Labor Law—Antitrust Liability Of Labor Unions—*Connell Construction Co. v. Plumbers Local 100*[1]–As bargaining representative for workers in the mechanical and plumbing trades industry in Dallas, Texas, respondent, Plumbers Local 100 (the Union), had agreed to a "most favored nation"[2] clause in a multiemployer collective bargaining agreement with a mechanical contractor's association. Seeking to expand Union membership but disclaiming any interest in representing workers directly employed by general construction contractors,[3] the Union sought to execute with petitioner, Connell Construction Co. (Connell), and several other general construction contractors in the Dallas area,[4] agreements which stipulated that the general contractor would subcontract mechanical work, which his employees did not perform, exclusively to firms which had a current collective bargaining agreement with the Union.[5] Connell obtained jobs by competitive bidding and customarily subcontracted its mechanical work on the basis of competitive bids submitted by both union and non-union sub-contractors.[6]

Connell refused to sign the agreement. As a result, the Union picketed one of the company's construction sites, causing work to

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

[2] A "most favored nation" clause generally protects a favored employer's competitive position by guaranteeing that more favorable terms will not be accorded another employer, or if given, will be extended to the favored employer. Note, 19 J. PUB. L. 399, 399 n.4 (1970). *See* 421 U.S. at 623.

[3] 421 U.S. at 631.

[4] At the time *Connell* went to trial, five additional general contractors had signed agreements identical to the Union-Connell agreement, and the Union was selectively picketing others who resisted. *Id.* at 621.

[5] The agreement provided:

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

Id. at 619-20.

[6] *Id.* at 619.

halt.[7] Prompted by this work stoppage, Connell filed suit in Texas state court,[8] seeking to enjoin the picketing as a violation of the Texas antitrust laws.[9] When the Union removed to the federal district court, however, Connell signed the agreement under protest and amended its complaint[10] to allege an illegal restraint of trade in violation of sections 1 and 2 of the Sherman Act.[11] A permanent injunction was requested against further picketing to coerce execution of the agreement.[12]

The district court held that the agreement was authorized by the construction industry proviso to section 8(e) of the National Labor Relations Act[13] (NLRA) and, therefore, was exempt from federal antitrust laws.[14] On appeal, the United States Court of Appeals for the Fifth Circuit affirmed,[15] holding that the agreement was exempt from the antitrust laws on several grounds. First, there was no evidence of a conspiracy to restrain trade between the Union and a non-labor

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[7] *Id.* at 620. The mechanical subcontractor on the picketed construction site had a current collective bargaining agreement with the Union. *See* Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1157, 84 L.R.R.M. 2001, 2002 (5th Cir. 1973).

[8] 421 U.S. at 620.

[9] TEXAS BUSINESS AND COMMERCE CODE ANN. §§ 15.01 *et seq.* In a similar incident involving the same Union, both the regional office and the General Counsel of the National Labor Relations Board had refused to issue an unfair labor practices complaint against the Union. 483 F.2d at 1158, 84 L.R.R.M. at 2003. Although the issue apparently has not been expressly adjudicated, it is generally believed that if the Regional Director and the General Counsel decline to issue a complaint, the charging party has no further recourse. *See* A. CON & D. BOK, CASES ON LABOR LAW 138 (7th ed. 1969).

[10] 421 U.S. at 620.

[11] *Id.* at 621. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970). Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1970).

[12] 421 U.S. at 621.

[13] Section 8(e) provides:

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

29 U.S.C. § 158(e) (1970).

[14] Connell Constr. Co. v. Plumbers Local 100, 78 L.R.R.M. 3012, 3015 (N.D. Tex. 1971). The district court also held that federal labor law preempted the Texas antitrust laws. *Id.* at 3014.

[15] 483 F.2d at 1175, 84 L.R.R.M. at 2017.

group.[16] Second, the agreement furthered a legitimate union interest: the elimination of competition based on wages, hours and working conditions.[17]

The Supreme Court, in a 5-4 decision, reversed and HELD: The Union's agreement with Connell was not exempt from the antitrust laws because: (1) the agreement imposed actual and potential direct restraints on the business market in excess of those which would be expected to flow naturally from the elimination of competition based on differences in wages, hours and working conditions;[18] (2) the agreement was outside the ambit of the construction industry proviso to section 8(e) of the NLRA which the Court interpreted as authorizing secondary boycott agreements only when entered into within the context of a collective bargaining relationship, and as "possibly" limited to common-situs relationships on particular jobsites;[19] and (3) the union activitiy was not subject exclusively to either the actual damages provision of section 303(b) of the NLRA[20] or the injunctive relief provision of section 10(*l*) of the NLRA[21] inasmuch as there was no indication that Congress, in providing those remedies for persons

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[16] *Id.* at 1166, 84 L.R.R.M. at 2009.

