

POST-CONNELL DEVELOPMENT OF LABOR'S NONSTATUTORY EXEMPTION FROM THE ANTITRUST LAWS

For a number of years after Congress passed the Sherman Act¹ in 1890, the United States Supreme Court used the antitrust laws to regulate labor activity.² As Congress passed major labor legislation,³ however, the Supreme Court recognized that Congress viewed the labor laws rather than the antitrust laws as the primary regulator of labor activity.⁴ Consequently, labor activity was exempted from antitrust scrutiny in certain situations.⁵ Yet, the Court has never granted labor a complete exemption from the antitrust laws. In one of the Supreme Court's more cogent labor/antitrust decisions, Justice Black observed that it would be anomalous to assume that Congress had intended to give unions "complete and unreviewable authority to aid business groups" in

¹ Sherman Act, ch. 647, 26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1-7 (1976).

² Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 31 (1963). For example, in *Loewe v. Lawlor*, 208 U.S. 274 (1908), the famous Danbury Hatters case, a union-organized consumer boycott of nonunion hat manufacturers was held to be a combination in restraint of trade. *Id.* at 301.

³ Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1976); Wagner Act, 49 Stat. 449 (1935), as amended 29 U.S.C. §§ 151-169 (1976).

⁴ Congress first sought to protect labor unions from antitrust regulation by enacting §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738 (1914), 15 U.S.C. § 17 and 29 U.S.C. § 52 (1976).

Section 6 of the Clayton Act provides in relevant part: "Nothing contained in the antitrust laws shall be construed to forbid the existence or operation of labor organizations . . . or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof . . . 15 U.S.C. § 17 (1976)."

Section 20 of the Clayton Act lists specific labor activities which may not be restrained or enjoined, and further states that such activities shall not be held to violate any other laws, 29 U.S.C. § 52 (1976). See 1 T. KHEEL, *LABOR LAWS* §§ 4.03-4.04 (1980) [hereinafter cited as KHEEL].

⁵ At first, the Supreme Court narrowly construed the language of §§ 6 and 20. In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), the Court held that the statutory exemption of the Clayton Act would apply only to primary disputes between employers and employees, and not to a secondary boycott instituted by a machinists' union in New York against the products of a printing press manufacturer who was being struck by machinists in Michigan. *Id.* at 471-77. See also *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37 (1927); *United States v. Brims*, 272 U.S. 549 (1926); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

The Court finally began in earnest to accommodate labor and antitrust policies in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). The approach taken by the Court in *Apex Hosiery*, however, was not followed in later decisions. Instead of declaring that certain labor activities were exempt from the antitrust laws, the Court held that the scope of the Sherman Act was not broad enough to apply to certain kinds of anticompetitive restraints. See St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606-07 (1976) [hereinafter cited as St. Antoine, *Connell*]. The union in *Apex Hosiery* engaged in a violent primary sitdown strike, 310 U.S. at 418-82, which restrained trade by interfering with the flow of goods in interstate commerce. *Id.* at 484. The Court noted, however, that the primary purpose of the union's activity was to promote labor interests rather than to restrain interstate commerce. *Id.* at 501.

frustrating the primary objectives of the antitrust laws.⁶ The judiciary thus has the difficult task of reconciling two conflicting congressional policies — one seeking “to preserve business competition and to proscribe business monopoly,”⁷ and the other seeking “to preserve the rights of labor to organize through the agency of collective bargaining.”⁸

When labor activity is exempted from the antitrust laws, the grounds for the exemption may be statutory — derived from express provisions in federal statutes,⁹ or nonstatutory — derived from the judiciary’s interpretation of Congress’ implied intent in the labor laws.¹⁰ The most recent Supreme Court decision considering labor’s nonstatutory exemption from the antitrust laws is *Connell Construction Co. v. Plumbers Local 100*.¹¹ The union in *Connell*, Local 100, represented employees of mechanical subcontractors in the construction industry.¹² Local 100 had forced Connell Company (Connell), a general contractor, to agree that it would not award contracts to mechanical subcontractors who had not signed a collective bargaining agreement with Local 100.¹³ Connell brought suit in federal court, charging that the agreement violated sections

Therefore, even though “indirect” restraints resulted from the union’s activity, *id.* at 510-11, the Sherman Act was not meant to prohibit a union’s attempts to eliminate price competition based on differences in labor standards. *Id.* at 503-04. Thus, the Supreme Court refused to apply the Sherman Act to cases in which “local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product, but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way.” *Id.* 496-97.

A year later, in *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court dismissed criminal charges brought under the Sherman Act against individual leaders of a union who called a strike against a brewery because of a dispute between their union and another union concerning work jurisdiction at the brewery’s facility. The Court approached the labor/antitrust problem in a different manner than in *Apex*. Instead of interpreting the Sherman Act as having a limited scope, the Court read the Sherman Act, together with the Clayton and Norris-LaGuardia Acts, “as a harmonizing text of outlawry of labor conduct.” *Id.* at 231. Thus, where application of the Sherman Act to labor activity was inconsistent with the provisions of the Clayton and Norris-LaGuardia Acts, the union would be exempt from antitrust prohibitions. *Id.* at 232.

⁶ *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 809-10 (1945).

⁷ *Id.* at 809.

⁸ *Id.* at 806. “We must determine how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.” *Id.*

⁹ In particular, §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1976) and 29 U.S.C. § 52 (1976), and §§ 4, 5, and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113 (1976).

¹⁰ “[The Clayton and Norris-LaGuardia Acts] do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).” *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1975).

¹¹ 421 U.S. 616 (1975).

¹² *Id.* at 619.

¹³ *Id.* at 619-21.

1 and 2 of the Sherman Act.¹⁴ After a trial on the merits,¹⁵ the United States District Court for the Northern District of Texas found that because the subcontracting agreement was authorized by section 8(e) of the National Labor Relations Act (NLRA),¹⁶ it was exempt from the antitrust laws.¹⁷ The *Connell* agreement clearly violated the general language of section 8(e) because it was a "hot cargo" agreement, that is, an agreement by an employer not to do business with another employer.¹⁸ Nevertheless, the District Court found that the agreement was protected by the construction industry proviso to section 8(e), which allows hot cargo agreements concerning work "to be done at the job-site" in the construction industry.¹⁹

The United States Court of Appeals for the Fifth Circuit affirmed the district court's holding that the agreement was exempt from the antitrust laws without deciding whether the agreement was protected by the construction industry proviso of section 8(e) of the NLRA.²⁰ The Supreme Court reversed on the question of federal antitrust immunity.²¹ In holding that the agreement was

¹⁴ *Id.* at 620-21. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), reads in pertinent part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared illegal . . ." Section 2, 15 U.S.C. § 2 (1976), provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several United States . . . shall be deemed guilty of a misdemeanor . . ."

¹⁵ *Connell Construction Co. v. Plumbers Local 100*, 78 L.R.R.M. 3012, 3014 (N.D. Tex. 1971).

¹⁶ 29 U.S.C. § 158(e) (1976). Section 8(e) of the NLRA 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 such extent unenforceable and void: *Provided*, That nothing in this subsection (e) 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) (1976).

¹⁷ 78 L.R.R.M. at 3015.

¹⁸ See *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 634-39 (1967) for a discussion of the legislative history of § 8(e).

¹⁹ 78 L.R.R.M. At 3014. See note 16 *supra* for the text of § 8(e).

²⁰ *Connell Construction Co. v. Plumbers Local 100*, 483 F.2d 1154, 1175 (5th Cir. 1973). The circuit court believed that it was actually confronted with a labor law controversy rather than an antitrust controversy. *Id.* at 1171. The court found that the Local 100 was pursuing a legitimate union interest regardless of whether the subcontracting clause violated § 8(e). *Id.* at 1167. Since there was no evidence of an anticompetitive conspiracy other than one in which Connell itself would have been a conspirator, *id.* at 1165-66, the court maintained that Connell's complaint exclusively involved labor issues which should initially be decided by the NLRB. *Id.* at 1174.

²¹ 421 U.S. at 621.

not exempt from the antitrust laws,²² the Court first used a method of analysis which focused on the nature, effect, and magnitude of the alleged restraint caused by the agreement.²³ It then found that the subcontracting agreement did in fact violate section 8(e) of the NLRA because it did not come within the protection of the construction industry proviso.²⁴

The *Connell* majority was criticized for not adequately protecting labor activity from antitrust regulation.²⁵ In two important respects, however, the facts of *Connell* are unlike those of previous labor/antitrust cases decided by the Supreme Court. First, the subcontracting agreement in *Connell* was not part of a collective bargaining agreement. In fact, Local 100 expressly indicated in the agreement that it had no desire to represent *Connell's* employees.²⁶ Second, the *Connell* Court held that the subcontracting agreement, a method used by Local 100 to organize subcontractors, was illegal because it was a "hot cargo" agreement violating section 8(e) of the NLRA.²⁷ Because of these distinguishing factors, some commentators predicted that the *Connell* decision would not significantly change the law regarding the labor exemption from the antitrust laws.²⁸ Essentially, their prediction was correct.

This note will analyze the effect the *Connell* decision has had on labor exemption cases where provisions in collective bargaining agreements are alleged to violate the antitrust laws. First, the scope of the nonstatutory exemption as it existed before *Connell* will be defined. The *Connell* case itself will then be discussed. Consideration will be given to how the *Connell* decision may potentially have affected the scope of the nonstatutory exemption. Next, this note will focus on lower court decisions that have interpreted *Connell*. This section will initially discuss cases in which collective bargaining provisions not otherwise illegal are alleged to violate the antitrust laws. It will then consider cases in which illegal collective bargaining provisions are alleged to violate the antitrust laws. It will be submitted that the *Connell* analysis should not apply where legal

²² *Id.* at 635. The Court remanded the case for consideration of whether the agreement, in fact, violated the Sherman Act. *Id.* at 637.

²³ *Id.* at 623-25. See text and notes at notes 97-105 *infra*.

²⁴ 421 U.S. at 633.

²⁵ See, e.g., Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533, 601 (1976); St. Antoine, *Connell*, *supra* note 5, at 622; Note, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 243-44 (1975); Note, *Labor's Exemption after Connell*, 36 OHIO ST. L. J. 852, 867 (1975); Note, *Diminution of Labor's Immunity Under the Antitrust Law*, 21 LOY. L. REV. 980, 993 (1975). But see Janofsky & Hay, *Connell — Consistent with Past, Indicative of Future*, 29th Annual N.Y.U. Conf. on Labor 3 (1976).

²⁶ "WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor" 421 U.S. at 620 (quoting from the *Connell*/Local 100 subcontracting agreement).

²⁷ *Id.* at 633.

²⁸ St. Antoine, *Connell*, *supra* note 5, at 628; GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING, 635 (1976); Note, *Connell Construction Co. v. Plumbers Local 100: New Limits on Labor's Antitrust Immunity?*, 4 FLA. ST. U.L. REV. 536, 550 (1976).

collective bargaining provisions are at issue. Instead, when a signatory to a legal collective bargaining agreement brings an antitrust action, the agreement should be exempt from the antitrust laws if arm's-length bargaining preceded its signing. Further, when a nonsignatory brings an antitrust suit regarding a legal collective bargaining agreement, pre-*Connell* analysis should be utilized. Finally, it will be submitted that where a collective bargaining provision is illegal under the labor laws, a "foreseeability" test should be included in any method of analysis which the court utilizes.

I. EXEMPTION OF LABOR ACTIVITIES FROM THE ANTITRUST LAWS: PRE-*CONNELL*

There are two distinct branches of the labor exemption from the antitrust laws — the statutory exemption and the nonstatutory exemption.²⁹ In both branches the judiciary must reconcile congressional labor and antitrust policies by determining whether Congress intended its labor policy or its antitrust policy to prevail in a given situation.³⁰ Although the two branches have a similar function, the statutory exemption is derived from the specific terms of the Clayton³¹ and Norris-LaGuardia³² Acts while the nonstatutory exemption is a judicial doctrine. To understand fully the development of the nonstatutory exemption, a cursory examination of the statutory exemption is helpful.

The statutory exemption of labor activities from antitrust prohibitions is concerned only with unilateral union activity — that is, those situations in

²⁹ The existence of the nonstatutory exemption was first expressly acknowledged by the Supreme Court in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). "The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* at 622. The terms "statutory" and "nonstatutory" are somewhat misleading since all exemption decisions support to accommodate the Labor Act with the Sherman Act. Comment, *The Supreme Court, 1974, Term*, HARV. L. REV. 47, 236 n.13 (1975).

³⁰ See *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806 (1945). Where the statutory exemption from the antitrust laws might apply, the Court purports to carry out Congress' express intention. *United States v. Hutcheson*, 312 U.S. 219, 231 (1941). In nonstatutory exemption cases, the Court must recognize Congress' implied intention. See *Connell*, 421 U.S. at 622-23.

³¹ See note 4 *supra*.

³² Section 4, 5, and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113 (1976) are the applicable provisions. Section 4 prohibits any court from issuing a restraining order or an injunction for certain listed activities if they arise out of a labor dispute. Section 5 provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

29 U.S.C. § 105 (1976). Section 13 broadly defines the term "labor dispute." See KHEEL, *supra* note 4, §§ 4.04-4.05 (1980).

which no agreement, combination, or conspiracy exists between a union and a nonlabor group.³³ The statutory exemption is derived from sections 6 and 20 of the Clayton Act,³⁴ and from the Norris-LaGuardia Act.³⁵ Congress expressly intended that these provisions should override the provisions of all other laws.³⁶ The Clayton and Norris-LaGuardia Acts, when read together with the Sherman Act as a "harmonizing text,"³⁷ exempt from antitrust scrutiny unilateral union activity that is not subject to a restraining order or injunction under the express terms of the Clayton and Norris-LaGuardia Acts.³⁸ The statutory exemption thus primarily serves to protect a union from the antitrust laws when it attempts to organize unilaterally or to gain employer recognition by using legal methods.³⁹ Some of these legal methods include: refusing to work, becoming a member of a union, paying strike or unemployment benefits, aiding persons involved in a labor dispute by all lawful means, and advertising for outside support in a labor dispute.⁴⁰

³³ In *United States v. Hutcheson*, 312 U.S. 219 (1941) the Court stated: So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 (of the Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232.

