenters’ contention that Congress had provided an exclusive remedy for section 8(e) violations and other unfair labor practices through enactment of section 303 of the National Labor Relations Act, which authorized suits for recovery of all compensatory damages by any injured employer.

Justice Douglas contributed a brief separate dissent. Citing Allen Bradley, he found the lack of a viable allegation of conspiracy determinative; absent a conspiracy, antitrust laws are inapplicable, and the general contractor’s remedies, if any, were provided exclusively by labor laws.

The Connell decision is difficult to reconcile with previous Court pronouncements in the labor-antitrust area. The majority carved from the traditional statutory antitrust exemption allowed unilateral union activity a limited nonstatutory exemption in some cases involving union-employer agreements. The Connell Court denied

---

68. 29 U.S.C. § 158(e) (1970). The excepting proviso states, in pertinent part:

[N]othing 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.

The Fifth Circuit had declined to decide this issue, holding that it was subject to the exclusive jurisdiction of the National Labor Relations Board. 483 F.2d at 1174.

69. 421 U.S. at 631. However, to suggest that such an agreement is to be negotiated site-by-site is to ignore the realities of subcontracting in the construction industry. See Address by Florian Bartosic, Secretary, ABA Section of Labor Relations Law, on Supreme Court Decisions in October 1974 Term, in 157 B.N.A. Daily Lab. Rep. at D-12 (August 13, 1975).

70. Id. at 634-35n.16.


73. 421 U.S. at 638.
the union the benefit of either exemption.

Historically, a union may claim a statutory exemption from the antitrust laws so long as it acts unilaterally in the furtherance of its own legitimate objectives in the course of a bona fide labor dispute. The Connell Court summarily dismissed the possibility of a statutory exemption for the union. In so doing, the Court ignored the possibility that the Plumbers and Steamfitters Local No. 100 acted unilaterally in the course of a labor dispute.

The existence of a "labor dispute" has always been an important initial criterion for determining the existence of labor's statutory exemption. The most oft-quoted Court pronouncement on the scope of a labor dispute is:


"Labor dispute" has been legislatively defined at 29 U.S.C. § 113 (1970):

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Congress and the Court early conflicted on the proper reach of the term "labor dispute," when the Court, in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 472 (1921), held that section 20 of the Clayton Act was to be construed narrowly to apply only to those parties to a dispute "concerning terms or conditions of employment" who stood in a "proximate relation" to the controversy and who were "affected in a proximate and substantial, not merely a sentimental, sense by the cause of the dispute." When Congress considered the Norris-LaGuardia Act in 1932, it specifically sought to overturn this narrow definition. See Report of the Senate Committee on the Judiciary, Feb. 4, 1932, noted in Koretz, STATUTORY HISTORY OF THE UNITED STATES LABOR ORGANIZATION 169 (1970). When the Court next undertook this task, in United States v. Hutcheson, 312 U.S. 219 (1941), Justice Frankfurter reasoned that the Norris-LaGuardia Act was a congressional interpretation of section 20 of the Clayton Act which was inconsistent with Duplex. Thus, so long as activity was within the bounds of a "labor dispute," as redefined under the Norris-LaGuardia Act, it was protected from Sherman Act liability.
[T]here may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing.\footnote{75}

Reason dictates that the Connell situation should be encompassed within the bounds of the above statement, thereby qualifying for the statutory exemption.\footnote{76} Although Connell was not an employer of union members, the realities of collective bargaining relationships in the construction industry indicate that the general contractor is intimately concerned with the labor affairs of its subcontractors.\footnote{77} To conclude that this dispute had no bearing on the

\begin{footnotes}
\footnote{75} It was thought at the time of the Hutcheson decision that a union remained wholly antitrust exempt so long as it acted alone. However, the Court recognized that a union's immunity extends only to conduct undertaken in the course of a labor dispute. See Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942). Controversy remained as to the proper reach of the term "labor dispute." It was suggested that a union's attempt to impose a direct restraint on the product market did not constitute a labor dispute. See ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTITRUST LAWS REPORT 296-300 (1955). The Allen Bradley Court considered such a contention and rejected the argument that the union's attempt to provide a sheltered market for union employers did not constitute a labor dispute. Although the union lost its immunity because of its combination with nonlabor, the Court rejected the contention that no labor dispute existed:

\begin{quote}
We do not have here, as we did in Columbia River Packers Ass'n v. Hinton, a dispute between groups of business men revolving solely around the price at which one group would sell commodities to another group. On the contrary, Local No. 3 is a labor union and its spur to action related to wages and working conditions.
\end{quote}

325 U.S. at 807n.12. Generally, the prevailing opinion is that the Hutcheson rule governs the scope of a labor dispute, and any activity in the union's self-interest meets that criterion. See Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. PA. L. REV. 252, 267-70 (1955) [hereinafter cited as A Preliminary Analysis].