[17] *Id.* at 1166-69, 84 L.R.R.M. at 2010-11. In addition, the circuit court held that a determination of the legality of the agreement under the terms of the construction industry proviso to section 8(e) of the NLRA was exclusively within the jurisdiction of the National Labor Relations Board. *Id* at 1169, 84 L.R.R.M. at 2012. The court further reasoned that the agreement's legality or illegality under section 8(e) was irrelevant since a finding of a legitimate union interest is not controlled by the legality of a union's activity under the NLRA. *Id.* at 1170, 84 L.R.R.M. at 2013. The court also held that federal labor law preempted the Texas antitrust laws. *Id.* at 1175, 84 L.R.R.M. at 2017. For comments on the circuit court decision see Note, 15 B.C. IND. & COM. L. REV. 595 (1974); Note, 52 TEXAS L. REV. 170 (1973).

[18] 421 U.S. at 625.

[19] *Id.* at 633. Although it is not entirely clear in the opinion, the Court appears to have definitely, rather than "possibly" limited the reach of the construction industry proviso to common-situs relationships on a "particular" jobsite. *Compare id., with id.* at 635.

[20] 29 U.S.C. § 187(b) (1970) provides that "[w]hoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court . . . and shall recover the damages by him sustained . . . ." Subsection (a), *id.* § 187(a), subjects to the damages provisions of subsection (b) secondary pressures outlawed by § 8(b)(4), *id.* § 158(b)(4).

[21] 29 U.S.C. § 160 (*l*) (1970) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B) or (C) of section 158(b) . . . or section 158(e) . . . or section 158(b)(7) . . . the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

injured by some secondary activities, sought to preclude antitrust liability for hot cargo[22] agreements.[23]

In determining whether the Union's agreement with Connell was exempt from the antitrust laws, the Court addressed itself to three major issues. This note will begin with an examination of the Court's treatment of the first issue: what type of union-employer agreements are protected by labor's antitrust exemption. It will then examine the Court's resolution of the second major issue: whether the construction industry proviso to section 8(e) of the NLRA was to be construed literally, reaching all subcontracting boycott agreements, or more narrowly, reaching only those agreements which protected the contracting union's members from having to work on multiemployer jobsites alongside non-union laborers. Since the Court's interpretation of the proviso is one of first impression, its likely impact on the construction industry will be discussed. Finally, this note will examine the Court's and dissenting Justice Stewart's resolution of the third major issue: whether Congress intended, by providing in the NLRA damages and injunction remedies for various kinds of secondary activity, to preclude an antitrust remedy when a union violates the hot cargo proscription of section 8(e).

I. ANTITRUST EXEMPTION

The first issue resolved by the Court was whether the Union-Connell agreement was shielded from antitrust scrutiny by the general policy of the labor laws. The Court began its analysis with the novel assertion that labor's antitrust exemption derived from two distinct sources: statutory and nonstatutory.[24] The statutory exemption is derived from the Norris-LaGuardia[25] and Clayton Acts.[26] As the Court

[22] A hot cargo agreement generally provides that an employer will not conduct business with, or handle the goods of, a non-union employer. S. REP. NO. 187, 86th Cong., 1st Sess. 79, reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 475 (1959).

[23] 421 U.S. at 634. The Court also affirmed the circuit court's ruling that state antitrust law was preempted since the application of state law would create a substantial risk of conflict with federal guarantees and regulation of employee organizational activities. Since the Union's activity in *Connell* was organizational, the application of Texas antitrust law presented a substantial risk of frustrating the basic labor policy favoring employee organization and interfering with the comprehensive NLRA scheme for regulating organizational activity. *Id.* at 637. Furthermore, the Court noted that it previously had held that labor law questions which are ordinarily within the original jurisdiction of the National Labor Relations Board but which are collateral issues in suits brought under an independent federal remedy can be decided by the federal courts. *Id.* at 626.

[24] *Id.* at 621-22. *Connell* appears to be the first case in which the Court has described labor's antitrust exemption as deriving from nonstatutory as well as statutory sources.