Later, in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), the Court held that the statutory exemption would not protect a union when it combined with a nonlabor group. *Id.* at 810. The defendant union in that case sought to obtain higher wages and better working conditions for its members. *Id.* at 799. The union succeeded in achieving its goals through collective bargaining, but in so doing it also joined with employers in a conspiracy to fix prices and to monopolize a particular product market. *Id.* at 800. Because the union had joined in an employer's conspiracy, the Court held that it should not be exempt from the antitrust laws. *Id.* 809-10. "Our holding means that the same labor union activity may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Id.* at 810. Thus, even though the union sought to achieve legitimate labor goals — better wages, hours and working conditions — it could not do so by aiding businessmen in a conspiracy which, absent union involvement, violated the Sherman Act. *Id.* at 808. Excellent treatments of the labor exemption prior to the Supreme Court's development of the nonstatutory exemption from the antitrust laws are: Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 404 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).

³⁴ See note 4 *supra*.

³⁵ See note 32 *supra*.

³⁶ See notes 4 and 32 *supra*.

³⁷ *United States v. Hutcheson*, 312 U.S. at 231. Curiously, the Wagner Act, 49 Stat. 449 (1935), was not included by Justice Frankfurter in the *Hutcheson* opinion as one of the Acts which should be read together with the Sherman Act in determining the availability of the labor exemption from the antitrust laws.

³⁸ See *United States v. Hutcheson*, 312 U.S. at 232; *United Mine Workers v. Pennington*, 381 U.S. 657, 661-62 (1965); St. Antoine, *Secondary Boycott: From Antitrust to Labor Relations*, 40 ANTITRUST L. J. 242, 245 (1971) [hereinafter cited as St. Antoine, *Secondary Boycott*].

³⁹ See *United States v. Hutcheson*, 312 U.S. at 232 (1941); St. Antoine, *Secondary Boycott*, *supra* note 38, at 245.

⁴⁰ See 29 U.S.C. § 104 (1976).

Today unions seldom rely on the protection of the statutory exemption from the antitrust laws.⁴¹ Once a union has passed the organizational stage of its development, it generally can persuade recalcitrant employers by utilizing its bargaining power without resorting to unilateral concerted activity.⁴² For example, unions may occasionally attempt to expand their control in industries that have resisted traditional unilateral organizing methods by using collective bargaining agreements to force "top down" organizing of nonunion employers.⁴³ The unions are no longer entitled to the protection of the statutory exemption, however, when they have executed a collective bargaining agreement with a nonlabor group.⁴⁴

While the statutory exemption, based on the Clayton and Norris-LaGuardia Acts, is rarely invoked by the unions, the nonstatutory exemption from the antitrust laws is more widely utilized. The nonstatutory exemption is derived from the congressional policy underlying the Wagner Act,⁴⁵ the Taft-Hartley Act,⁴⁶ and the Landrum-Griffin Amendments,⁴⁷ which together form the Labor Management Relations Act (LMRA)⁴⁸ and the National Labor Relations Act (NLRA).⁴⁹ Congress intended the LMRA and NLRA to pro-

⁴¹ St. Antoine, *Secondary Boycott*, *supra* note 38, at 255.

⁴² Union signatory clauses or work preservation clauses, for example, are used to prevent nonunion workers from obtaining jobs traditionally held by union workers. *N.L.R.B. v. International Longshoremen's Ass'n*, 100 S. Ct. 2305, 2314 (1980).

⁴³ A clause which violates § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976), see note 90 *infra*, may allow a union to organize without making a "grass roots" effort to obtain members using traditional means. In *Connell*, the Court noted that Congress intended the Landrum-Griffin Amendments to the NLRA to limit the use of "top down" organizing campaigns. 421 U.S. at 632.

⁴⁴ See note 30 *supra*. Another reason for the limited utility of the statutory exemption derives from the Supreme Court's narrow definition of "unilateral" union activity. Generally it can be assumed that, during collective bargaining, an employer strongly resists each concession a union receives — the union and the employer do not normally act in concert at the negotiating table. Nevertheless, once the union and the employer have reached an agreement, the Supreme Court considers that the union has acted in combination with a nonlabor group, and it will not apply the nonstatutory exemption from the antitrust laws. See *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 622-23 (1975); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688-89 (1965); Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 914-15 (1976); 7 J.O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 48.03(1) (1979).

The Supreme Court may further limit the scope of its definition of unilateral union activity when it decides *H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 622 F.2d 647 (2d Cir. 1980) *cert. granted*, 49 U.S.L.W. 3372 (No. 80-348). In that case, the Second Circuit applied the statutory exemption from the antitrust laws because franchising agreements signed between theatrical agents and a theatrical union were deemed to constitute unilateral union activity since the agents were members of the theatrical union. 622 F.2d at 650. See *American Federation of Musicians v. Carroll*, 391 U.S. 99 (1967) (a case in which the statutory exemption from the antitrust laws was applied to similar facts).

⁴⁵ 49 Stat. 449 (1935).

⁴⁶ 61 Stat. 136 (1947).

⁴⁷ 73 Stat. 541 (1959).

⁴⁸ 61 Stat. 136 (1947), as amended by 29 U.S.C. §§ 141-197 (1976).

⁴⁹ 49 Stat. 449 (1935), as amended by 29 U.S.C. §§ 151-169 (1976).

mote stable relations between employees and employers⁵⁰ by encouraging the collective bargaining process.⁵¹ Therefore, the most important factor considered by courts in determining whether to allow the nonstatutory exemption is the extent to which the collective bargaining process may be adversely affected by the antitrust suit.⁵² Because the congressional policy favoring collec-

⁵⁰ The stated purpose of the Taft-Hartley Act is: to promote the full flow of commerce to prescribe the legitimate rights of both employees and employers . . . to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of the other, to protect the rights of individual employees in their relations with labor organizations . . . , to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141 (1976).

⁵¹ The Wagner Act declares that it is the "policy of the United States to eliminate . . . substantial obstructions" to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment. . . . 29 U.S.C. § 151 (1976). The Supreme Court has commented that:

The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed.

Local 24, Int'l Bd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959) (citations omitted).

⁵² United Mine Workers v. Pennington, 381 U.S. 657 (1965). "[W]e are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation,' Fibreboard Paper Prods. Corp. v. Labor Board, 379 U.S. 203, 211 (1964)." *Id.* at 665. The Court in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975) stated: "The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* at 622. *See also* Mackey v. National Football League, 543 F.2d 606, 611-12 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Mann, Powers & Roberts, *The Accommodation Between Antitrust and Labor Laws: The Antitrust Labor Exemption*, 9 SETON HALL L. REV. 744, 748 (1978); KHEEL, *supra* note 4 § 4.06[1][e][i] (1980).

It has been argued, however, that the Supreme Court intended the nonstatutory exemption from the antitrust laws to promote two congressional labor interests — (1) the interest in promoting industrial peace through collective bargaining, and (2) the interest in advancing union interests — but that the lower courts have begun to recognize that the primary interest to be protected by the nonstatutory exemption is that of collective bargaining. Casenote, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest*: *McCourt v. California Sports, Inc.*, 21 B.C. L. REV. 680, 695, 712-14 (1980).

Nevertheless, it is apparent that the Supreme Court has always recognized that the nonstatutory exemption from the antitrust laws was intended primarily to protect the collective bargaining process developed by Congress in the NLRA. The major issue in the Supreme Court's nonstatutory exemption cases has not concerned whether a policy of advancing labor interests or a policy of promoting collective bargaining is to be protected. Rather, the controversy has centered on the question of how much protection Congress intended the collective bargaining process to have. For example, Justice Goldberg, concurring in the judgment of *Local 189*,

tive bargaining was intended to promote industrial peace rather than to further union interests the nonstatutory exemption from the antitrust laws may be asserted by employers as well as by unions.⁵³

Before *Connell*, the parameters of the nonstatutory exemption were loosely drawn in two cases that were decided by the United States Supreme Court on the same day, *Meat Cutters v. Jewel Tea Co.*⁵⁴ and *United Mine Workers v. Pennington*.⁵⁵ In *Jewel Tea*, the Court recognized a nonstatutory exemption by holding that in a case where the statutory exemption does not apply, a union might still be exempt from the antitrust laws. Jewel Tea Co. had signed, under duress,⁵⁶ a collective bargaining agreement negotiated by representatives of a group of meat retailers, of which Jewel was a member, and the Amalgamated Meat Cutters and Butcher Workmen of America, AFL-CIO.⁵⁷ Jewel then brought suit against the unions, charging that a marketing hours restriction in the agreement preventing the sale of meat during certain hours violated sections 1 and 2 of the Sherman Act.⁵⁸ The federal district court found that because there was no evidence of an anticompetitive conspiracy between the union and the retailers against Jewel,⁵⁹ the marketing-hours restriction was exempt from the antitrust laws.⁶⁰ Although the appeals court did not disturb the district court's

Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), and dissenting in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), would have held that Congress intended "all collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act" to be exempt from the antitrust laws. 381 U.S. at 709-10. Justice White, however, writing the plurality opinion of the Court for both cases, determined that the collective bargaining process should have a lesser degree of protection. See text and notes at notes 64-80 *infra*.

⁵³ Only labor activity is protected by the Clayton and Norris-LaGuardia Acts. See text and notes at notes 29-40 *supra*; see also *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad*, 353 U.S. 30, 40 (1957); but see *KHEEL*, *supra* note 4, § 4.01(4) (1980) (arguing that the statutory exemption may be available to management as well). The statutory exemption is therefore available only to labor groups. See *Calif. State Council of Carpenters v. Ass'n Gen. Contractors of Calif., Inc.*, 105 L.R.R.M. 3311, 3316-17 (9th Cir. 1980). The LMRA and the NLRA, however, were intended to favor neither unions nor employers. In these acts Congress intended to create an impartial atmosphere that would foster the peaceful settlement of labor disputes. See 29 U.S.C. § 141 (1976). Consequently, the courts have recognized that the nonstatutory exemption should be available to employers. *Scooper Dooper, Inc. v. Krafco Corp.*, 494 F.2d 840, 847, n.14 (3d Cir. 1974) (*dicta*); *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); 7 J. O. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATIONS* § 48.03(3) (1979) [hereinafter cited as *VON KALINOWSKI*].

In *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979), an employer was successful in asserting the exemption defense. *Id.* at 1203. See text and notes at notes 121-28 *infra*.

⁵⁴ 381 U.S. 676 (1965).

⁵⁵ 381 U.S. 657 (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).

⁵⁶ 381 U.S. at 681.

⁵⁷ *Id.* at 680.

⁵⁸ *Id.* at 681.

⁵⁹ 215 F. Supp. 839, 845 (N.D. Ill. 1963).

⁶⁰ *Id.* at 848. The court found that the marketing hours restriction was exempt from antitrust scrutiny because it exclusively served the union's interests, *id.* at 846, and because the union's goals of protecting work and job security were legitimate. *Id.* at 848.

finding of no conspiracy,⁶¹ it nevertheless ruled that the agreement violated the antitrust laws.⁶² Thus when the case reached the Supreme Court, the question was whether the collective bargaining agreement, by itself, could be held to violate the antitrust laws.⁶³ Justice White, writing the opinion of the Court,⁶⁴ found first that the marketing-hours restriction was "intimately related to wages, hours and working conditions,"⁶⁵ because it constituted a mandatory subject of collective bargaining under section 8(d) of the NLRA.⁶⁶ In addition, he determined that the restriction was obtained "through bona fide, arm's-length bargaining."⁶⁷ Finally, Justice White found that the unions had sought the restrictions "in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups."⁶⁸ He concluded that where these three criteria are met, the unions should be protected by the "national labor policy" and exempted from the Sherman Act.⁶⁹ The test developed in *Jewel Tea* — that a provision contained in a collective bargaining agreement is exempt from antitrust scrutiny if it concerns a mandatory subject of collective bargaining, is the product of a bona fide arm's-length bargaining, and is not entered into at the behest of or in combination with nonlabor groups — is known as the intimately related test.⁷⁰

While in *Jewel Tea* a collective bargaining provision was exempted from antitrust scrutiny, in *Pennington*, wage scale provisions in a collective bargain-

⁶¹ See 381 U.S. at 688.

⁶² 331 F.2d 547, 551 (7th Cir. 1964). The court found that Jewel's complaint had sufficiently alleged an unreasonable restraint of trade. *Id.* at 550. In addition, the court concluded that the contract or combination which contained the marketing-hours restriction constituted a conspiracy, even though no independent evidence of an anticompetitive intent to injure Jewel's business had been presented. *Id.* at 551. In effect, the court considered the terms, "contract," "combination," and "conspiracy" to be interchangeable. *Id.*

⁶³ 381 U.S. at 688. Had there been independent evidence of a conspiracy, the holding of *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), would have been controlling, and the agreement would have been nonexempt. See note 4 *supra*.

⁶⁴ The Justices divided into three groups of three in *Jewel Tea*. Justice White, joined by Chief Justice Warren and Justice Brennan, wrote the opinion of the Court. Justice Douglas, joined by Justices Black and Clark, wrote a dissenting opinion. Justice Goldberg, joined by Justices Harlan and Stewart, wrote a concurring opinion. Justice White's opinion in *Jewel Tea*, which defines the exemption in narrower terms than the Goldberg opinion, has been regarded as containing the authoritative holding of that case.

⁶⁵ 381 U.S. at 689-90.

⁶⁶ *Id.* at 691. Under section 8(d) of the NLRA, employers' and employees' representatives are required to bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1976).