\footnote{76} See Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 807 (1945). The union had waged an aggressive campaign to obtain closed-shop agreements with all local electrical equipment manufacturers and contractors. Using strikes and boycotts, it gradually obtained more and more closed-shop agreements in the New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed-shop agreements with Local No.3, and manufacturers obligated themselves to confine their New York City sales to contractors employing the union's members. Since the union's contribution to the joint union-employer plan was accomplished through threats to withhold labor, the Allen Bradley Court stated that in the absence of the union-employer conspiracy it would have been exempt. The means used fell squarely within the specified acts declared by section 20 of the Clayton Act not to be violations of federal law. The means used by the union in Connell to obtain its agreement were substantially similar.

\footnote{77} This is the precise reason for the various common-situs picketing bills, the latest of which is discussed at text accompanying notes 139 through 144 infra. The view is that because of the close community of interests on a construction site, no employer can be truly neutral in the disputes of another.
employer-employee relationship would be tenuous—the general contractor was not a disinterested party, and the methods used by the union were a common approach to unionization in the construction industry.78

The Connell majority seems to admit that the statutory exemption should apply in this case,79 but relies upon contorted application of the Allen Bradley “combination with nonlabor” test to defeat the union’s exemption claim. That the Court does not consider the union’s activity unilateral is demonstrated by statements in response to the dissenters’ contention that Congress had specifically considered and rejected attempts to narrow the statutory exemption. While correctly pointing out that the rejected proposals were broader than the Connell issue, the Court stated that the mere fact that Congress had rejected those proposals “hardly furnishes proof that it intended to extend labor’s antitrust immunity to include agreements with nonlabor parties, or that it thought antitrust liability under the existing statutes would be inconsistent with the NLRA.”80 Therefore, it seems that the Court recognizes that the union’s activity, if unilateral, should be immune. Concluding, however, that the union’s activity was not unilateral, the Court found that the activity must be judged by a limited nonstatutory exemption standard.

The Court had recognized in Allen Bradley that a union loses its antitrust protection when it combines with a nonlabor group to aid a business conspiracy.81 After Allen Bradley, the question of whether a requisite combination with nonlabor existed when the employer succumbed to union demands under pressure persisted. Similarly, the questions of whether a union’s combination with a single employer would be sufficient to forfeit the exemption, and whether a collective bargaining agreement could constitute a combination


79. See 421 U.S. at 621-22. The Court states that specific union activities, such as secondary picketing and boycotts, are protected by the statutory exemption. However, the statutory exemption does not protect concerted action or agreements between unions and nonlabor parties.

80. 421 U.S. at 635n.16 (emphasis added). See discussion of these proposals at text accompanying notes 99 through 119 infra.

81. 325 U.S. 797 (1945). In the majority’s view of the facts, the union lost its antitrust immunity because it had aided and abetted a business conspiracy. Justices Murphy and Roberts argued in dissent that the majority had mischaracterized the facts and that the agreements were instigated by the union. It appeared, however, that Allen Bradley was not interpreted to prohibit parallel collective agreements effecting market control when the agreements were union-sponsored. See Preliminary Analysis, supra note 74, at 270-71.
with nonlabor, remained unanswered. These questions were partially answered in Jewel Tea, where the Court stated that the fact that the parties to a challenged agreement were but a single employer and the union representing the company’s employees did not compel immunity for the agreement. Following the decision, commentators recognized that the union had, in effect, been acting alone when it forced the employer to sign the disputed marketing-hours provision. Further, according an employer the right to bring suit under the Sherman Act to vindicate his compelled participation in bargaining arms employers with extremely powerful weapons with which to discourage union demands at the bargaining table.

It was unnecessary for the Jewel Tea Court to explore the ramifications of imposing antitrust liability on unilateral union activity since it found the challenged provision protected as “intimately related” to wages, hours and marketing conditions.

The Connell decision thus clarifies the Court’s view that a union’s success in compelling an employer’s agreement to a contract may be sufficient to subject it to antitrust liability. The dangers inherent in such a posture are obvious. The only means by which a union can ever secure implementation of its objectives is through agreement with an employer, but it now seems that the mere signing of

82. See Labor’s Antitrust Exemption, supra note 24, at 747-48.
83. 381 U.S. at 689.
84. See, e.g., Labor’s Antitrust Exemption, supra note 24, at 757. The author suggests that the Court’s assumption — that a collective bargaining agreement signed by a single employer could create the requisite combination with nonlabor even though the employer initially resisted inclusion of the disputed provision — constituted a “radical departure” from lower court precedent. The author terms “even more startling” the Court’s conclusion that the sole nonlabor party to the agreement could challenge it under the antitrust laws.
85. Only Justice Douglas seemed to recognize that the Connell agreement should not properly be characterized as a combination with nonlabor. Citing Allen Bradley, he pointed out that Congress had not intended to immunize union participation in business conspiracies from the Sherman Act. The Connell situation, he asserted, did not fall within the Allen Bradley rule since the company had alleged no conspiracy. Therefore, the agreement should have been regulated solely by the labor laws. 421 U.S. at 638. For a discussion of a similar situation from the point of view of an injured subcontractor see Webb v. Bladen, 480 F.2d 306 (4th Cir. 1973). The subcontractor brought an antitrust suit after a union and two general contractors agreed to terminate his contract. The subcontractor made no claim under the labor laws. The court found that the general contractors had terminated their contracts with the subcontractor as a result of union pressure, and held that this activity did not constitute a combination with nonlabor; since the union had acted alone, it could not be liable under the antitrust laws.
86. See the discussion in Justice Goldberg’s Jewel Tea-Pennington opinion, 381 U.S. at 721.