[25] 29 U.S.C. §§ 101-15 (1970).

[26] 15 U.S.C. §§ 12-27, 44, 29 U.S.C. § 52 (1970).

recognized in *United States v. Hutcheson,*[27] this exemption protects specific union conduct such as secondary picketing and boycotts.[28] Thus, it allows a union, acting unilaterally and not in combination with a non-labor group, to impose various restraints on competition.[29] On the other hand, the nonstatutory exemption, which protects union-employer agreements, is a Court-created exemption derived from a recognition of the need to accommodate conflicting congressional policies expressed in the antitrust and labor laws.[30] While the antitrust laws promote a freely competitive economic order, the labor laws, by granting workers the right to associate and bargain collectively over their conditions of employment, favor the elimination of competition based on differences in wages, hours and working conditions.[31]

The nonstatutory exemption, representing a reconciliation of these conflicting labor and antitrust policies, is, as the Court noted, "limited."[32] In three major decisions, *Meat Cutters Local 189 v. Jewel Tea Co.,*[33] *UMW v. Pennington,*[34] and *Allen Bradley Co. v. Local 3, IBEW,*[35] the Court had haltingly delineated the scope of the exemption. In *Pennington,* the Court concluded that there is nothing in the national labor policy to protect a union which agrees with the employers in one bargaining unit to impose the same wages, hours and working conditions on another bargaining unit.[36] Even though such an agreement is related to the legitimate union goal of obtaining uniform labor standards and thereby eliminating competition based on differences in those standards, the Court in *Pennington* held that a union would not be entitled to an antitrust exemption:[37] by agreeing with one set of employers to impose the identical wages on other bargaining units, the union was furthering an employer anticompetitive conspiracy[38] and acting in contravention of its obligation to its members to bargain on a unit-by-unit basis.[39] Similarly, twenty years prior to *Pennington,* the Court had held in *Allen Bradley* that if a union com-

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[27] 312 U.S. 219 (1941). *Hutcheson* outlined the statutory antitrust exemption:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [Clayton Act] § 20 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.

[28] 421 U.S. at 621-22, *citing Hutcheson,* 312 U.S. 219 (1941).

[29] 421 U.S. at 622.

[30] *Id., citing* Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965).

[31] 421 U.S. at 622.

[32] *Id.*

[33] 381 U.S. 676 (1965).

[34] 381 U.S. 657 (1965).

[35] 325 U.S. 797 (1945).

[36] 381 U.S. at 666.

[37] *Id.* at 669.

[38] *Id.*

[39] *Id.* at 666.

bines with conspiring business groups and assists in effecting a business monopoly the union is not entitled to an antitrust exemption.[40]

Thus, prior to *Connell,* both *Pennington* and *Allen Bradley* clearly stood for the proposition that a union-employer agreement would not be entitled to the nonstatutory antitrust exemption if the agreement was the result of a conspiracy to restrain trade. However, absent a conspiracy, the scope of the nonstatutory exemption was less clear.

In *Jewel Tea,* a case stripped of conspiracy overtones,[41] two distinctly different tests of exemption were delineated, but neither received the support of a majority of the Court. Justice White, in an opinion joined by Justice Brennan and Chief Justice Warren,[42] contended that a collective bargaining agreement's nonstatutory exemption turned on whether or not the subject matter of the agreement is "intimately related" to the wages, hours or working conditions of the bargaining unit's employees.[43] Applying this test, Justice White upheld the challenged meat marketing hours provision since the anticompetitive restraints imposed by the prohibition of retail meat sales after 6 pm went no further than was necessary to preserve existing working conditions.[44] Concurring in the result, Justice Goldberg propounded a broader test in an opinion joined by Justices Harlan and Stewart:[45] If the subject matter of the agreement is a mandatory bargaining subject, the agreement should be accorded an exemption.[46] Finding that the meat marketing hours provision in fact was a mandatory bargaining subject, Justice Goldberg therefore concluded that the agreement was lawful.[47] Thus, in the absence of a conspiracy, there appeared to exist two tests for a nonstatutory exemption, since neither the Goldberg nor the White formulations had received support from more than three justices.