⁶⁷ 381 U.S. at 689-90.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Note, *Labor Law — Antitrust Liability of Labor Unions — Connell Construction Co. v. Plumbers Local 100*, 17 B.C. INDUS. & COM. L. REV. 217, 225 (1976) [hereinafter cited as B.C. Note]; Comment, *Connell: Broadening Labor's Antitrust Immunity While Narrowing Its Construction Industry Proviso Protection*, 27 CATH. U.L. REV. 305, 320 (1978) [hereinafter cited as Cath. U. Comment].

ing agreement, clearly mandatory bargaining subjects,⁷¹ were held to be non-exempt.⁷² A small coal operator contended in *Pennington* that the United Mine Workers (UMW) had entered into a conspiracy with the large coal operators to impose the wage and royalty scales contained in its collective bargaining agreement on nonunion coal operators.⁷³ The alleged purpose of this conspiracy was to eliminate the small coal operators from the market by forcing them to pay wage scales that they could not afford.⁷⁴ After a full trial, a jury rendered a verdict for the small coal operator which was subsequently affirmed by the court of appeals.⁷⁵

The Supreme Court reversed and remanded because of errors in the admission of evidence.⁷⁶ A majority of the Court found, however, that the union was not exempt from the antitrust laws.⁷⁷ According to Justice White, author of the Court's opinion, the wage and royalty scales contained in the collective bargaining agreement, by themselves, would have been exempt from antitrust sanctions had the union sought to impose them on employers unilaterally, as a matter of its own policy.⁷⁸ The small coal operator alleged, however, that the union had agreed with the large coal operators to impose the restrictive scales on competing employers.⁷⁹ The union was therefore not exempt from the anti-

⁷¹ 381 U.S. at 774 (Goldberg, J., dissenting).

⁷² *Id.* at 669.

⁷³ *Id.* at 659-60. The suit was initiated by the UMW Welfare and Retirement Fund to collect royalty payments owned by the small coal operator. *Id.* at 659. The small coal operator filed a counterclaim against the trustees of the fund, the UMW, and certain large coal operators which alleged that the collective bargaining agreement that required them to pay into the retirement fund violated the Sherman Act. *Id.*

⁷⁴ *Id.* at 660. The counterclaim alleged that in addition to negotiating a collective bargaining agreement in 1950, the UMW and the large coal operators tacitly agreed to eliminate overproduction in the coal industry by forcing the small coal operators out of business. *Id.* In return for a promise of high wage and royalty payments, the UMW allegedly agreed (1) to abandon its attempts to set the working time of its members, (2) to allow rapid mechanization of the coal mines, and (3) to impose the terms of the collective bargaining agreement on the small coal operators without regard to their ability to pay. *Id.*

⁷⁵ 325 F.2d 804, 817 (6th Cir. 1963).

⁷⁶ 381 U.S. at 669-72.

⁷⁷ As in *Jewel Tea*, the Justices divided into three groups of three in *Pennington*. Justice White, joined by Chief Justice Warren and Justice Brennan, again wrote the opinion of the court. Justice Douglas, joined by Justices Black and Clark, wrote a concurring opinion. Justice Goldberg's concurring opinion in *Jewel Tea* served also as the dissenting opinion in *Pennington*. While Justice White's *Jewel Tea* opinion has been regarded as containing the authoritative holding of that case, lower courts consistently have regarded Justice White's opinion in *Pennington*, read in conjunction with Justice Douglas' concurring opinion, to contain the authoritative holding of that case. See, e.g., *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416, 428 (4th Cir. 1980), cert. denied, 101 S. Ct. 207 (1980); *Consol. Exp. Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 516 (3d Cir. 1979), vacated and remanded on other grounds, 100 S. Ct. 3040 (1980). See also Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 720-21 (1965); Cox, *Labor and Antitrust Laws: Pennington and Jewel Tea*, 46 B.U. L. REV. 317, 323 (1966).

⁷⁸ 381 U.S. at 664, 665 n.2.

⁷⁹ *Id.* at 665.

trust laws under *Jewel Tea*'s intimately related test. In addition to executing a collective bargaining agreement with the large coal operators, the union agreed to impose the terms of its collective bargaining agreement on the small coal operators, and it allegedly did so at the behest of or in combination with large coal operators who were seeking to eliminate the small coal operators.⁸⁰

The intimately related test, formulated in *Jewel Tea* and *Pennington*, was intended for use in cases where provisions in collective bargaining agreements are alleged to violate the antitrust laws. This does not mean, however, that the intimately related test has provided a clear standard for the lower courts to apply in such cases. On the contrary, the test is somewhat vague and difficult to interpret.⁸¹ The primary difficulty encountered by the lower courts concerns the meaning of the Court's requirement that a union may not enter into an agreement at the behest of or in combination with nonlabor groups.⁸² In *Pennington*, for example, the Court may have meant that a union forfeits its exemption from the antitrust laws whenever it surrenders, in a collective bargaining agreement with one group of employers, its freedom to negotiate different terms with another group of employers.⁸³ Yet the generally accepted interpretation of the Court's meaning in *Pennington* is that while a union might surrender its freedom to bargain on its own initiative, it may not agree with one group of employers to impose certain terms on a competing group of employers.⁸⁴ A second difficulty in utilizing the intimately related test has yet to be

⁸⁰ *Id.* at 667-69.

⁸¹ P. AREEDA & D. TURNER, 1 ANTITRUST LAW § 229 (1978). Much of this difficulty stems from the fact that both *Jewel Tea* and *Pennington* were plurality decisions. See notes 64 and 77 *supra*.

⁸² The lower courts therefore have had no instruction from the Supreme Court on how much evidence, if any, must be presented before a showing has been made that an agreement should be nonexempt because it was entered into at the behest of nonlabor groups. Once the exemption question has been settled, however, the lower courts have been given some guidance from the Supreme Court concerning the standard of proof required to show that an antitrust violation has occurred. See *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971) (the ordinary predominance-of-the-evidence standard is applicable to unions). See also *South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767 (6th Cir. 1970); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896 (5th Cir. 1974); *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980) *cert. denied*, 101 S. Ct. 207 (1980). It is interesting to note that ultimately, it was found that the union in *Pennington* had not violated the antitrust laws. *Lewis v. Pennington*, 400 F.2d 806, 818 (6th Cir. 1968) *cert. denied*, 393 U.S. 983 (1968).

⁸³ See 381 U.S. at 667.

⁸⁴ See *id.* at 665-66. This interpretation regards Justice Douglas' concurring opinion in *Pennington* as a proper summarization of Justice White's opinion. Authority cited at note 77 *supra* supports this interpretation. Under this interpretation, evidence of a conspiracy between the union and a nonlabor group, or at least evidence of some sort of anticompetitive agreement independent from the collective bargaining agreement, must be shown.

The *Pennington* majority (including Justice Douglas), would, . . . deny an exemption for (1) an explicit agreement by a union with one or more employers to impose the same wage on rival employers, (2) regardless of the latter's ability to pay or other extreme circumstances, (3) regardless of the union's self interest, and (4) for the purpose of destroying those other firms. How much less than this would be condemned was left unclear by the Supreme Court Even if there were

addressed by the courts. By stating in *Jewel Tea* that agreements concerning mandatory bargaining subjects often may fall under the protection of the non-statutory exemption from the antitrust laws, the Court seemed to infer that agreements concerning nonmandatory bargaining subjects should always be open to antitrust attack. It is unclear, however, if the Court fully considered whether the congressional policy favoring collective bargaining would be compromised if the mandatory bargaining requirement were imposed in all labor/antitrust cases.

Given these difficulties, it was hoped that in a subsequent decision the Court would provide more precise guidelines for application of *Jewel Tea*'s intimately related test. This hope was not realized in the recent decision of *Connell Construction Co. v. Plumbers Local 100*,⁸⁵ however, where the Court applied a different kind of analysis — its natural effects analysis.⁸⁶

II. THE CONNELL DECISION

In *Connell*, Local 100, the defendant union, asked Connell Construction Company, a general contractor, to sign a "hot cargo" agreement which provided that Connell would subcontract only to mechanical subcontractors who had signed a collective bargaining agreement with Local 100.⁸⁷ When Connell refused to sign the agreement, Local 100 picketed Connell's construction site.⁸⁸

an agreement, moreover, it should not be considered improper unless the second or fourth elements are present. *Pennington* does not compel a contrary conclusion.

P. AREEDA & D. TURNER, 1 ANTITRUST LAW § 229, at 211 (1978).

⁸⁵ 421 U.S. 616 (1975).

⁸⁶ In general, the lower courts have avoided discussion in detail whether the Supreme Court's decision in *Connell* has merely modified the intimately related test, or whether it has replaced it entirely. In *Consol. Exp., Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979) *vacated on other grounds*, 100 S. Ct. 3040 (1980), the Court of Appeals for the Third Circuit commented that the tests advanced in *Jewel Tea* and *Connell* are similar. *Id.* at 517-18. Some commentators have regarded the natural effects test to be merely a modification of the intimately related test. See, e.g., Comment, Connell: Broadening Labor's Antitrust Immunity While Narrowing its Construction Industry Proviso Protection, 27 CATH. U.L. REV. 305, 320-22 (1978); Note, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 242-43 (1975); Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest*: *McCourt v. California Sports, Inc.*, 21 B.C. L. REV. 680, 695 (1980). At least one commentator has argued that the natural effects test supplants the intimately related test. Note, *Labor Law — Antitrust Liability of Labor Unions — Connell*, 17 B.C. INDUS. & COM. L. REV. 217, 224-25 (1976).

It is contended in this note that the natural effects test may be fundamentally different from the intimately related test. A court applying the natural effects test could find that an agreement is not exempt because of the severity of the restraint which it imposes without fully considering the extent to which the agreement should be protected by the congressional policy favoring collective bargaining. A court applying the intimately related test, however, must consider the extent to which an agreement should be protected by the congressional policy favoring collective bargaining, since it must determine whether an agreement concerns a mandatory subject of collective bargaining, and whether the agreement was the product of bona fide arm's-length collective bargaining.

⁸⁷ 421 U.S. at 619-20.

⁸⁸ *Id.* at 620.

Connell then signed the agreement under protest and brought suit to have the agreement declared invalid because it violated sections 1 and 2 of the Sherman Act.⁸⁹

Local 100 defended against the claim on two grounds. First, it argued that its agreement with Connell was authorized under the construction industry proviso of section 8(e) of the NLRA.⁹⁰ If this argument were accepted, the union urged that the agreement would be exempt, since Congress probably intended that an agreement expressly authorized under the NLRA should not be held to violate any other laws.⁹¹ Alternatively, Local 100 argued that even if the agreement violated section 8(e), it was exempt from the Sherman Act because Congress intended that where an activity is expressly prohibited by the labor laws, the labor laws should provide the exclusive remedy.⁹²

After considering the contentions of Local 100, the Supreme Court held, in a 5-4 decision,⁹³ that Local 100 was not exempt from the Sherman Act. The Court remanded the case for consideration of Connell's antitrust claim on the merits.⁹⁴ In addition, the majority held that the agreement violated section 8(e) of the NLRA because it was not contained in a collective bargaining agreement, and "possibly" because it was not expressly limited to "common-situs

⁸⁹ *Id.* at 620-21. *Connell* also brought suit under Texas' antitrust laws. The Court held that federal law pre-empted state antitrust law where federal labor policy was in question, and dismissed the state antitrust claims. *Id.* at 635-36.

⁹⁰ Respondent's Brief on the Merits on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, at 11-32 [hereinafter cited as Respondent's Brief].

⁹¹ Respondent's Brief, at 29-32. Local 100 relied on Seventh Circuit's decision in *Suburban Title v. Rockford Building Trades Council*, 354 F.2d 1 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966) to support this contention. Since a valid construction subcontracting agreement had been held to concern a mandatory subject of collective bargaining, *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964), and since economic action to secure such agreements had been upheld, *Essex County and Vicinity District Council of Carpenters v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964), the Seventh Circuit found that "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. The lower courts have continued to accept the proposition that a clause which does not violate section 8(e) is exempt from the antitrust laws. *See, e.g.*, *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1111 (9th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3493 (1981); *Landscape Specialties, Inc. v. Laborers' Local 806*, 477 F. Supp. 17, 19 (C.D. Cal. 1979). *But see Barabas v. Prudential Lines, Inc.*, 451 F. Supp. 765 (S.D.N.Y. 1978). An agreement which is not prohibited by § 8(e), however, might be subject to antitrust scrutiny if it is alleged that the agreement was part of a conspiracy between the signatories to force competitors out of business. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

⁹² Respondent's Brief, at 32-43. Local 100 argued that Congress intended that the labor laws should provide the exclusive remedy for an 8(e) violation because Congress rejected amendments calling for the inclusion of language in the LMRA which would allow an antitrust remedy.

⁹³ Justice Powell wrote the opinion for the majority, in which Chief Justice Burger and Justices White, Blackmun, and Rehnquist joined. Justice Stewart filed a dissenting opinion, in which Justices Douglas, Brennan, and Marshall joined. Justice Douglas also filed a separate dissenting opinion.

⁹⁴ 421 U.S. at 637.

relationships on particular jobsites as well."⁹⁵ The majority found no legislative history suggesting that Congress intended the labor laws to provide the exclusive remedy for a section 8(e) violation.⁹⁶ Local 100 had failed to persuade the majority to accept its arguments.

In determining whether the agreement would be exempt from the Sherman Act, the *Connell* Court developed a method of analysis which examined the nature, effect, and magnitude of the alleged restraint. Under the Court's natural effects analysis,⁹⁷ the agreement in *Connell* was not exempt from the Sherman Act because it imposed a "direct restraint on the business market [having] substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."⁹⁸ In deciding that the agreement at issue imposed a direct restraint, the majority noticed that there was a separate collective bargaining agreement signed by Connell and the mechanical subcontractors which contained a most favored nation clause.⁹⁹ This clause had the "primary effect" of preventing the union from offering any outside employers a more favorable contract.¹⁰⁰ Moreover, the agreement between Local 100 and Connell pro-

⁹⁵ *Id.* at 633. See note 16 *supra* for the text of section 8(e).