Professor Archibald Cox has recognized the incongruity of such a result. It appears after Connell that unions may strike, picket and boycott with immunity, but will become liable under the antitrust laws when the employer concedes to the demands and signs a contract. See Pennington and Jewel Tea, supra note 6, at 327 (1966).
a collective bargaining agreement might subject a union to liability under the Court's limited nonstatutory exemption for union-employer agreements. Such a characterization will greatly restrict the scope of the statutory exemption as very few union activities will now be deemed unilateral.

In Connell, the Court clearly states that while the statutory exemption would "exempt specific union activities, including secondary picketing and boycotts" from operation of the antitrust laws, the statutory exemption would not protect "concerted action or agreements between unions and nonlabor parties." 87 However, citing Jewel Tea, the Court conceded that some union-employer agreements are to be allowed a "limited nonstatutory" exemption. 88 The Court pointed out that although the statutory exemption allows a union to accomplish some restraints by acting unilaterally, as in the Carroll situation, the nonstatutory exemption "offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." 89 After a discussion concerning the effects of the Connell agreement upon the market, the Court concluded that the union could not claim a nonstatutory exemption. 90

Apparently, although the Court does not so state, the standards enunciated in Jewel Tea should govern the union's claim to a nonstatutory exemption. 91 Thus, the union should be protected if its

---

87. 421 U.S. at 622.
88. Id. The designation of the exemption allowed some union-employer agreements as "nonstatutory" is apparently a new innovation of the Connell Court. In its previous decisions, the Court did not distinguish between the two types of exemptions, and appeared to analyze the fact situations in view of what is now termed the statutory exemption. In Jewel Tea, it seemed that the "intimately related" test was a new interpretation of the statutory exemption. See 381 U.S. at 688-97.
89. 421 U.S. at 622-23. It thus appears that the Court has formulated two different classes of antitrust exemptions for labor. The statutory exemption for unilateral activity is broad and may probably be defined in terms of the Hutcheson decision. The nonstatutory exemption is more limited, but the Court fails to clearly articulate what activities it protects. However, by classifying the Connell agreement as a combination with nonlabor so as to entitle it to only a limited nonstatutory exemption, the Court effectively limits the Hutcheson holding by limiting the definition of unilateral union activity.
90. Id. at 625.
91. Id. at 622.
activities are "intimately related" to wages, hours and working conditions, mandatory subjects of bargaining. *Jewel Tea* suggests that this determination is to be made by balancing the benefit to labor of an agreement against its impact on the product market. However, *Carroll* implies that only the labor interest is to be considered in determining the existence of an "intimate relation."92 Of course, the preliminary obstacle to the application of this standard to the *Connell* facts is that in the absence of a bargaining relationship there are no mandatory subjects of bargaining.93

Subsequent to *Jewel Tea*, it was suggested that the focus on mandatory subjects of bargaining would automatically exclude any union secondary activity from the labor exemption.94 Because such an approach would signal a virtually inevitable return to the discredited *Duplex* rationale, lower courts have chosen not to follow this restrictive interpretation. Rather, the inquiry has been directed toward whether the agreements served to achieve better wages, hours and working conditions generally for union members, and has not involved whether the specific agreement concerned a mandatory subject of bargaining in the particular instance.95

Without noting the absence of a mandatory subject of bargaining, the Court seemingly analyzes the *Connell* agreement in view of the *Jewel Tea* criteria, although the operation of those criteria in the progression of the Court's analysis is difficult to detect. Although the Court did admit that organizing was a "legitimate" union goal, the Court failed to consider the necessity of the subcontracting

---

92. See text accompanying notes 37 through 44 supra.

93. Within a collective bargaining relationship, a subcontracting clause has been held to be a mandatory subject of bargaining. See Suburban Tile Center, Inc. v. Rockford Building and Constr. Trades Council, 354 F.2d 1, 3 (7th Cir. 1965) and cases cited therein.

94. See Comment, 55 CAL. L. REV. 254, 266-68 (1967), where the author suggests that prior to *Jewel Tea* the Court defined the scope of labor's antitrust exemption in terms of conduct made non-enjoinable by the Norris-LaGuardia Act, i.e. all peaceful union conduct undertaken in the course of a labor dispute. It is further suggested that the Court in *Jewel Tea* abandoned this approach and switched its emphasis to the concept of the bargaining unit and the mandatory subjects of collective bargaining under the National Labor Relations Act and that the Court narrowed the limits of the exemption to activities protected under the NLRA.