Against this background of the nonstatutory exemption, as delineated by the conspiracy bar and the non-conspiracy tests of Justices White and Goldberg, the *Connell* Court reasoned that congressional labor policy warrants an exemption for agreements which lessen business competition based on substandard wages, hours and working conditions.[48] Conversely, the Court stated that no exemption is warranted if an agreement restrains competition based on factors other than substandard labor conditions.[49]

Turning to the Union-Connell agreement, the Court held that the agreement did not qualify for the nonstatutory exemption. The

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[40] 325 U.S. at 810.
[41] 381 U.S. at 688.
[42] *Id.* at 679.
[43] *Id.* at 689-90.
[44] *See id.* at 692-97.
[45] *Id.* at 697.
[46] *Id.* at 732-33.
[47] *See id.* at 735.
[48] 421 U.S. at 622.
[49] *Id.* at 622-23.

agreement required Connell to boycott *all* non-Local 100 subcontractors, regardless of whether the competitive advantage of these subcontractors was derived from substandard wages, hours and working conditions, or from more efficient operating methods.[50] The infirmities involved in the exclusion of all non-Local 100 subcontractors were enhanced by the "most favored nation" clause in the Union's multiemployer bargaining agreement with the Mechanical Contractors Association of Dallas. The clause prescribed the exact terms the Union could seek in bargaining with newly organized subcontractors.[51] Thus, as the Union expanded its membership to new subcontractors who were forced to unionize, competition between the subcontractors would be lessened, since all would be bound by the same terms, due to the "most favored nation" clause. Moreover, the lessening of competition would extend not only to wages, hours and working conditions but also to terms in the Union's collective bargaining agreement with the Association unrelated to labor conditions.[52]

Additionally, the Court found that because the Union's agreements with Connell and other general contractors provided for subcontracting only to Local 100 firms, the agreements gave the Union substantial control, within its geographical jurisdiction, over contractor access to the mechanical subcontracting market.[53] This control, *if exercised,* would have had substantial anticompetitive effects which were not the result of organizing workers and eliminating competition based on differences in wages, hours and working conditions, but rather the result of simply eliminating from the market subcontractors with whom the Union chose not to deal.[54] These actual and potential anticompetitive effects of the Union-Connell agreement, the Court stated, were not justified by congressional labor policy since they did not "follow naturally" from the Union's legitimate goal of organizing workers and eliminating competition based on differences in wages, hours and working conditions.[55] Therefore, the Court held that the agreement was not entitled to a nonstatutory exemption from the antitrust laws.[56]

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[50] *Id.* at 623.

[51] *Id.* at 623 & n.1.

[52] *Id.* 623-24.

[53] *Id.* at 624.

[54] *Id.* at 624-25. Hypothesizing potential abuses of the Union's ability to control market access, the Court stated that the Union might refuse to sign collective bargaining agreements with "marginal" firms if it suited the interests of the Union's members. *Id.* Since the "most favored nation" clause in the Union's agreement with the Contractors Association required the Union to seek the same terms from other subcontractors as it had with the Association, the Court suggested that the Union could put subcontractors, who were willing to bargain but unable to meet the terms contained in the Union's agreement with the Association, out of business by insisting upon those terms. *Id.* Moreover, the Court also hypothesized that the Union might create a "geographical enclave" for Local 100 subcontractors by refusing to deal with "travelling" subcontractors. *Id.* at 625.

[55] *Id.* at 625.

[56] *Id.*

The Court's analytic focus on the anticompetitive effects of the Union-Connell agreement indicates that these effects, standing alone, were determinative of the Union's nonstatutory antitrust exemption. There was no evidence which suggested a subjective intent on the part of the Dallas Mechanical Contractor's Association to restrain competition.[57] Thus, the Court has apparently delineated a new "natural effects" test of nonstatutory exemption which is to be applied to union-employer agreements having no conspiracy overtones. Moreover, this test appears to supplant the *Jewel Tea* tests regardless of whether or not the agreement arises in a collective bargaining context. Prior to *Connell,* it was clear that the nonstatutory antitrust exemption, as articulated in *Jewel Tea,* extended to agreements made within the collective bargaining context. The Union-Connell agreement, on the other hand, arose outside of that context. Simply by inquiring as to whether the Union-Connell agreement was entitled to the exemption, the Court appears to have extended the nonstatutory exemption to *all* union-employer agreements regardless of the context in which they are made.[58] Furthermore, the Court noted in dicta that if an agreement creating a market restraint of the magnitude created by the Union-Connell agreement were effected within a collective bargaining relationship it would still not be entitled to the nonstatutory antitrust exemption.[59] This comment militates against a conclusion that the Court was evolving a nonstatutory exemption test limited solely to union-employer agreements executed outside a collective bargaining relationship. Rather, the dicta buttresses the conclusion that the Court was attempting to provide a single test of exemption for the courts to apply in all future antitrust-labor litigation regardless

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[57] *Id.* at 625 n.2.