⁹⁶ *Id.* at 634. Justice Stewart argued forcefully in his dissenting opinion that the legislative history showed Congress intended the exclusive remedy for all illegal secondary boycott activity to be provided by the labor laws. *Id.* at 654-55.

⁹⁷ The method of analysis adopted by the Court in *Connell* has previously been referred to as the natural effects test. See B.C. Note, *supra* note 65, at 225; Cath. U. Comment, *supra* note 65, at 320.

⁹⁸ 421 U.S. at 625.

⁹⁹ *Id.* at 619 and 623-24. In a most favored nation clause, a union guarantees that if it grants a more favorable contract to an employer outside the multi-employer group that negotiated the original collective bargaining agreement, it will grant the same favorable terms to members of the multi-employer group. Note, *Antitrust Law — Most Favored Nation Clause and Labor's Antitrust Exemption*, 19 J. PUB. LAW 399, 399 n.4 (1970).

¹⁰⁰ The Court hinted that the most favored nation clause in the collective bargaining agreement between Local 100 and the mechanical subcontractors would not have been exempt, had it been the subject of an antitrust attack, since the Court found that the primary effect of the clause was to restrict the freedom of the union to negotiate by inhibiting it from offering other employees a more favorable contract. *Id.* at 623 n.1 and 623-24. The Court noted that a Local 100 official had admitted during the trial that, because of the most favored nation clause, Local 100 would not negotiate a collective bargaining agreement with an employer containing terms more favorable than those in the existing agreement. *Id.* See VON KALINOWSKI, *supra* note 53, § 48.03(2) (1979).

Prior to the *Connell* decision the courts and the NLRB maintained that a most favored nation clause would violate the antitrust laws only if it could be shown that the employer insisted upon the inclusion of such a clause for an underlying anticompetitive or "predatory" purpose. *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546, 554 (7th Cir. 1970); *Dolly Madison Industries, Inc.*, 182 N.L.R.B. 1037, 1037-38 (1970). In *Dolly Madison Industries*, the Board commented:

In contrast to Pennington, the MFNC provision [most favored nation clause] upon which the Employer here insisted 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

hibited the latter's subcontracting not only to nonunion firms, but also to union firms not represented by Local 100.¹⁰¹ The combination of the collective bargaining agreement signed by Local 100 and the subcontractors with the Connell/Local 100 "hot cargo" agreement therefore had the actual effect of sheltering signatory mechanical subcontractors from competitors who had not signed with Local 100.¹⁰² In addition, the two agreements could cause a potential restraint on competition, since Local 100 could eliminate subcontractors from the market by refusing to sign collective bargaining agreements with them.¹⁰³ These anticompetitive effects, according to the Court, "would not flow naturally from the elimination of competition over wages and working conditions"¹⁰⁴ because they could restrain subcontractors who have a competitive advantage based on efficiency as well as nonunion subcontractors who have a competitive advantage based on the payment of substandard wages.¹⁰⁵

An important factor in the Court's decision not to exempt the Connell/Local 100 agreement from the antitrust laws was the absence of any collective bargaining relationship between Connell and Local 100. Local 100 admitted that it had no interest in representing Connell's employees.¹⁰⁶ This admission was significant to the Court, because in *Connell*, as in *Pennington* and *Jewel Tea*, the labor policy which the court sought to accommodate with antitrust policy was "the congressional policy favoring collective bargaining under the NLRA."¹⁰⁷ Thus, where an agreement executed in an atmosphere remote from the collective bargaining relationship is attacked, as in *Connell*, the defending party would have difficulty showing that such an agreement should be protected by the congressional policy embodied in the NLRA, and consequently protected from antitrust scrutiny.

any disadvantage that it might otherwise suffer if the Union subsequently negotiated more favorable wage and benefit levels with other employers.

Id. at 1038. In addition, the Board found that the most favored nation clause was a mandatory subject of bargaining. *Id.* See generally Comment, *Antitrust Law — Most Favored Nation Clause and Labor's Antitrust Exemption*, 19 J. PUB. L. 399 (1970); St. Antoine, *Connell*, *supra* note 5, at 610-12.

Subsequent to the *Connell* decision, the courts and the NLRB have continued to uphold most favored nation clauses. In two district court cases decided after *Connell* the courts have found that most favored nation clauses do not necessarily violate the antitrust laws, and are not necessarily nonexempt. *Signatory Negotiating Com. v. Local 9, Int'l Union of Op. Eng.*, 447 F. Supp. 1384, 1391 (D. Colo. 1978); *Theatre Techniques v. Local 829*, 103 L.R.R.M. 2215 (S.D.N.Y. 1979). In *Theatre Techniques*, the court observed that a most favored nation clause that was not used to impose conditions on noncontracting parties might be exempt. *Id.* at 2216. The NLRB recently has refused to hold that a most favored nation clause which is specifically limited to "wages, hours and working conditions" violates the antitrust laws. *Hotel Employees & Bartenders Union, Local 355*, 245 N.L.R.B. No. 100, n.1 (1979).

¹⁰¹ *Connell Construction Co. v. Plumbers, Local 100*, 421 U.S. at 624.

¹⁰² *Id.*

¹⁰³ *Id.* at 624-25.

¹⁰⁴ *Id.* at 625.

¹⁰⁵ *Id.* at 623-24.

¹⁰⁶ *Id.* at 620.

¹⁰⁷ *Id.* at 622.

While the *Connell* court specified that its natural effects analysis should apply to agreements that are not the product of collective bargaining, it left open the question whether its analysis also should be applied to provisions contained in collective bargaining agreements. The following amorphous and perplexing dicta from the *Connell* opinion contains the only clue as to what the Court might decide when faced with an antitrust attack on a collective bargaining agreement: "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement."¹⁰⁸ At most, this statement indicates that the Court would not apply the *Connell* standard to a case involving an attack on a collective bargaining agreement. At the very least, it indicates that the Court is not certain that it would apply the *Connell* standard to such a case.¹⁰⁹

In addition to the absence of a collective bargaining agreement, a final factor significant to the *Connell* Court in making its decision was that the agreement between Local 100 and Connell violated section 8(e) of the NLRA. The Court observed that although the end Local 100 sought to achieve — that of organizing nonunion subcontractors — was legal, the methods Local 100 used to achieve that end were illegal.¹¹⁰ The subcontracting agreement's violation of

¹⁰⁸ *Id.* at 625-26.

¹⁰⁹ See VON KALINOWSKI, *supra* note 53, § 48.03(2) (1979).

A further suggestion as to whether the Court would apply the *Connell* standard to a case where a collective bargaining agreement is alleged to violate the antitrust laws is provided in *Federal Maritime Com'n v. Pacific Maritime Ass'n*, 435 U.S. 40 (1978). In that case the Court held, in a 5-3 decision, that all collective bargaining agreements negotiated in the shipping industry must be submitted to the Federal Maritime Commission for approval pursuant to § 15 of the Shipping Act, 39 Stat. 733 (1916) as amended, 46 U.S.C. § 814 (1976), and that the Commission could reject an agreement on the grounds that it might violate the antitrust laws. *Id.* at 53. The majority stressed, however, that it was accommodating the Shipping Act and the labor laws — not the Sherman Act and the labor laws. 435 U.S. at 63. The majority stressed further that it was not necessary that the exemption for collective bargaining agreements submitted under the Shipping Act be identical to the labor exemption as generally applied. *Id.*

Justice Powell, joined by Justices Brennan and Marshall, dissented. Justice Powell was convinced that the majority's decision "undercut federal labor policy, imposing undue burden on collective bargaining, without advancing significantly any Shipping Act objectives." *Id.* at 65. Justice Powell's dissent is significant because it strongly suggests that, of the majority in *Connell*, he, at least, would have considered Local 100's exemption defense more favorably if the agreement attacked in *Connell* had been part of a collective bargaining agreement.

In *Group Life & Health Ins. v. Royal Drug Co.*, 99 S. Ct. 1067 (1979), a case concerning an exemption from the antitrust laws other than the labor exemption, Justice Stewart, writing for a 5-4 majority, observed: "It is well settled that exemptions to the antitrust laws are to be narrowly construed," and cited *Connell* as one of the cases supporting his observation. *Id.* at 1083. There is little reason to believe that Justice Stewart, author of the dissent in *Connell*, intended his comment to have a wide-ranging effect where the labor exemption is concerned.

¹¹⁰ 421 U.S. at 625. The subcontracting agreement itself was an illegal method because it violated § 8(e). Moreover, because the agreement violated § 8(e), Local 100 violated § 8(b)(4)(ii)(A) by picketing Connell to force it to sign the agreement. Section 8(b)(4)(ii)(A) makes it an unfair labor practice for a union to force an employer to enter into an agreement which violates § 8(e). 29 U.S.C. § 158(b)(4)(ii)(A) (1976).

section 8(e) thus had at least some bearing on the Court's determination that the agreement was nonexempt.¹¹¹ It should be noted, however, that the existence of an 8(e) violation was not by itself the determining factor regarding the labor exemption. Before considering this factor, the Court first decided that the agreement was not exempt because of the nature, effect, and magnitude of the restraint which it imposed.¹¹² Only after denying the exemption did it hold that the agreement violated section 8(e) and that the labor laws did not provide the exclusive remedy for 8(e) violations.¹¹³

In *Connell*, therefore, the Supreme Court was faced with a fact situation quite different from those of *Jewel Tea* and *Pennington*. The agreement alleged to violate the antitrust laws in *Connell* was not a collective bargaining agreement, and a collective bargaining relationship did not exist between the parties to the agreement.¹¹⁴ Moreover, the method used by the union in *Connell* was held to violate section 8(e) of the NLRA.¹¹⁵ After *Connell*, it remained to be seen whether the lower courts would restrict the use of the natural effects test to situations where the distinguishing factors of *Connell* were present, or whether they would apply the test in cases with facts resembling those of *Jewel Tea* or *Pennington*.

III. AN EVALUATION OF *CONNELL*'S EFFECT ON LOWER COURT DECISIONS

The lower courts have followed the *Connell* decision in cases involving agreements that are not collectively bargained.¹¹⁶ They have been reluctant, however, to apply *Connell*'s natural effects analysis to cases involving collective bargaining agreements. Representative lower court cases involving antitrust attacks on collective bargaining provisions will be evaluated here. The extent to which the lower courts have relied, or should have relied, on *Connell* will be explored to determine whether the courts applied an appropriate test in specific situations. Lower court cases concerning collective bargaining agreements can be divided according to whether the methods used by the union or employer were legal or illegal. When the methods used by a union or employer are legal — when the union's methods violate no laws other than the antitrust laws —

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 633.

¹¹⁴ *See id.* at 620.

¹¹⁵ *Id.* at 633.

¹¹⁶ Where an agreement which is alleged to violate the antitrust laws is not a collective bargaining agreement, the interest in protecting the collective bargaining process is absent. Lower courts have considered *Connell* to be controlling in such cases. *See, e.g.,* Calif. State Council of Carpenters v. Ass'n Gen. Contractors of Calif., Inc., 105 L.R.R.M. 3311 (9th Cir. 1980); Larry V. Muko, Inc. v. Southwestern Pennsylvania, 609 F.2d 1368 (3rd Cir. 1979); Altemose Constr. Co. v. Atlantic, Cape May, Etc., 493 F. Supp. 1181 (D.N.J. 1980); James Julian, Inc. v. Raytheon Co., 105 L.R.R.M. 2741 (D. Del. 1980).

Although the Supreme Court implicitly recognized in *Connell* that the nonstatutory exemption from the antitrust laws might apply to an agreement which was not the product of collective bargaining, *see Muko*, 609 F.2d 1373, *see also* B.C. Note, *supra* note 65, at 224 n.58, no court has yet allowed a party to assert successfully the nonstatutory exemption defense.

the courts generally have refrained from using natural effects analysis, regardless of the extent of the actual or potential anticompetitive effects of an alleged restraint.¹¹⁷ When the method used by the union or employer is illegal, however, the courts have been more willing to apply the natural effects test to hold that an agreement is nonexempt.¹¹⁸ This does not represent a significant shift away from use of the intimately related test, however, for most such agreements would be nonexempt under the intimately related test as well.¹¹⁹

In *Muko*, a restaurant chain hired Muko, a nonunion general contractor, to construct several restaurants. 609 F.2d at 1370-71. Two unions then passed out leaflets at the first restaurant which Muko had completed, asking patrons to refrain from eating at the restaurant because Muko was paying substandard wages. *Id.* at 1371. Officers from the restaurant chain met with the unions, and soon after that meeting an officer of the restaurant chain wrote to the unions expressing an intention to do business in the future with contractors approved by the unions. *Id.* Muko was not asked to bid on contracts for the construction of a number of additional restaurants opened by the chain. *Id.* Muko responded by bringing an antitrust suit against the unions and the restaurant chain. *Id.* at 1370.

The Court of Appeals for the Third Circuit stated that the jury could have found that (1) the unions had acted in concert with a nonlabor group, the restaurant chain, (2) the agreement between the unions and the restaurant chain imposed a "direct restraint" because it made Muko ineligible to bid for contracts with the restaurant chain, (3) the agreement had a substantial anticompetitive effect since Muko could show that the restaurant chain could have saved \$250,000.00 by contracting with it, and (4) the agreement could have had "a potential for restraining competition in the business market that would not follow naturally from the elimination of competition over wages and working conditions," *Connell*, 421 U.S. at 635, because it excluded Muko from competition even if its competitive advantage was derived from efficient operating methods rather than from payment of substandard wages. 609 F.2d at 1374.