This analysis indicated that the Court may have been shifting toward the approach taken in *Connell*—that to be immune from the antitrust laws, the union conduct must be aimed at protecting the wages, hours and working conditions of union members *within the bargaining unit*. Such a position signals a return to the pre-*Hutcheson* posture that union secondary conduct is not antitrust exempt.

95. The *Connell* appeals court took this approach and found that the subcontracting agreement was necessary because of the difficulty involved in organization in the construction industry, which is of an ambulatory nature and often involves a lack of continuity between the various parties on a construction site. 483 F.2d at 1167-68. *See also* Cedar Crest Hats v. United Hatters, 362 F.2d 322 (5th Cir. 1966).
agreement to the union's organizing campaign, and the benefit of
the agreement to union members generally.

Apparently, the Court has, in some manner, utilized the balanc-
ing element of Justice White's *Jewel Tea* analysis, deeming the
restraint on the product market to outweigh the benefit to the labor
market without even considering the possible benefit to union mem-
ers. The Court enunciates the rule that restraints on the business
market which do not follow naturally from the elimination of com-
petition over wages and working conditions will not be antitrust
exempt.\(^96\)

It is difficult to understand, in the absence of explanation of the
underlying rationale of the opinion, why the Court deems the
Connell agreement so heinous. The anticompetitive effect of the
questioned agreement is substantially similar to that of a contract
authorized under section 8(e), and is, in fact, the goal of any legal
hot-cargo agreement in the construction industry.\(^97\) Although the
Court implies that the national policy of fostering collective bar-
gaining might salvage such an agreement within the collective bar-
gaining context, *Jewel Tea* demonstrates that the collective bar-
gaining relationship is not an absolute shield from antitrust liabil-
ity.

There are inherent difficulties with the Court's approach to the
nonstatutory exemption. First, it suffers from the same vagueness
as the standards previously enunciated in the *Apex-Allen Bradley-
Jewel Tea* line of cases. Additionally, this exemption is exceedingly
difficult to apply. A determination regarding which restraints follow
naturally from the elimination of competition over wages and work-
ing conditions by a lower court would require that the court apply
its own notions of the proper balance of industrial power. The very
purpose of the broad exemption of Norris-LaGuardia was to elimi-

---

96. *421 U.S.* at 625.

97. See Appendix to Respondent's Brief on the Merits at 31a, 32a, *Connell Constr. Co. v.
Plumbers and Steamfitters, Local No.100, 421 U.S. 616* (1975). NLRB General Counsel Peter
Nash states:

[O]rganizing in the building and construction industry both prior to and subse-
quent to the 1959 amendments, was and is primarily carried on by building and
construction trades councils on behalf of their constituent craft locals. The build-
ing trades agreements proffered are not conventional collective-bargaining agree-
ments, nor is a conventional collective-bargaining relationship sought, but rather
an attempt is made to obtain skeleton agreements (containing little more than
subcontracting provisions) which in turn are augmented by the execution of
collective-bargaining agreements by the individual trade unions, the latter agree-
ments containing provisions governing wages and other substantive conditions of
employment.
nate this type of judicial balancing. 98

Moreover, examination of congressional activity surrounding enactment of the Taft-Hartley Act in 1947, 99 the Landrum-Griffin Act in 1959, 100 and subsequent proposals clearly evidences congressional intent to preserve the existing statutory scheme.

CONGRESSIONAL REJECTION OF ATTEMPTS TO NARROW LABOR'S ANTITRUST EXEMPTION

During consideration of the Taft-Hartley Act, the House Bill, as initially reported and passed, proposed to exclude “unlawful secondary activities” from the Norris-LaGuardia Act 101 and would have subjected such activities to liability under the Sherman Act. 102 The Senate Committee on Labor and Public Welfare also decided to prohibit secondary boycotts, but afforded injunctive relief upon application to the NLRB to injured parties. No provision for private suits was made. 103

Four members of the Senate Committee expressed their intent to offer floor amendments to strengthen several provisions of the bill. 104 Senator Ball, in the course of floor debate, offered an amendment designed to correct the interpretation of the Norris-LaGuardia and Clayton Acts made by the Supreme Court in the Hutchinson [sic] case, and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers. 105

Senator Taft opposed the Ball Amendment on the ground that the “temper of the Senate” was opposed to restoring injunctive relief for secondary boycotts and offered a “substitute, which provides for direct suits in cases of secondary boycotts.” 106 The Ball amendment


103. S. 1126, 89th Cong., 1st Sess. (1947); I LEG. HIST. 1947, supra note 101, at 413-14, 428.


105. 93 Cong. Rec. 4838 (1947); II LEG. HIST. 1947, supra note 101, at 1354.

106. 93 Cong. Rec. 4843-44 (1947); II. LEG. HIST. 1947, supra note 101, at 1365.