[58] This apparent extension of the nonstatutory exemption to union-employer agreements executed outside the collective bargaining context implies that secondary agreements are entitled to the exemption if their anticompetitive effects are the result of eliminating competition based on substandard labor conditions. Thus, if the Union-Connell agreement had provided merely that Connell would subcontract mechanical work only to firms whose employees were accorded the same wages, hours and working conditions to which the Union and Local 100 subcontractors had agreed, the Union-Connell areement would not have been subject to any of the anti-competitive infirmities which the Court found in the executed agreement. Rather, the agreement essentially would have constituted a secondary union standards agreement. However, since such an agreement would involve a neutral employer in a union's controversy with another employer, it would directly contravene the labor policy expressed in §§ 8(b)(4) and 8(e) of the NLRA, 29 U.S.C. §§ 158(b)(4), (e) (1970), which generally seek to curb a union's power to involve neutral employers in its labor disputes. Thus, unless the Court meant that this type of secondary boycott agreement would be entitled to the nonstatutory exemption but would be capable of being redressed under the NLRA, the apparent extension of the nonstatutory exemption to union-employer agreements entered into outside a collective bargaining context may indicate a judicial determination that the congressional labor policy favoring the elimination of competition based on substandard labor conditions displaces the NLRA's policy against secondary boycotts when the substandard conditions are eliminated by means of a secondary boycott agreement.

[59] 421 U.S. at 625-26.

of the context in which the agreement is concluded.

Nonetheless, the Court does not appear to have strayed far. In delineating this new test, and thereby removing the uncertainty surrounding the exemption test created by the lack of a Court consensus in *Jewel Tea,* the Court appears to have adopted a mode of analysis closely paralleling Justice White's *Jewel Tea* test,[60] which exempted those union-employer agreements "intimately related" to wages, hours and working conditions. The "intimately related" test involved a judicial determination that if an agreement goes further than necessary to protect a legitimate union interest and creates additional restraints on competition, the union's interest does not outweigh the public's interest in free competition.[61] The "natural effects" test of *Connell* implies the same determination. If the anticompetitive effects of the agreement are the result of eliminating competition based only on differences in wages, hours and working conditions, an exemption is appropriate.[62] However, if the agreement goes further than necessary to eliminate competition based on substandard labor conditions, and instead directly restrains other areas of competition, its anticompetitive effects are not a natural consequence of legitimate union interests and the union is not, therefore, entitled to the nonstatutory antitrust exemption.[63]

The "natural effects" test also appears to consider "potential" as well as "actual" anticompetitive effects.[64] In *Connell,* the record contained no facts indicating that the Union might utilize its power to control market access.[65] However, the Court only considered whether the Union-Connell *agreement* was entitled to the nonstatutory antitrust exemption and not whether the agreement in fact unreasonably restrained competition and thereby violated the Sherman Act.[66] Whether potential anticompetitive effects mature into actual violations of the Sherman Act is a separate issue, distinct from the labor law considerations defining the nonstatutory antitrust exemption. The Court's intent seems clear; a union-employer agreement is not entitled

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[60] 381 U.S. at 689-90.

[61] In *Jewel Tea,* Justice White examined the meat marketing hours provision to determine if the union's interest in its members' working hours was in fact protected by the provision. *Id.* at 694-97. According to Justice White, the validity of the provision turned on whether the union's goal of limiting butchers' hours could be effected without it. *Id.* at 694. The inference which can be drawn from this mode of analysis is that if the provision imposed anticompetitive restraints in excess of those necessary to protect the union's interests, it, like the agreement in *Connell,* would not have been exempted from the antitrust laws. *See also* American Fed'n of Musicians v. Carroll, 391 U.S. 99, 117 (1968) (White, J., dissenting).

[62] *See* 421 U.S. at 625.

[63] *See id.*

[64] *See id.* at 623-25.

[65] *Id.* at 624-25.

[66] Since neither the district nor the circuit court had considered whether the agreement actually restrained trade within the meaning of the Sherman Act, and since the issue was not fully briefed or argued before the Court, the case was remanded for a finding of whether the agreement violated the Sherman Act. *Id.* at 637.

to the nonstatutory exemption if it has *potential* anticompetitive effects unrelated to legitimate union interests.