Explicitly applying its understanding of the holding of *Connell* — "that an agreement between a union and a business organization, outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny," *id.* at 1373 — the Third Circuit held that it was error for the district court to direct a verdict for the defendants on the ground that they were exempt from the antitrust laws. The Third Circuit might have held, however, that the defendants were exempt from the antitrust laws if the agreement between the unions and the restaurant chain had been a collective bargaining agreement. See text and notes at notes 174-206 *infra*.

The complaint in *Calif. State Council of Carpenters* was regarded by the Ninth Circuit as presenting the "flip side" of the situation presented in *Connell*. Two unions alleged that an association of general contractors and its individual members had sought to coerce owners of property and general contractors to hire only nonunion subcontractors. 105 L.R.R.M. at 3314-15. The defendants brought a motion to dismiss claiming that they were immune from the antitrust laws under the nonstatutory exemption. *Id.* at 3315. The court noted that the unions could show that "[m]ore efficient subcontractors who had signed with the unions and were paying wage rates and fringe benefits equal to or lower than those paid by nonunion subcontractors would be precluded from competing for carpentry work required by those who had not signed with the Unions." *Id.* Therefore, the court reasoned that the natural effects analysis of *Connell* could apply with equal force against employer groups as against unions. *Id.* The court denied the employers' motion to dismiss, finding that "the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages and working conditions." *Id.* at 3318. Thus, it appears that the Ninth Circuit interpreted *Connell* as restricting application of the nonstatutory exemption from the antitrust laws only to collective bargaining agreements, or the equivalent.

¹¹⁷ See text and notes at notes 133-74 *infra*.

¹¹⁸ See text and notes at notes 175-82 *infra*.

¹¹⁹ *Id.*

A. *Where Collective Bargaining Provisions are Legal Under the Labor Laws*

1. *Action Brought by Signatory Attacking an Agreement which Affects Only Parties to the Agreement*

When an action involving a legal collective bargaining provision is brought by a signatory to the agreement, the courts have been strongly influenced by one factor — namely, the status of the parties who must endure the restraint allegedly caused by the provision. The lower courts generally have recognized that the extent to which collective bargaining agreements restraining trade should be shielded from the congressional antitrust policy depends greatly on the degree to which parties *outside* the collective bargaining relationship are affected by the restraint.¹²⁰ Consequently, when an alleged restraint affects only parties within a collective bargaining relationship, such as the signatory plaintiff, the lower courts have avoided making an initial inquiry into the nature and magnitude of an alleged restraint, even though the restraint imposed on one of those parties may be particularly severe. The lower courts thus have not used *Connell's* natural effects analysis in such cases.

An example of such a case is *McCourt v. California Sports, Inc.*¹²¹ Individual hockey players brought suit in *McCourt* alleging that the reserve system in the National Hockey League violated the antitrust laws.¹²² Their employers defended by claiming that the reserve system was exempt from antitrust scrutiny because it was contained in a fully negotiated collective bargaining agreement.¹²³ In deciding whether the reserve system was exempt from the antitrust laws, the United States Court of Appeals for the Sixth Circuit did not apply the natural effects method of analysis by considering the nature, magnitude, and effect of the restraint imposed by the reserve system. The court noted that the reserve system had no significant anticompetitive effect on parties outside the collective bargaining relationship.¹²⁴ It therefore applied the relevant portions of the intimately related tests — (1) the agreement must concern a mandatory

¹²⁰ See *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

¹²¹ 600 F.2d 1193 (6th Cir. 1979). See Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest: McCourt v. California Sports, Inc.*, 21 B.C. L. REV. 680 (1980). Another representative case of this type is *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), discussed at note 129 *infra*.

¹²² 600 F.2d at 1196. The reserve system provided basically that if a player signs with another team after the expiration of his contract, the new team must compensate the player's former team, either by the assignment of contracts, the assignment of players, or the payment of money. *Id.* at 1195.

¹²³ See *id.* at 1197. Employers as well as unions are entitled to involve the nonstatutory exemption as a defense. See note 53 *supra*.

¹²⁴ *Id.* at 1198.

subject of collective bargaining, and (2) it must be the product of bona fide arm's length bargaining — to determine whether the reserve system was exempt.¹²⁵ The court found that the reserve system concerned a mandatory subject of collective bargaining.¹²⁶ In addition, the court closely examined the bargaining history of the reserve system,¹²⁷ and concluded that bona fide bargaining had taken place. Consequently, the court held that, under the intimately related test, the reserve system was exempt from the antitrust laws.¹²⁸

The lower courts have correctly recognized that application of *Connell's* natural effects analysis to cases where an alleged restraint does not affect parties outside the collective bargaining relationship is unwarranted.¹²⁹ The proper method of analysis in such situations does not call for an investigation into the nature and magnitude of an alleged restraint. Rather, it calls for consideration of whether bona fide arm's-length bargaining has occurred. As long as bona fide bargaining has taken place, the lower courts have been willing to protect the congressional labor policy favoring collective bargaining, even though the magnitude of the alleged restraint could be significant. No significant antitrust policies are furthered when a party freely negotiates and assents to a collective bargaining agreement and then invokes the antitrust laws to free itself from its contractual obligations. In addition, the collective bargaining process

¹²⁵ *Id.* at 1197-98. There was no allegation that the reserve system did not satisfy the third party of the intimately related test — that is, that the agreement was entered into by the player's association at the behest of nonlabor groups for an anticompetitive purpose.

¹²⁶ *Id.* at 1198. The court found that the reserve system was a mandatory subject of collective bargaining under § 8(d) of the NLRA because it restricted the players' ability to change teams and lowered their wages.

¹²⁷ *Id.* at 1199-203.

¹²⁸ Had the *McCourt* panel applied a broad interpretation of the natural effects test, it might have reached a different conclusion. The court would have focused more on the nature and effect of the restraint imposed by the reserve system. It could have found that the reserve system imposed a substantial anticompetitive effect because it restricted the players from entering new "markets" by changing teams, and because it prevented the poorer teams from acquiring good players by artificially increasing the cost of recruiting them. Arguably, such a restraint does not follow naturally from elimination of competition over wages and working conditions because of its effect of competition based on efficiency. The court could have found that the ability of the more "efficient" players to compete with less "efficient" players would be reduced because the cost of obtaining "efficient" players in the open market was artificially high.

¹²⁹ Another court which has refused to apply *Connell's* natural effects analysis to this type of case is the Eighth Circuit in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). In *Mackey*, individual professional football players attacked the NFL's reserve system, the so-called "Rozelle Rule." *Id.* at 609. In determining whether to apply the nonstatutory exemption, the *McCourt* court had followed the standards which had been set out in *Mackey*. Compare 600 F.2d at 1197-98 with 543 F.2d at 614-15. The Rozelle Rule was held not to be exempt from the antitrust laws in *Mackey*, however, because the court was not convinced that the Rule was the product of bona fide arm's-length bargaining. 543 F.2d at 616. After the court had determined that bona fide bargaining had not taken place, and that the need to protect the collective bargaining process was not compelling, the court then examined the nature and magnitude of the restraint involved and held that it unreasonably restrained trade in violation of the Sherman Act. *Id.* at 622.

would be compromised. Any provision in a valid collective bargaining agreement could potentially be voided merely upon a showing that the provision imposes a harsh burden on one of the parties to the agreement.¹³⁰

2. Action Brought by Signatory Attacking Agreement which Affects Third Parties

Occasionally, a signatory may allege that a collective bargaining agreement violates the antitrust laws because it has an anticompetitive impact not only on itself, but also on parties outside the collective bargaining relationship. Where a restraint imposed by a collective bargaining agreement does affect parties outside the collective bargaining relationship, the need to protect the congressional antitrust policy increases, since a competitive economy may be hampered by agreements restraining the competitive ability of innocent third parties. It can be assumed that a party outside a collective bargaining relationship will bring an antitrust suit if it is actually injured by the terms of a collective bargaining agreement. When a signatory to a collective bargaining agreement which potentially affects third parties brings suit, generally the gravamen of its complaint is that its freedom to deal with innocent third parties has been restrained. Thus, whether the agreement has had an actual anticompetitive effect on parties outside the collective bargaining relationship is immaterial, so far as application of the exemption from the antitrust laws is concerned. What is required, however, is that the agreement does have the potential to affect parties outside the bargaining relationship. The relationship between the parties in such cases is similar to the relationship between the parties in *Connell*. In that case, *Connell* contended that it was injured because the agreement which it had signed inhibited its freedom to deal with innocent third parties — that is, subcontractors who had not signed a collective bargaining agreement with Local 100.¹³¹ Despite the similarity between these cases and *Connell*, however, the lower courts hearing these cases have not followed *Connell*. Without applying an alternative standard, they have found the agreements in question to be exempt from antitrust scrutiny simply because the *Connell* decision was distinguishable.

An example of this type of case is *In re Bullard Contracting Corp.*¹³² In

¹³⁰ See Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). The authors argue that individual members of a collective bargaining unit should not be able to sue their employers in antitrust. *Id.* at 22-28. "Collective bargaining seeks to order labor markets through a system of countervailing power. Thus, it is often referred to by economists as a bilateral monopoly. If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished." *Id.* at 22 (footnotes omitted).

¹³¹ See *Connell*, 421 U.S. at 618-22. It is interesting to note that the *Connell* court discussed how the *Connell*/Local 100 agreement would impose a substantial anticompetitive effect on hypothetical subcontractors rather than how the agreement would affect *Connell* Company, the actual party bringing suit. *Id.* at 623-25.

¹³² 464 F. Supp. 312 (W.D.N.Y. 1979). Another case of this type is *Signatory Negotiating Com. v. Local 9, Int'l Union of Operators*, 447 F. Supp. 1384 (D. Colo. 1978). *Signatory*, like

Bullard, as in *Connell*, a general contractor (Bullard) alleged that subcontracting provisions contained in a collective bargaining agreement, which it had signed with its employees' union, violated the Sherman Act by restricting its freedom to contract with subcontractors of its choice.¹³³ Before Bullard brought its antitrust suit in the district court, the union involved had filed two grievances for arbitration in which it charged that Bullard had violated the subcontracting clause that it had signed with the union.¹³⁴ Bullard then brought its antitrust suit asking the court to stay the arbitration proceedings because the subcontracting agreement violated the antitrust laws.¹³⁵ Bullard also filed a charge with the NLRB alleging that the subcontracting clause violated section 8(e) of the NLRA.¹³⁶ The district court did not decide whether the agreement violated section 8(e), however, since both Bullard and the union stipulated that they would await the NLRB's decision.¹³⁷

Connell differed from *Bullard* in one important respect. In *Bullard* the subcontracting agreement at issue was contained in a collective bargaining agreement.¹³⁸ The district court held that the union was exempt from antitrust scrutiny because *Connell* was distinguishable.¹³⁹ It did not explain why the union would be exempt from antitrust scrutiny under alternative standards. The primary question which courts should consider in cases like *Bullard* is whether the bona fide bargaining requirement of the intimately related test has been satisfied, the same question which was of primary importance in *McCourt*.

Under the same general facts as in *Bullard*, a surprisingly different case

Bullard, involved an action brought by a general contractor alleging that a collective bargaining provision against subcontracting to nonunion subcontractors violated the antitrust laws. *Id.* at 1386-87. The *Signatory* court distinguished *Connell* because (1) the subcontracting provision involved was contained in a collective bargaining agreement, *id.* at 1390, (2) the court found that the subcontracting agreement could not be used by a specific group of employers to eliminate competition from employers outside that group, *id.*, and (3) the subcontractors were not required under the agreement to recognize the union unless they had been on the construction site for more than 31 days. *Id.* at 1390-91. The court found that the subcontracting provision was exempt from antitrust scrutiny because "the predominant interests involved in the agreement . . . are well within the legitimate concerns of organized labor as reflected in the policy established by the enactment of national labor legislation." *Id.* at 1391. The court applied no clear standards to come to this conclusion, however. Moreover, because it had reached this conclusion, the court found it unnecessary to consider whether application of the agreement could be considered an unfair labor practice under § 8(e) of the NLRA. *Id.* Apparently the court was willing to accept the proposition that an agreement violating § 8(e) protected interests "within the legitimate concerns of organized labor." *Id.*

¹³³ 464 F. Supp. at 313.

¹³⁴ *Id.* at 313.

¹³⁵ *Id.*

¹³⁶ *Id.* at 314 n.3.

¹³⁷ *Id.* at 314 n.4. Had the court considered the § 8(e) claim, it might have found that the subcontracting clause violated § 8(e). It could have conceivably found, therefore, that the clause was not exempt from the Sherman Act because it did not concern a mandatory bargaining subject. See text and notes at notes 166-74 *infra*.

¹³⁸ 464 F. Supp. at 315. The court commented: "The whole thrust of the *Connell* opinion was directed at the impact caused by the absence of the collective-bargaining relationship." *Id.* at 316.

¹³⁹ See *id.* at 315-17.

would exist if a nonunion subcontractor had brought an antitrust suit attacking the subcontracting clause signed by Bullard and the union. The subcontractor could have brought its suit against both the union and Bullard, and both the union and Bullard could conceivably have been held liable to the subcontractor.¹⁴⁰ Incredibly, then, in two suits concerning the same agreement and the same factual background, an employer would receive damages in one suit, but would pay damages in the other. Clearly, such inconsistent results should not be countenanced. Thus, when an employer brings suit against a union alleging that its collective bargaining agreement with the union violates the antitrust laws, the employer should show that it was coerced by the union into signing the agreement — that the agreement was not the product of bona fide bargaining.¹⁴¹ If the employer cannot make this showing, it would be equally at fault with the union in a suit brought by a third party who was adversely affected by the agreement, and therefore should not be allowed to benefit from the antitrust laws.