The compensatory nature of the section 303 damage remedy was made clear by Senator Taft's statement that the measure was designed only to "restore to people who lose something because of boycotts . . . the money which they have lost."\footnote{93 CONG. REC. 4858 (1947); II LEG. HIST. 1947, supra note 101, at 1398.} That this remedy was intended to preclude possible antitrust liability was decisively stated:

Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of actual damages.\footnote{93 CONG. REC. 4872-73 (1947); II LEG. HIST. 1947, supra note 101, at 1370-71.}

It is thus clear that in 1947 Congress specifically defeated proposals to repeal the interpretation of Norris-LaGuardia expressed in Hutcheson and precluded Sherman Act liability for anticompetitive unfair labor practices by providing an exclusive alternative remedy.\footnote{93 CONG. REC. 4872-73 (1947); II LEG. HIST. 1947, supra note 101, at 1370-71.}

Similar action occurred in 1959, when Congress sought to provide for "loopholes" in the secondary activity regulation.\footnote{93 CONG. REC. 4872-73 (1947); II LEG. HIST. 1947, supra note 101, at 1370-71.}

When Congress enacted the Taft-Hartley Act in 1947, it probably intended, in section 8(b)(4), to outlaw all secondary boycotts. Section 8(b)(4)(A) made it illegal for a union to induce or encourage employees to strike or engage in a concerted refusal to work, where the object was to force an employer to stop doing business with another employer. Seef Fleming, Title VII: The Taft-Hartley Amendments, 54 NW. U. L. REV. 666, 681 (1960). Hot-cargo contracts, which require that union workers not be allowed to handle nonunion work, generally tended to fall within this section. See also Brinker, Hot Cargo Cases in the Construction Industry Since 1958, 22 LAB. L.J. 690 (1971) [hereinafter cited as Brinker].

Several years of experience under Taft-Hartley revealed that Congress had left loopholes in its provisions for regulating secondary boycotts. Judicial and Board interpretations required that, to find a violation, the union's objective had to be to force one employer to stop doing business with another and that the means to this end had to be a strike or the inducement of employees to strike. See Address by NLRB General Counsel Stuart Rothman, Institute on the Labor Management Reporting and Disclosure Act of 1959, Feb. 12, 1960, Emory University School of Law, in 45 L.R.R.M. 78 (1960). The major decision in this area was Local No. 1976, United Brotherhood of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958), which held that a hot-cargo agreement would be legal so long as it was entered into voluntarily by the employer, but a strike to enforce such a clause would be illegal.

Therefore, when Congress considered reform legislation in 1959, it specifically created section 8(e) to outlaw all hot-cargo agreements. See generally, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 [hereinafter cited as LEG. HIST. 1959]. The provision makes it an unfair labor practice for a union and an employer to enter into a hot-cargo agreement, express or implied, including those voluntarily agreed upon by the employer. Further, the Landrum-Griffin Act amended section 8(b)(4) so that section 8(b)(4)(ii) makes it an unfair labor practice for a union to threaten or coerce an employer to enter into an agreement illegal under section 8(e). See generally Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257 (1969); Farmer, The
Labor's Antitrust Exemption

8(b)(4), which designates use of coercion to obtain an illegal hot-cargo contract an unfair labor practice, and section 8(e), which bans most hot-cargo agreements, were enacted as amendments to the National Labor Relations Act. During consideration of the amendments, Congressman Alger availed himself of the opportunity to reiterate dissatisfaction with Hutcheson and Allen Bradley:

Court decisions which removed labor organizations from antitrust laws were handed down in 1941 by the Supreme Court by United States against Hutcheson when the Court, in effect, said:

If you are a labor union and you determine in your mind that what you desire to do—although unlawful to everybody else—is in the self-interest of your union, it becomes legal. No matter how much damage this activity may inflict upon the economy, society, or individuals, it is legal—because you say it is in the union's self-interest.

Then, in a 1945 decision, the Court opened the door still wider to union freedom from legal restraint. In simple terms, it said:

Labor unions have a license to impose whatever economic restraints they wish without regard to their effect upon the rest of society.

The House rejected an amendment co-sponsored by Representatives Alger and Hiestand, which provided that nothing contained in the National Labor Relations Act or the Norris-LaGuardia Act

Status and Application of the Secondary-Boycott and Hot-Cargo Provisions, 48 Geo. L.J. 327 (1959). However, a proviso to section 8(e) specifically excludes from its prohibitions such agreements in the construction industry, so long as the agreements relate to contracting or subcontracting of work to be done at the construction site. Although it seems clear that the proviso means that a general contractor and a union may lawfully agree that all subcontractors on a job must employ union labor, most of the litigation concerning the reach of this exception has concerned the definition of work performed on the jobsite. See, e.g., Acco Constr. Equipment, Inc. v. NLRB, 511 F.2d 848 (9th Cir. 1975). See generally Brinker, supra this note.

111. 29 U.S.C. § 158(b) provides:
(4) It shall be an unfair labor practice for a labor organization or its agents—
(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
(A) forcing or requiring any employer . . . to enter into an agreement which is prohibited by subsection (e) of this section.