In fact, so long as the collective bargaining agreement is the product of bona fide negotiations, it should be exempt from an antitrust suit brought by any signatory, including signatories to agreements which have no effect on parties outside the collective bargaining relationship. This result should obtain regardless of whether the provision in question can satisfy the mandatory bargaining requirement of the intimately related test. For purposes of illustration, the factual setting of *Bullard* proves helpful. Suppose that Bullard knew, at the time of negotiations, that the subcontracting clause desired by the union likely would violate section 8(e) of the NLRA. Since a clause which violates section 8(e) probably does not concern a mandatory subject of bargaining, such a clause would presumably be nonexempt from the antitrust laws under the intimately related test. Bullard, however, could gain quite a bit and lose very little by signing an agreement containing the illegal clause. First, it could bargain for substantial concessions from the union in return for signing the clause.¹⁴² Second, the primary sacrifices resulting from enforcement of the clause would be borne by nonunion subcontractors who would be prevented from doing business with Bullard. Bullard might suffer some injury if the nonunion

¹⁴⁰ See, e.g., *Consolidated Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980); *Granddad Bread v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3493 (1981); *Calif. Dump Truck v. Associated Gen. Contractors*, 562 F.2d 607 (9th Cir. 1977).

¹⁴¹ The dividing line between legitimate hard bargaining and coercion may be difficult to define. In most cases, a union's unilateral bargaining efforts, so long as they are not unfair labor practices, should not amount to coercion. If a provision violates § 8(e) of the NLRA, the employer may prove coercion by showing that the union violated § 8(b)(4)(ii)(A) of the NLRA. Section 8(b)(4)(ii)(A) makes it an unfair labor practice for a union to force or require an employer to enter into an agreement that violates § 8(e).

¹⁴² "Employers may have no predatory purpose against secondary targets, but may nevertheless be quite willing to sacrifice in the bargaining process the interests of those targets in exchange for concessions on other bargaining issues." *Consolidated Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 520 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980).

subcontractors could contract with Bullard at a lower price than union subcontractors, but the amount of injury would probably be substantially outweighed by concessions Bullard would receive from the union in return for signing the agreement. Finally, knowing that the agreement is illegal, Bullard could choose to violate it. Certainly an employer should not be allowed to bring an antitrust suit against a union in such a case. The congressional antitrust policy is not furthered if an employer such as Bullard is allowed to benefit from the use of the antitrust laws. By signing its collective bargaining agreement, Bullard showed a lack of regard for the nonunion subcontractors upon whom the subcontracting provision potentially could impose substantial anticompetitive effects. In addition, the congressional labor policy would not be promoted by allowing an employer to gain substantial benefits by voluntarily assenting to a potentially illegal collective bargaining provision.¹⁴³

¹⁴³ If the union had brought suit to enforce its collective bargaining agreement in federal court and Bullard had not filed unfair labor practice charges with the NLRB, the federal court possibly could have refused to allow Bullard to assert in its defense that the subcontracting clause violated the antitrust laws. In *Kelly v. Kosuga*, 358 U.S. 516 (1959), the Supreme Court did not allow the assertion of a defense of antitrust illegality in an action to enforce an otherwise valid sales contract. *Id.* at 521. The Court held that a defense of antitrust illegality made by a party seeking to avoid its contractual obligations should be allowed only when failure to allow the defense would "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Id.* at 520. Thus far, the rule of *Kelly* has been applied to labor contracts only in cases that involve suits brought by trustees of employee benefit trusts to recoup funds owed by employers under the terms of collective bargaining agreements. See, e.g., *Mullins v. Kaiser Steel Corp.*, 105 L.R.R.M. 2579, 2580 (D.C. Cir. 1980); *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457, 458 (3d Cir. 1978); *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 439 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). In *Mullins*, *Huge*, and *Lewis*, the employer/defendants argued that they should be excused from their obligations because the collective bargaining provisions which required them to pay into employee benefit funds violated both the antitrust laws and § 8(e) of the NLRA. 105 L.R.R.M. at 2580; 590 F.2d at 459, 462; 382 F.2d at 439. The *Mullins*, *Huge*, and *Lewis* courts based their decisions to refrain from entertaining the employers' antitrust illegality defenses on the rule developed by the Supreme Court in *Kelly*. 105 L.R.R.M. at 2583-84; 590 F.2d at 459-60; 382 F.2d at 441. In addition, the *Mullins* court found that considerations of equity prevented the employers from asserting an antitrust defense. 105 L.R.R.M. at 2585.

The union in *Bullard* probably would have been unsuccessful in urging the district court to refuse to hear Bullard's antitrust claims on the basis of *Kelly*. See *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546, 552 (7th Cir. 1970) ("To discourage private enforcement [of the antitrust laws in a case where an employer asserts an illegality defense] by requiring the parties to await the arbitrator's decision would be contrary to the objectives of the Sherman Act."). Although the rule of *Kelly* has had limited application to cases involving collective bargaining agreements, extension of the rule to a wider range of antitrust suits between signatories to collective bargaining agreements may be warranted. The basic policy underlying the rule seems to be that courts are unwilling to allow the antitrust laws to be used by parties seeking to avoid their contractual obligations. When a party first freely assents to a provision in a collective bargaining agreement and then brings an antitrust suit to invalidate that provision, the courts should question whether the antitrust laws were meant to provide that party with a remedy. Such an inquiry would be particularly appropriate when the labor laws provide an adequate remedy, see *Mullins v. Kaiser Steel Co.*, 105 L.R.R.M. at 2590-91, and when the party seeking to invoke the antitrust laws has already received a substantial benefit in the form of bargaining concessions by signing the agreement.

Signatories to collective bargaining agreements, therefore, generally do not present compelling antitrust claims. If the complaining signatory bargained for the offending provision, it need not abide by it if it violates the labor laws. To allow the signatory an antitrust remedy in addition, however, offends the bargaining process. If the provision actually does restrain the competition of innocent third parties, those parties may obtain their remedy in the courts. In fact, they may bring their antitrust suit against *all* of the signatories to the agreement. Only in cases where bona fide bargaining has not taken place should the nonstatutory exemption be unavailable as between signatories. In such cases the collective bargaining process is not compromised, since real collective bargaining did not occur.

3. Action Brought by an Outside Party

The conflict between labor and antitrust policies sharpens when a party outside a collective bargaining relationship brings an antitrust suit against the parties to a collective bargaining agreement.¹⁴⁴ In these cases the plaintiff is most likely to have suffered the kind of injury normally remedied by the antitrust laws. Occasionally, in such a suit, the third party may have been forced to sign the challenged collective bargaining agreement.¹⁴⁵ Nevertheless, the third party can still be considered outside the collective bargaining relationship if (1) the collective bargaining agreement signed by the third party is essentially the same as one previously negotiated and signed between the union and competing employers, and (2) it is apparent that the third party had to sign the challenged collective bargaining agreement due to economic necessity.¹⁴⁶

Consistent with their position in suits brought by signatories to a collective bargaining agreement, the majority of lower courts have been reluctant to apply the natural effects analysis of *Connell* to suits brought by parties outside the

¹⁴⁴ See, e.g., *Frito Lay, Inc. v. Retail Clerks Local 7*, 105 L.R.R.M. 2104 (10th Cir. 1980); *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 207 (1980); *Consol. Exp., Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980); *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3493 (1981); *Ackerman-Chillingworth v. Pacific Electrical, Etc.*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *Cal. Dump Truck v. Associated General Contractors*, 562 F.2d 607 (9th Cir. 1977); *National Constructors Ass'n v. NECA*, 105 L.R.R.M. 2434 (D. Md. 1980); *Feather v. United Mine Workers*, 494 F. Supp. 701 (D. Pa. 1980); *Landscape Specialties, Inc. v. Laborers', Local 806*, 477 F. Supp. 17 (C.D. Cal. 1979); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979); *Suburban Beverages v. Pabst Brewing*, 462 F. Supp. 1301 (E.D. Wis. 1978).

¹⁴⁵ See, e.g., *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3249 (1980); *National Constructors Ass'n v. NECA*, 105 L.R.R.M. 2437 (D. Ma. 1980); *Feather v. United Mine Workers*, 494 F. Supp. 701 (D. Pa. 1980).

¹⁴⁶ Thus, *Jewel Tea* and *Pennington* fit into this category while *Bullard* does not. There was no evidence in *Bullard* that the parties had not freely negotiated and signed an original collective bargaining agreement.

collective bargaining relationships.¹⁴⁷ These courts have implicitly recognized that, provided the challenged agreement does not violate laws other than the antitrust laws, the intimately related test is better suited to accommodate congressional labor and antitrust policies than the natural effects test.¹⁴⁸ *California Dump Truck v. Associated General Contractors*¹⁴⁹ provides a good example of a lower court case which rejects *Connell's* natural effects analysis and instead applies the

¹⁴⁷ See, e.g., *Frito Lay, Inc. v. Retail Clerks, Local 7*, 105 L.R.R.M. 2104 (10th Cir. 1980); *Granddad Bread v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), cert. denied, 49 U.S.L.W. 3493 (1981); *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), cert. denied, 101 S. Ct. 207 (1980); *Landscape Specialties, Inc. v. Laborers' Local 806*, 477 F. Supp. 17 (D. Cal. 1979); *Suburban Beverages v. Pabst Brewing*, 462 F. Supp. 1301 (E.D. Wis. 1978). But see *Barabas v. Prudential Lines, Inc.*, 451 F. Supp. 765 (S.D.N.Y. 1978), aff'd, 577 F.2d 184 (2d Cir. 1978).

¹⁴⁸ See, e.g., *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980) (court relied on *Pennington* in deciding that coal operator failed to sustain its burden of proof on the merits of its antitrust claim against the UMW); *Murphy Tugboat Co., Ltd. v. Shipowner's & Merchant's Tugboat Co., Ltd.*, 467 F. Supp. 841 (N.D. Cal. 1979) (court explicitly applies intimately related test to find that agreement between pilots and tugboat company is exempt from antitrust scrutiny; agreement exempt even though not contained in a collective bargaining agreement since collective bargaining relationship exists between parties to the agreement); *Suburban Beverages v. Pabst Brewing Co.*, 462 F. Supp. 1301 (E.D. Wis. 1978) (intimately related test implicitly applied to find that agreement between beer manufacturer and union is exempt even though the agreement forces private distributor to stop distributing beer in county where union drivers distribute).

In a number of cases the courts have not clearly applied either the natural effects test or the intimately related test. The courts in these cases have apparently followed the simple rule that an agreement is exempt if it does not violate § 8(e) of the NLRA. See *Frito Lay, Inc. v. Retail Clerks, Local 7*, 105 L.R.R.M. 2104, 2111 (10th Cir. 1980); *Granddad Bread v. Continental Baking Co.*, 612 F.2d 1105, 1110-11 (9th Cir. 1979); *Landscape Specialties, Inc. v. Laborers' Local 806*, 477 F. Supp. 17, 20 (C.D. Cal. 1979).

The only lower court decision which has clearly applied *Connell's* natural effects analysis is *Barabas v. Prudential Lines, Inc.*, 451 F. Supp. 765 (S.D.N.Y. 1978), aff'd, 577 F.2d 184 (2d Cir. 1978). In *Barabas*, the American Radio Association (ARA) had negotiated a collective bargaining agreement with Prudential Lines, a shipping company, which contained a provision prohibiting Prudential from selling its ships without first ensuring that the ships' radio operators would be employed by the purchasing company. *Id.* at 767. Prudential made arrangements to sell thirteen of its ships. *Id.* at 767-68. Prudential could not ensure that its radio operators would be employed by the purchasing company, however, because the purchasing company had a collective bargaining agreement with a rival union which prohibited such an arrangement. *Id.* at 768.

The ARA brought a motion in the district court for a preliminary injunction preventing Prudential and the purchasing company from completing the sale. *Id.* The court denied the motion because the ARA had not shown a likelihood of success on the merits. *Id.* at 769. Applying the natural effects test, the court held that the collective bargaining agreement was not likely to be exempt from antitrust scrutiny because the magnitude of the restraint at issue overrode any legitimate labor interests. *Id.* at 771. The Court of Appeals for the Second Circuit summarily affirmed the decision of the district court on the very next day without holding that the district court's findings regarding the probability of success were correct. 577 F.2d at 185.

Had the district court in *Barabas* applied the intimately related test, it probably would have found that the agreement was exempt. The agreement concerned a mandatory subject of collective bargaining negotiated at arm's-length because the district court found that it did not violate § 8(e) of the NLRA. 451 F. Supp. at 770. See note 91 *supra*. In addition, there was no evidence that the ARA had entered into its agreement with Prudential at the behest of a nonlabor group.

¹⁴⁹ 562 F.2d 607 (9th Cir. 1977).

intimately related test. In *Dump Truck*, a group of independent dump truck operators alleged that the International Brotherhood of Teamsters Local 36 (Local 36) combined and conspired with several groups of contractors in violation of section 1 of the Sherman Act and section 4 of the Clayton Act.¹⁵⁰ Local 36 had negotiated a collective bargaining agreement with the contractors which provided that the owner-operators should receive a rate of pay not less than the rate paid to drivers belonging to Local 36, and that owner-operators must be cleared by Local 36 in order to work for signatory contractors.¹⁵¹ The United States Court of Appeals for the Ninth Circuit found that the owner-operators had failed to allege with specificity any combination or conspiracy not based on the collective bargaining agreement,¹⁵² and therefore dismissed the complaint with leave to amend.¹⁵³ *Dump Truck* was unlike *Connell* in three ways: (1) there was no indication that the union attempted to control the market directly, (2) there was a collective bargaining agreement, and (3) there was a desire on the part of the union to represent the general contractor's employees.¹⁵⁴ Since these factors, important to the Supreme Court in *Connell*, were not present, the Ninth Circuit applied *Jewel Tea's* intimately related test.¹⁵⁵ The court held that the collective bargaining agreement was exempt because it concerned mandatory bargaining subjects.¹⁵⁶

The Ninth Circuit was correct in utilizing the intimately related test to determine whether the nonstatutory exemption from antitrust scrutiny should apply. In cases involving only voluntary signatories to a collective bargaining agreement, the defending party should be entitled to the nonstatutory exemption from the antitrust laws if the collective bargaining provision in question is the subject of bona fide, arm's-length bargaining.¹⁵⁷ When an innocent party outside the collective bargaining relationship brings an antitrust suit, however, the interest in protecting the congressional antitrust policy increases. The party bringing suit serves as a private attorney general, protecting the interests of unknown parties who may be injured by such agreements. If an agreement has an anticompetitive effect only upon signatories, however, the interest in protecting the congressional antitrust policy applies only to a limited, well-defined group of parties, all of whom were responsible for the execution of the agreement. A party outside the collective bargaining relationship may suffer severely from the effects of an agreement for which it was not responsible, and which

¹⁵⁰ *Id.* at 609.

¹⁵¹ *Id.* To be cleared by Local 36, the owner-operators had to present proof of ownership at Local 36's headquarters. *Id.* at 613.

¹⁵² *See id.* at 615. Such allegations would have shown that the agreement was obtained at the behest of nonlabor groups. As a result, the *Pennington* requirement of the intimately related test would not be satisfied.

¹⁵³ *Id.* at 609.

¹⁵⁴ *Id.* at 612-13.

¹⁵⁵ *Id.* at 613-14.

¹⁵⁶ *Id.* at 614.

¹⁵⁷ *See* text and notes at notes 140-42 *supra*.

may have been designed for the purpose of eliminating parties outside of the agreement from a competitive market. Therefore, the collective bargaining provision should completely satisfy the requirements of the intimately related test before it is exempted. Not only must the provision have been the subject of bona fide bargaining, but also it must concern a mandatory subject of bargaining, and it must not have been entered into at the behest of a nonlabor group for an anticompetitive purpose.

The accommodation of congressional labor and antitrust policies is properly achieved when *Jewel Tea's* intimately related test is applied in antitrust suits brought by parties outside a collective bargaining relationship. The test which the Supreme Court developed in *Jewel Tea* is preferable to *Connell's* natural effects analysis for three reasons. First, the intimately related test provides a court with more predictable criteria to utilize in determining whether an exemption should apply. Second, a court applying the intimately related test can more easily avoid prematurely weighing the merits of an antitrust claim in deciding whether the exemption from the antitrust laws should be available. Finally, the intimately related test affords greater protection to the collective bargaining process.

The criteria utilized in the intimately related test are relatively concrete and predictable. While the intimately related test may be characterized as a balancing test,¹⁵⁸ it gauges primarily the extent to which the congressionally protected collective bargaining process is involved. The basic issues presented in determining if the intimately related test is satisfied — whether the agreement concerns a mandatory subject of bargaining, and whether it was negotiated through bona fide arm's-length bargaining — are issues often litigated in the labor field. Courts determining these issues may rely upon a solid body of case precedent for guidance. Therefore, if a provision in a collective bargaining agreement concerns a mandatory bargaining subject negotiated at arm's length, the inquiry is ended unless the agreement was entered into by the union at the behest of a nonlabor group.¹⁵⁹ The agreement is exempt regardless of the nature, extent, or magnitude of the restraint it imposes.¹⁶⁰

The natural effects test, on the other hand, provides a balancing test which may be ambiguous and subjective. Using the natural effects test, a court can hold any agreement to be nonexempt from the antitrust laws if the court determines that the nature, magnitude, and effect of the alleged restraint out-

¹⁵⁸ See *Ackerman-Chillingworth v. Pacific Electrical, Etc.*, 579 F.2d 484, 503 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979) (Hufstedler, J., concurring and dissenting).

¹⁵⁹ See text and notes at notes 59-73, *supra*.

¹⁶⁰ There is some language in *Jewel Tea* which could be construed to suggest that even an agreement which satisfies the intimately related test may be nonexempt if the "relative impact" of the agreement on the product market outweighs "the interests of union members." 381 U.S. at 690 n.5. No court has yet found, however, that an agreement which satisfies the intimately related standards is not exempt from the antitrust laws because of its impact on the product market without relying on *Connell*. See text and notes at notes 114-23 *supra*.

weigh considerations requiring protection of the congressional labor policy.¹⁶¹ A court applying the natural effects test could hold that an agreement is not exempt from antitrust even though it satisfies the intimately related test by arbitrarily reasoning that the agreement restrains trade more than necessary to achieve a legitimate labor goal.

The intimately related test is also preferable to the natural effects test because the natural effects test too easily allows the judiciary to determine whether an agreement is exempt from the antitrust laws by making a preliminary determination as to whether an antitrust violation, in fact, occurred. The Supreme Court has instructed the trial courts first to determine whether an agreement is exempt and then, if the agreement is nonexempt, to determine whether the agreement actually violates the antitrust laws.¹⁶² These two separate inquiries should not be considered simultaneously.¹⁶³ Thus, where provisions in collective bargaining agreements are alleged to violate the antitrust laws, the intimately related test offers the most certain and logical approach to the exemption problem. First, in determining whether to apply the nonstatutory exemption, a court may use the intimately related test to measure the extent to which the collective bargaining process is involved. If the intimately related test is not satisfied, the interest in protecting the collective bargaining process is sufficiently weak that the exemption from antitrust scrutiny should not apply. Then, the court may examine the nature, effect, and magnitude of the restraint which the agreement imposes as it considers the antitrust claim on its merits.

A court applying the natural effects analysis, however, must examine the nature, effect, and magnitude of an alleged restraint in determining whether it is exempt from the antitrust laws. Therefore, under the natural effects test, only agreements which impose a minimal anticompetitive restraint are likely to be held exempt from the antitrust laws. If only agreements which are not likely to impose restraints severe enough to violate the antitrust laws are held to be exempt, the purpose of the nonstatutory exemption from the antitrust laws is eviscerated. An exemption is presumably created to exempt agreements which are otherwise illegal — not merely agreements which are legal from the beginning.

¹⁶¹ See, e.g., *Consolidated Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 48 U.S.L.W. 3849 (1980). "The requirements for antitrust exemption [under *Connell*] are, first, that the market restraint advance a legitimate labor goal, and second, that the agreement restrain trade no more than is necessary to achieve that goal." *Id.* at 517-18.

¹⁶² *Federal Maritime Com'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 61 (1978).

¹⁶³ The method of analysis used in *Connell* itself gave the impression that the Court was considering exemption and antitrust issues simultaneously. The district court below in *Connell* was put in the unenviable position of having to decide whether the agreement between Local 100 and Connell Company violated the Sherman Act when the Supreme Court had already noted that the agreement had "substantial anticompetitive effects," 421 U.S. at 625, and that it imposed a restraint of considerable magnitude. *Id.* at 625-26. Accordingly, it is not surprising that the case never went back to trial.

A final reason why the intimately related test is better suited than the natural effects test for use in antitrust suits brought by parties outside a collective bargaining relationship is that the intimately related test better protects the collective bargaining process. Because the intimately related test is less ambiguous than the natural effects test,¹⁶⁴ its application by the courts is more predictable and uniform. If the collective bargaining process is to be regulated by the antitrust laws, it is best regulated in a consistent fashion.

The natural effects test inadequately protects the congressional labor policy in this type of suit because it injects an unwarranted element of uncertainty into the collective bargaining process.¹⁶⁵ Employers and unions would be inhibited from reaching agreements on important subjects if *Connell's* natural effects analysis were to be routinely applied. They could know that an agreement concerned a mandatory subject of bargaining negotiated at arm's length, and they could know that the union had not entered into the agreement at the behest of nonlabor groups. The parties could never be certain, however, that the agreement could not restrain trade more than necessary to achieve a legitimate labor goal. At the time of the bargaining, the parties should not be required to foresee what anticompetitive effects an agreement which satisfies the intimately related test might have in the future.

A survey of lower court cases involving antitrust challenges to otherwise legal collective bargaining provisions reveals that the lower courts have been reluctant to rely on the *Connell* decision. In suits brought by signatories, the primary question to be asked by the courts should be whether bona fide arm's-length bargaining has taken place. In suits brought by parties outside the collective bargaining relationships, the courts should ask whether the more stringent requirements of the intimately related test have been satisfied. The *Connell* decision has created special problems, however, for cases which involve collective bargaining provisions held to be illegal under the labor laws. This type of case is considered separately in the following section.

B. *Where Collective Bargaining Provisions are Illegal Under the Labor Laws*

In *Connell*, the Supreme Court held that the *Connell/Local 100* agreement violated section 8(e) of the NLRA.¹⁶⁶ The Court observed that the methods used by Local 100 should not be exempt from antitrust scrutiny simply because the goal which Local 100 sought to achieve was legitimate.¹⁶⁷ Furthermore, the Court found that Congress, at least with respect to section 8(e), did not intend that the labor laws should provide the exclusive remedy for a section 8(e) violation.¹⁶⁸ The Court did not indicate, however, the extent to which its decision

¹⁶⁴ See text and notes at notes 107-09 *supra*.

¹⁶⁵ See Comment, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 690 (1968).

¹⁶⁶ 421 U.S. at 626.

¹⁶⁷ *Id.* at 625.

¹⁶⁸ *Id.* at 634.

that the agreement violated section 8(e) influenced its decision that the agreement was not exempt from antitrust scrutiny.¹⁶⁹

The question raised by the *Connell* Court's holding regarding section 8(e) is whether a union will be nonexempt from the antitrust laws whenever it uses illegal methods.¹⁷⁰ Almost invariably this question concerns whether a collective bargaining provision which violates section 8(e) of the NLRA should ever be exempt from the antitrust laws. There has been some disagreement among the lower courts as to whether a section 8(e) violation precludes application of the nonstatutory exemption from the antitrust laws,¹⁷¹ but only one lower court has directly confronted the question.

¹⁶⁹ The Court first held that the agreement should not be exempt from the antitrust laws. *Id.* at 625. Then it held that the agreement violated § 8(e) of the NLRA. *Id.* at 633.

¹⁷⁰ A union uses "illegal methods" for the purpose of this discussion when it violates laws other than the antitrust laws. A union may use illegal methods when its agreement with an employer violates express provisions of the labor laws, or possibly when a union agrees with an employer to utilize violent methods against a third party in order to achieve its goals. *But see* 7 J.O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 48.03(1) where the author suggests that a union uses illegal methods when it violates the labor laws, or when the agreement has a "direct anticompetitive effect on the product or business market." *Id.*

The question whether a union might be nonexempt from the antitrust laws whenever it uses illegal methods other than methods which violate § 8(e) cannot be answered until the Supreme Court determines whether Congress intended the labor laws to provide the exclusive remedy for § 8(b)(4) violations. In *Connell*, the Court found that Congress did not intend that the labor laws should provide the exclusive remedy for § 8(e) violations, 421 U.S. at 634, but the Court expressly left open the question whether the labor laws provide an exclusive remedy for violations of § 8(b)(4). *Id.* Section 303 of the LMRA, 29 U.S.C. § 187 (1976), provides that any party who has suffered damages as a result of § 8(b)(4) violations committed by a union may bring suit against the union for actual damages. The *Connell* Court noted that § 303 did not apply to § 8(e) violations because Congress did not amend § 303 to include 8(e) violations when § 8(e) was enacted in 1959. 421 U.S. at 634 n.16. When a union coerces an employer to sign an agreement that violates § 8(e), or strikes to force an employer to sign such an agreement, however, the union has committed an unfair labor practice under §§ 8(b)(4)(ii)(A) or 8(b)(4)(ii)(B) which may be remedied in an action for damages under § 303 of the LMRA. Lower courts have allowed employers to bring antitrust suits where both §§ 8(e) and 8(b)(4)(ii)(A) or 8(b)(4)(ii)(B) have been violated, and where the § 303 damage remedy is available. Curiously, these courts failed to discuss the issue whether § 303 of the LMRA provides the exclusive remedy for an 8(b)(4) violation. *See, e.g.,* James Julian, Inc. v. Raytheon Co., 105 L.R.R.M. 2741, 2747 (D. Del. 1980); Altomose Constr. Co. v. Bldg. Trades Council, 104 L.R.R.M. 2856, 2863-64 (D.N.J. 1980); Consolidated Express, Inc. v. N.Y. Shipping Ass'n, 602 F.2d 494 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980).

¹⁷¹ The Second Circuit has commented in dicta that a determination that a clause violates § 8(e) does not "necessarily" preclude the availability of an antitrust exemption, although it "lends support" to a contention that the clause cannot be exempt from the antitrust laws. *Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 801-02 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977). *But see id.* at 803-04 (Lumbard, J., dissenting).

The Third Circuit, however, has stated that a finding by the NLRB of an unfair labor practice "precludes recognition of a complete nonstatutory antitrust immunity." *Consolidated Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 518 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980). This statement has been criticized as being overly broad since it extends to all unfair labor practices rather than only to § 8(e) violations. 7 J.O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 48.03(2) (1979). *See* note 170 *supra*.

The Third Circuit, in *Consolidated Express, Inc. v. New York Shipping Ass'n (Conex)*¹⁷² found that a collective bargaining provision which violates section 8(e) of the NLRA is generally nonexempt under traditional application of either *Connell's* natural effects test or *Jewel Tea's* intimately related test. Under *Connell's* natural effects test, a collective bargaining provision which violates section 8(e) is not exempt from the antitrust laws, provided that the provision imposes a direct and substantial anticompetitive effect on a product or business market. Likewise, under *Jewel Tea's* intimately related test, such a provision is nonexempt provided that the following propositions are accepted: (1) that an agreement concerning a nonmandatory bargaining subject cannot be exempt from the antitrust laws,¹⁷³ and (2) that an illegal bargaining provision does not concern a mandatory subject of collective bargaining.¹⁷⁴ The *Conex* court decided, however, that in some cases strict application of the natural effects or intimately related tests would burden the congressional labor policy more than it would promote antitrust objectives.¹⁷⁵ Accordingly, it devised a modified test that could be applied in those cases.¹⁷⁶

The facts of *Conex* are as follows. The litigation in *Conex* resulted from the use of huge containers in the shipping industry.¹⁷⁷ Because these containers can be unloaded directly from a ship's hold onto trucks without being opened, fewer longshoremen are needed to unload containerized ships than conven-

¹⁷² 602 F.2d 494 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980). See note 186 *infra*.