112. 29 U.S.C. § 158(e) 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 unenforceable and void . . . .

shall be deemed to exempt from the application of the antitrust laws of the United States . . . any employer, labor organization, or other person who becomes a party to or engages or participates in any such contract, combination or conspiracy in restraint of trade or commerce.\textsuperscript{114}

Representative Alger specifically stated that his proposed amendment would have made it unlawful under the antitrust laws for a union to “[e]nter into any arrangement—voluntary or coerced—with any employer, groups of employers, or other unions which cause product boycotts, price fixing, or other types of restrictive trade practices.”\textsuperscript{115}

During discussion of the Landrum-Griffin Bill, Representative Griffin pointed out that his bill was a “substitute” for Representative Alger’s proposal, and contained “no antitrust law provision.”\textsuperscript{116}

This bill was enacted as the Labor Management Reporting and Disclosure Act of 1959.

Two years subsequent to the enactment of Landrum-Griffin, Senator McClellan, with five other Senators, introduced a bill to provide antitrust liability for illegal hot-cargo contracts in the transportation industry.\textsuperscript{117} Such agreements were already expressly prohibited by section 8(e) of the National Labor Relations Act. While the bill never reached a vote, as was pointed out by the majority,\textsuperscript{118} it does serve to demonstrate that at least six members of the Senate recognized that Connell-type agreements were violations of section 8(e) but were not, under the existing law, subject to antitrust challenge.

It would thus appear that Congress repeatedly reflected its approval of the statutory exemption as interpreted in Hutcheson and rejected attempts to narrow its scope.\textsuperscript{119} Moreover, when Congress did decide to outlaw certain anticompetitive union activities, it did so, not by subjecting them to the antitrust laws, but by providing specific alternative remedies under the labor laws.

\textsuperscript{114} 105 CONG. REC. 15853 (1959); II LEG. HIST. 1959, supra note 110, at 1685.
\textsuperscript{115} 105 CONG. REC. 15533 (1959); II LEG. HIST. 1959, supra note 110, at 1569.
\textsuperscript{116} 105 CONG. REC. 15535 (1959); II LEG. HIST. 1959, supra note 110, at 1571-72.
\textsuperscript{117} S. 2573, 87th Cong., 1st Sess. (1961).
\textsuperscript{118} 421 U.S. at 635.
\textsuperscript{119} See Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 554-56 (9th Cir. 1974). Circuit Judge Sneed reviewed the legislative history of the 1947 and 1959 labor acts and concluded that “nothing in the legislative history of either of these Acts indicates either a congressional intent to narrow the scope of that antitrust immunity previously accorded to all unions under the Clayton, Norris-LaGuardia and National Labor Relations Act . . . .” Id. For a general discussion of the labor-antitrust problem from a legislative viewpoint, see Dooley, Antitrust Legislation and Labor Unions, 11 LAB. L.J. 911 (1960).
The *Connell* dissenters reviewed this legislative history and found that since the conduct in question was arguably an unfair labor practice, it was not to be regulated under the antitrust laws. Lower courts have also had difficulty when presented with antitrust complaints for activities which could also constitute unfair labor practices. Generally, it has been recognized that conduct specifically made legal by the National Labor Relations Act cannot be the basis of a federal antitrust suit, although it has also been held that the two considerations are separate and independent.

When conduct is found illegal under the labor laws, it has proved even more difficult for courts to accommodate the possibility of an antitrust claim. Two circuit courts have manifested the viewpoint that all labor issues should be certified to the NLRB before any antitrust determination can be made. Some courts have voiced the opinion of the *Connell* dissenters: violations of the labor laws should not give rise to antitrust liability, although it has also been held that the labor laws provide no shield from liability for conduct which violates them.

The *Connell* majority made short shrift of this primary contention of the dissenters. The rationale for the majority's rejection of the

---

120. 421 U.S. at 638-55.

121. The leading case standing for this proposition is *Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council*, 354 F.2d 1 (7th Cir. 1965). On facts similar to those of *Connell*, the court held that the agreement in question was authorized by section 8(e). Therefore, "it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws." 354 F.2d at 3. In *Papazian v. Los Angeles Trades Council*, 83 L.R.R.M. 2710 (C.D. Calif. 1973), the court held that section 8(e) protected the union's efforts to compel a general contractor to execute a collective bargaining agreement containing a clause preventing the general from subcontracting work to nonunion subcontractors. Therefore, the plaintiff's antitrust claim was without merit. *See also California Dump Truck Owners Ass'n v. Associated General Contractors*, 70 L.R.R.M. 2412 (E.D. Calif. 1969), which holds that contracts made in accordance with § 8(e) cannot violate the antitrust laws. The *Connell* district court followed the rationale of these decisions.

122. *See Morse Bros. v. International Union of Operating Engineers*, 87 L.R.R.M. 2833 (D. Or. 1974), where the court purported to follow the Fifth Circuit *Connell* decision, but concluded that compliance with section 8(e) would not necessarily insulate an agreement from the antitrust laws. *See also Thomson Newspapers, Inc. v. Toledo Typographical Union*, 387 F. Supp. 351 (E.D. Mich. 1974), where it was held that since an antitrust action, even though involving the same facts as a labor complaint, is based on an entirely different theory of law, the question of whether the alleged activities are proper under the National Labor Relations Act would not dispose of the question of an antitrust violation.