¹⁷³ The Supreme Court has not expressly held that a bargaining provision which does not concern a mandatory bargaining subject must always be nonexempt from the antitrust laws. This note argues that the requirement of a mandatory bargaining subject is unwarranted in cases where the party challenging a provision is a party who took part in negotiating that provision. See text at note 159 *supra*. When a stranger to the collective bargaining agreement brings an antitrust suit, however, a holding that the challenged provision does not have to concern a mandatory bargaining subject would be inconsistent with the Court's reasoning in *Jewel Tea*.

¹⁷⁴ Since a party should not be allowed to insist to the point of a bargaining impasse upon the inclusion of an illegal provision in a collective bargaining agreement, it would follow that an illegal bargaining provision does not specifically concern a mandatory bargaining subject, even though the general subject which the provision at least in part concerns (e.g., subcontracting) is mandatory. *Consolidated Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980); *National Maritime Union (Texaco Co.)*, 78 N.L.R.B. 971, 981-82 (1948), *enfd*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). See also *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 360 (1958) (Harlan, J., concurring and dissenting); *Local 1049, Electrical Workers*, 244 N.L.R.B. No. 21 (1979).

¹⁷⁵ *Id.* at 519-21.

¹⁷⁶ *Id.*

¹⁷⁷ *Conex* does not by any means reflect the only controversy caused by containerization in the shipping industry. See, e.g., *NLRB v. International Longshoremen's Ass'n*, 100 S. Ct. 2305 (1980), *aff'g*, 613 F.2d 890 (D.C. Cir. 1979); *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *International Longshoremen's Association and New York Shipping Association, Inc. (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978); *International Longshoremen's Association, et al. (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977).

tional ships; the containers themselves do not have to be unloaded until they reach their final inland destination.¹⁷⁸ In an effort to halt this development, the International Longshoremen's Association (ILA) negotiated a collective bargaining agreement with maritime shippers, including the New York Shipping Association, which contained provisions governing the use of containers in the shipping industry (Rules on Containers).¹⁷⁹ The Rules of Containers were designed to prevent freight consolidators who did not employ ILA members from loading or unloading containers within fifty miles of the docks,¹⁸⁰ thereby giving the ILA exclusive control over most such work.

Consolidated Express (Consolidated) was engaged in the business of consolidating the cargo of low-volume shippers who had less than a container load of cargo to be shipped.¹⁸¹ Since the freight could be consolidated away from the docks, Consolidated did not use longshoremen to load and unload its containers.¹⁸² Because the Rules on Containers significantly curtailed the amount of freight consolidating business available to Consolidated, Consolidated and another freight consolidator brought a suit for treble damages against the ILA, the New York Shipping Association, and various member-employers of the New York Shipping Association alleging that the Rules on Containers violated the antitrust laws.¹⁸³ The circuit court accepted the NLRB's previous finding¹⁸⁴ that the Rules on Containers were not a valid work preservation agreement,¹⁸⁵ and that the Rules were therefore illegal under section 8(e) of the NLRA.¹⁸⁶

Although the Rules on Containers were contained in a collective bargaining agreement, the *Conex* court did not distinguish *Connell*. It found that two important factors present in *Connell* were also present in *Conex*. First, the union in both cases had sought to achieve a legitimate labor goal — work preservation in *Conex*, organization of subcontractors in *Connell* — but in both cases the

¹⁷⁸ 602 F.2d at 498.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See id.*

¹⁸³ *Id.* at 501. Consolidated Express also sought actual damages against the union under § 303(b) of the LMRA, alleging that the union had committed an unfair labor practice in violation of section 8(b)(4)(ii)(B) of the LMRA. *Id.* See note 170 *supra*.

¹⁸⁴ Consolidated Express, Inc., 221 N.L.R.B. 956 (1975).

¹⁸⁵ A primary work preservation clause is designed to prevent work which has been performed "traditionally" by union members from being contracted out to other workers or eliminated entirely. *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 511 (1977). The Supreme Court has held that primary work preservation clauses are not prohibited under § 8(e). *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 (1967).

¹⁸⁶ *Id.* at 511-12. The Supreme Court vacated *Conex* and remanded the case for further consideration in light of its decision in *NLRB v. International Longshoremen's Ass'n*, 100 S. Ct. 2305 (1980). In *International Longshoremen's Ass'n*, the Court held that the NLRB had improperly defined the nature of work performed in loading and unloading containers as work which had not "traditionally" been conducted by the union. *Id.* at 2318. The Court ordered the NLRB to reconsider whether the Rules on Containers was a primary work preservation provision that would not violate § 8(e). *Id.*

method used was held to violate section 8(e) of the NLRA and was therefore illegal.¹⁸⁷ Second, both courts found that the agreements in question had significant anticompetitive impacts.¹⁸⁸ Applying its understanding of the natural effects test,¹⁸⁹ the *Conex* court found that the anticompetitive effects of the Rules outweighed the advancement of legitimate labor goals.¹⁹⁰ In addition, the court applied the intimately related test to the facts presented, and found that because the Rules violated section 8(e) of the NLRA, they did not concern a mandatory subject of collective bargaining.¹⁹¹ The court recognized, therefore, that when a union has used illegal methods in a collective bargaining agreement to achieve its goals, the nonstatutory exemption from antitrust scrutiny may be equally unavailable under either the natural effects or the intimately related tests.¹⁹² Thus, the court was compelled to hold that the Rules could not be completely exempt from the antitrust laws.¹⁹³

Nevertheless, the *Conex* court reasoned that the national labor policy would not be properly accommodated if all parties who had negotiated agreements violating section 8(e) of the NLRA were automatically subject to antitrust suits for treble damages.¹⁹⁴ Consequently, the court argued that some agreements violating section 8(e) might be entitled to a partial exemption from the antitrust laws. Such an exemption would allow injunctive relief but bar treble damage awards.¹⁹⁵ According to the court, the exemption was necessary for the protection of the collective bargaining process.¹⁹⁶ The court reasoned that the purpose of allowing antitrust suits for damages in the context of collective bargaining was "to encourage the parties to the collective bargaining process to take into account anticompetitive injury to secondary parties."¹⁹⁷ That purpose, however, could not be served if the parties could not foresee, at the time of bargaining, that they might be subject to antitrust damages.¹⁹⁸ Often a party could not foresee that a provision would violate sections 8(b)(4) or 8(e) because of unanticipated shifts in the NLRB's interpretation of those sections,¹⁹⁹ or because of inconsistencies in interpretation by the courts.²⁰⁰ Consequently, the

¹⁸⁷ 602 F.2d at 512.

¹⁸⁸ *Id.* at 518.

¹⁸⁹ "The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal." *Id.* at 517-18. The court believed that the "*Connell* mode of analysis is similar to that of the *Jewel Tea* majority." *Id.* at 517.

¹⁹⁰ *Id.* at 518.

¹⁹¹ *Id.*

¹⁹² See notes 171-72 *supra*.

¹⁹³ 602 F.2d at 518.

¹⁹⁴ *Id.* at 519-20.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 520.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 521.

²⁰⁰ For example, there is currently a split in the circuits regarding the scope of the construction industry proviso to § 8(e). The Ninth Circuit, in *Pacific Northwest Chapter, Etc. v.*

court found that even where it has been shown that a particular provision in a collective bargaining agreement violates sections 8(e) or 8(b)(4), the provision might still be exempt from damages under the antitrust laws if a determination of illegality under sections 8(e) or 8(b)(4) was not reasonably foreseeable.²⁰¹ The *Conex* court remanded the case for the district court to determine whether, at the time of negotiation, the parties could not reasonably foresee that the provision would be held unlawful under section 8(e).²⁰²

The foreseeability test advocated in *Conex* does have shortcomings. The court did not consider that an additional purpose of antitrust damages is to compensate a secondary party for injury received as a result of an anticompetitive agreement reached between the parties to a collective bargaining agreement.²⁰³ Nor did the court consider whether injection of the issue of foreseeability into labor/antitrust cases would have the effect of further confusing the law concerning the nonstatutory exemption by adding one more variable for the courts to take into consideration.

In spite of these shortcomings, *Conex*'s foreseeability test should be adopted.²⁰⁴ Absent adoption of such a test, the freedom of parties to bargain collectively could be significantly restrained.²⁰⁵ For example, a union might want to negotiate a provision which, because of the unsettled nature of the law,

NLRB, 609 F.2d 1341 (9th Cir. 1979), has held that "the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Id.* at 1347. The District of Columbia Circuit, however, in *Donald Shriver, Inc. v. NLRB*, 105 L.R.R.M. 2818 (D.C. Cir. 1980), has expressly refused to apply the Ninth Circuit's interpretation of the construction industry proviso. *Id.* at 2831. According to the District of Columbia Circuit, a subcontracting provision contained in a collective bargaining agreement is within the construction industry proviso even if it is "not limited to particular jobsites at which signatory union workers [are] already employed." *Id.* at 2834-35.

In fact, the parties who negotiated the Rules on Containers at issue in *Conex* clearly could not have foreseen whether they would violate § 8(e), since that question has yet to be finally resolved by the courts. See note 186 *supra*.

²⁰¹ 602 F.2d at 521.

²⁰² *Id.* The *Conex* decision was subsequently vacated, however. See note 186 *supra*.

²⁰³ On remand, Consolidated Express would have been able to obtain an award for actual damages under § 303 of the LMRA even if the district court would hold that it was unforeseeable that the Rules on Containers would violate § 8(e). A finding of unforeseeability by the district court, however, would have precluded Consolidated Express from obtaining a damage award from the employers who had signed the Rules on Containers. See *id.* at 520.

²⁰⁴ The foreseeability test adopted in *Conex* was subsequently applied in *Feather v. United Mine Workers*, 494 F. Supp. 701 (W.D. Pa. 1980). In *Feather*, a group of coal haulers brought a suit for damages against the UMW. They alleged (1) that the UMW had negotiated a collective bargaining provision with coal operators which violated § 8(e) because the operators agreed to contract out work for the transportation of coal only to haulers who had signed a collective bargaining agreement with the UMW, *id.* at 703, and (2) that the UMW violated § 8(b)(4)(ii)(B) of the NLRA and §§ 1 and 2 of the Sherman Act by striking to force the coal haulers to sign the agreement. *Id.* The district court held for the coal haulers on all of their allegations. *Id.* at 720. Nevertheless, the district court held that a treble damage award should not be allowed against the union because, at the time of bargaining, reasonable negotiators could not have known of a § 8(b)(4) or § 8(e) risk. *Id.* at 718-19.

²⁰⁵ See *Conex*, 602 F. 2d at 520-21.

might be illegal and hence nonmandatory. The employer might be willing to accept the provision in order to gain concessions in other areas. Due to the possibility that both parties might be subject to an antitrust suit for treble damages, they might nevertheless fail to reach an agreement, even though the provision ultimately might be held legal. If a treble damage recovery is allowed "whenever the agreement is found to be illegal, the scales tilt too far away from the national interest in collective bargaining over arguably legitimate subject matters."²⁰⁶ Thus, in suits brought by parties outside the collective bargaining agreement where it has been shown that the collective bargaining provision in question violates section 8(e) of the NLRA, the nonstatutory exemption from the antitrust laws should ordinarily be unavailable. Yet if the defending party can show that it could not have foreseen, at the time of bargaining, that the agreement would be held to violate section 8(e), no treble damage remedy should be awarded.

CONCLUSION

Prior to *Connell*, a collective bargaining provision was exempt from antitrust scrutiny if it concerned a mandatory bargaining subject negotiated through bona fide bargaining, provided that the agreement was not entered into at the behest of a nonlabor group for an anticompetitive purpose. In *Connell*, the Supreme Court held that an agreement which was not the product of collective bargaining was not exempt from the antitrust laws. To reach this result, the Court used a method of analysis which focused on the nature, effect, and magnitude of the alleged restraint caused by the agreement. This method of analysis, if applied to collective bargaining agreements, could be used to subject agreements to antitrust scrutiny which had heretofore been exempt from the antitrust laws. The lower courts have implicitly recognized, however, that application of *Connell's* natural effects test to collective bargaining provisions would not promote the congressional labor policy favoring collective bargaining. Thus, in such cases, the lower courts have either distinguished *Connell* outright, or reached decisions which are consistent with the intimately related test established in *Jewel Tea* and *Pennington*. A court properly accommodates labor and antitrust policies in suits involving only voluntary signatories to collective bargaining provisions which are legal under the labor laws by exempting all provisions obtained through bona fide bargaining. In suits brought by parties outside the collective bargaining relationship, all requirements of the intimately related test should be satisfied. Collective bargaining provisions which are illegal under the labor laws may not be exempt under any method of analysis which has thus far been endorsed by the Supreme Court. A proper accommodation of the congressional labor policy with the congressional antitrust policy might not be achieved, however, under either the intimately related test

²⁰⁶ *Id.* at 521.

or the natural effects test if the full range of antitrust remedies were allowed in all such cases. The foreseeability test developed by the Third Circuit in *Conex* should therefore be adopted by the courts.

The nonstatutory exemption is a judicially created doctrine designed to protect the collective bargaining process from antitrust regulation. Parties at the bargaining table derive little benefit from the nonstatutory exemption if the standards for its application remain as vague and unpredictable as they are in the *Connell* decision. If the standards for the nonstatutory exemption are more clearly defined, along the lines set out in *Jewel Tea*, the nonstatutory exemption may better serve its purpose. Bargaining parties will know with some assurance — at the time of bargaining, and not after years of costly litigation — whether a particular provision is subject to antitrust scrutiny.

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