125. *See notes 122 and 123 supra and cases cited therein.*

126. 421 U.S. at 634-35 n.16.
argument that section 303 should provide the exclusive remedy for labor law violations was that Congress never specifically amended section 303 to include section 8(e) violations.\textsuperscript{127} This approach, however, avoids the issue because section 8(e) was incorporated by reference into section 8(b)(4), which makes it an unfair labor practice to employ coercion to obtain an illegal hot-cargo contract. Section 303 was amended to apply to this very type of unfair labor practice, and, as the dissent points out, the full range of NLRB remedies is available for violations of section 8(e).\textsuperscript{128}

The majority's viewpoint seems even less defensible when it is considered that the conduct in question may not have been a violation of the labor laws. The relationship of section 8(b)(4) to section 8(e) demonstrates that it is legal to strike to obtain a hot-cargo clause which is permitted under section 8(e), while it is a violation of 8(b)(4) to strike to obtain a clause not permitted under section 8(e).\textsuperscript{129} Thus, if the agreement forced upon Connell fell within the protection of section 8(e), the company would have no remedy.\textsuperscript{130}

Apparently, the precise question presented by Connell—whether section 8(e) sanctions subcontracting clauses in the construction industry in the absence of a collective bargaining relationship—had not been decided by either the NLRB or any court.\textsuperscript{131} However, it is

\textsuperscript{127} The very nature of section 303 goes against the Court's conclusion that it cannot remedy the Connell situation. It has been construed broadly to allow a third party to sue for damages caused by a secondary boycott if the injured party is in the direct line of fire between the union and the primary object of the secondary boycott. See, e.g., W.J. Milner & Co. v. Local No. 349, IBEW, 476 F.2d 8 (5th Cir. 1973).

\textsuperscript{128} 421 U.S. at 652.

\textsuperscript{129} Initially, since the construction industry was not specifically excepted from section 8(b)(4), it was thought that strikes to obtain hot-cargo contracts authorized by section 8(e) would continue to be illegal. See Colson & Stevens Constr. Co., 137 N.L.R.B. 1650 (1962). This position was rejected by some courts: Constr. Laborers Union Local No. 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963); Essex County & Vicinity District Council of Carpenters v. NLRB, 332 F.2d 636 (3rd Cir. 1964); Orange Belt Dist. Council of Painters v. NLRB, 328 F.2d 534 (D.C. Cir. 1964). This position was finally adopted by the NLRB in Centlivre Village Apartments, 148 N.L.R.B. 854 (1964). The NLRB has made it clear that a union may strike to obtain a hot-cargo agreement allowable under section 8(e). See Memorandum for National Labor Relations Board as Amicus Curiae at 8, Connell Constr. Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616 (1975).

\textsuperscript{130} The Connell dissenter recognized this possibility. 421 U.S. at 648.

\textsuperscript{131} Connell Constr. Co. v. Plumbers and Steamfitters, Local No. 100, 483 F.2d 1154, 1174 (5th Cir. 1973); Memorandum for National Labor Relations Board as Amicus Curiae at 9, Connell Constr. Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616 (1975). Moreover, the NLRB has refused to issue a complaint in a similar case against the same union involved in Connell. See Appendix to Respondent's Brief on the Merits, Connell Constr. Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616 (1975). It strongly suggests that if the NLRB were to consider this question, it would find the agreement protected by section 8(e).
established, as the Court recognizes, that Connell-type agreements are protected in the context of collective bargaining.132

The Court's conclusion is based upon the fact that some lower courts have found that Congress intended to minimize jobsite friction between union members and nonunion workers in its enactment of section 8(e).133 Congressional purpose, however, does not appear to be so limited, especially in view of the close community of interests at a construction site.134 Additionally, the Court appears to focus on the anticompetitive aspect of the agreement in denying the union's exemption claim. Since the anticompetitive effect of the agreement would be the same if the union represented some of the company's employees, it is curious that the Court so cursorily dismisses the claim to labor law protection. The majority's position renders the labor law prohibition against hot-cargo contracts superfluous, as it will always be more advantageous for an injured party to sue under the antitrust treble damage provisions. Such a result contravenes the existing congressional mandate that only actual, compensatory damages are recoverable for labor law violations.135

Further, by characterizing the Connell agreement as beyond the scope of the labor laws, the Court avoided disposition of the question of whether unfair labor practices are to be regulated solely under the labor laws. It is entirely possible that lower courts will read the Connell opinion as authorization for use of the antitrust laws to regulate certain union secondary activity.

However, early indications are that the restrictive implications of the Connell decision, like its predecessors Pennington and Jewel Tea, may be somewhat ignored by the lower federal courts.136 Indeed, Congress has already circuitously attempted to foster precisely such treatment of the Connell holding. While considering a

132. 421 U.S. at 621.
133. Acco Constr. Equipment, Inc. v. NLRB, 511 F.2d 848, 851 (9th Cir. 1975); Drivers, Salesmen, Etc., Local No. 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966); Essex County & Vicinity District Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3rd Cir. 1964).
135. Id.
138. Post-Connell labor/antitrust decisions have not accorded these implications a great deal of attention. In Carpenters v. General Contractors, 90 L.R.R.M. 2511 (N.D. Calif. 1975), the court stated that disputes between unions and employers do not normally give rise to violations of the antitrust laws. Only an agreement between a union and an employer to conspire in some respect gives rise to an antitrust violation; the normal labor dispute does not. In Ackerman-Chillingworth v. Peca, 405 F. Supp. 99 (D. Hawaii 1975), the court discussed the labor exemption in terms of Allen Bradley without citing Connell.
bill to broaden the on-site picketing powers of unions in the construction industry, a bill which at best related only tangentially to the major issues in *Connell*, Congress apparently made a deliberate effort to undercut the validity of the decision.\(^\text{139}\)

Both the House and Senate committee reports on the Construction Site Picketing Bill noted the *Connell* decision, and included language calculated to discredit the holding on all issues. The Senate report devoted considerable space to the labor exemption from the antitrust laws.\(^\text{140}\) Secondary boycotts, it stated, were first regulated under federal law by the antitrust laws, a situation exemplified by the *Duplex* decision.

The report interpreted *Duplex* as limiting the labor exemption to the employer-employee relationship, so that economic activity by a union against an employer whose employees it did not represent, or whose wages and working conditions were not the subject of the dispute, would be a Sherman Act violation—an analogue to the *Connell* holding.

*Duplex*, the report continues, provided the impetus for the enactment of the Norris-LaGuardia Act, which effectively overruled that decision. Additionally, when Congress in 1947 sought to regulate the secondary boycott, it did so not by “reintroducing the antitrust law,” but by providing section 8(b)(4) and section 303 as remedies, to “protect a third person who is wholly unconcerned in the disagreement between an employer and his employees.”\(^\text{141}\) Further, the report states Senator Taft’s view that the 1947 bill, in regulating secondary boycotts under the National Labor Relations Act, “did not entail a return to the regulation of labor’s economic weapons

---

\(^\text{139}\) *See* Construction Site Picketing Bill, H.R.5900 and S.1479, 94th Cong., 1st Sess. (1975). These bills were the latest in a series of congressional attempts to overrule NLRB v. Denver Bldg. Trades Counc., 341 U.S. 675 (1951), and allow common situs picketing in the construction industry. For a discussion of previous legislative attempts in this area, *see* Note, Common Situs Picketing and the Construction Industry, 54 GEO. L.J. 962 (1966); S. REP. No. 438, 94th Cong., 1st Sess. 20-21 (1975). *See also* Janofsky & Peterson, The Exercise of Unreviewed Administrative Discretion To Reverse the United States Supreme Court, 25 LAB. L.J. 729 (1974). Hearings on the House version of this bill commenced at approximately the time *Connell* was decided. It was stated at that time that the bill, as passed by the House and sent to the Senate, seemed to deal with those activities at the site of the construction directed at employers at the worksite, involving disputes relating to wages, hours and working conditions. Since these activities are not otherwise unlawful under the National Labor Relations Act, it would have little applicability to a *Connell*-type situation. *See* Kilberg, Interpretation of Supreme Court’s Decision in *Connell* Construction Company and Its Impact on Situs Picketing Bill, 127 B.N.A. DAILY LAB. REP. (July 1, 1975).


under the Sherman Act.\textsuperscript{142}

It is submitted that a discussion of this type is a relatively ineffective way for Congress to demonstrate its view of the proper scope of the labor exemption. In any event, since the Construction Site Picketing Bill was vetoed by President Gerald R. Ford,\textsuperscript{143} it is doubtful that the foregoing legislative history retains value beyond demonstrating that, once again, Congress and the Court are at odds concerning the scope of antitrust application to labor activities.

A request for legislative guidance in this area is neither new nor unique. It may well be, as has been suggested, that developments in economic and social conditions since the passage of the Norris-LaGuardia Act justify a change in the scope of labor's exemption.\textsuperscript{144} However, as has been often stated, it is "not for judges"\textsuperscript{145} to determine the national labor policy. Having indicated its unhappiness with the result reached by the Court, Congress must attempt to specifically deal with the scope of the labor exemption and articulate clear guidelines. Until it does so, the courts have no alternative but to apply their own views of the balance to be struck in this area.

\textbf{Jacalyn J. Zimmerman}

\textsuperscript{142} Id. at 16.
\textsuperscript{143} 12 \textit{Weekly Compilation of Presidential Documents} 16-17 (1976).
\textsuperscript{144} See, e.g., Siegel, \textit{supra} note 6.
\textsuperscript{145} Duplex Printing Press Co. v. Deering, 254 U.S. 443, 456 (1924) (Brandeis, J., dissenting).