II. SECTION 8(e)

The second major issue addressed by the Court was whether the agreement was specifically authorized by the construction industry proviso to section 8(e) of the NLRA and was, therefore, exempt from the antitrust laws.[67] Section 8(e) generally prohibits agreements between a union and a neutral secondary employer under the terms of which the neutral employer agrees not to do business with, or deal in the goods of, a primary employer with whom the union has a labor dispute.[68] However, the proviso to section 8(e) provides that "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 . . . of a building . . ." is exempt from 8(e)'s general proscription of secondary objective (hot cargo) agreements.[69]

The Union-Connell agreement appeared to be included within the literal language of the proviso. However, the Court rejected the literal language approach, choosing instead to interpret the proviso narrowly in light of its legislative history. Determining that Congress never intended to authorize agreements such as that between the Union and Connell, the Court concluded that the agreement was not authorized by the proviso.[70]

In concluding that the proviso should be narrowly construed, the Court first reasoned that, in contrast to the full exemption given employees in the garment industry proviso to section 8(e),[71] the exemption created by the construction industry proviso was far more limited.[72] Congressional debates and reports which dealt with the garment industry proviso, unlike those dealing with the construction industry proviso, indicated a clear congressional intent to allow garment industry workers to use subcontracting agreements broadly for

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[67] *Id.* at 626.

[68] *See* 29 U.S.C. § 158(e) (1970). See note 9 *supra.*

[69] *Id.*

[70] 421 U.S. at 627-28.

[71] The garment industry proviso to § 8(e) provides:

> That for the purposes of this subsection and subsection (b) of this section the terms "any employer", "any person engaged in commerce or any industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry . . . .

29 U.S.C. § 158(e) (1970). For a discussion of the garment industry exemptions see Danielson v. Joint Bd., ILGWU, 494 F.2d 1230, 1233-39 (2d Cir. 1974) (Friendly, J.).

[72] 421 U.S. at 630.

organizational purposes.[73] With regard to the construction industry proviso, however, the Court perceived a narrower congressional intent. This perception was based on Congress' sketchy references[74] in 1959 to the Supreme Court's decision in *NLRB v. Denver Building & Construction Trades Council,*[75] and Congress' subsequent failure, largely for procedural reasons,[76] to legislatively overrule that case and permit picketing of a neutral general contractor to force him to cease doing business with a non-union subcontractor. According to the Court, the congressional concern with friction between union and non-union employees on a multiemployer construction site culminated in the express use of the words "site of the construction . . . or other work" in the proviso itself.[77] Thus, Congress indicated a desire to limit the proviso to subcontracting agreements designed to alleviate the problems attending the close juxtaposition of interests on a multiemployer construction site: specifically, the problems of friction and work stoppages

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[73] *Id.* at 633 & n.13.

[74] Senator Kennedy, in his report on the Conference agreement, stated:

> The first proviso . . . is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b) (4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.
>
> It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

105 CONG. REC. 17900 (1959) (remarks of Senator Kennedy). Senator Kennedy's remarks are reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1433 (1959).

In an analysis of the Landrum-Griffin legislation, which enacted § 8(e), Representatives Thompson and Udall stated:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others.

105 CONG. REC. 1554 (1959). This memorandum is reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1577 (1959).

These statements represent the extent of the 1959 congressional discussion of the implications of the construction industry proviso.

[75] 341 U.S. 675 (1951).

[76] 421 U.S. at 629 n.8.

[77] *See id.* at 629-30.

which result from the presence of a non-union subcontractor on a multiemployer jobsite.[78]

Second, the Court reasoned that to interpret the proviso to allow construction industry unions to seek subcontracting agreements from contractors with whom they did not have a collective bargaining relationship was contrary to one of the major purposes of the 1959 amendments: the placing of restrictions on "top-down" organizing campaigns.[79] To authorize such tactics under the construction industry proviso would undermine the restrictions placed on organizing by sections 8(b)(7)[80] and 8(b)(4)(B)[81] of the NLRA.[82]

Examining the Union-Connell agreement in light of this strict interpretation, the Court found that it was unrelated to protecting either Connell's employees or Local 100's members from having to work on a multiemployer jobsite alongside non-union laborers.[83] Rather, the agreement placed restrictions only on the subcontracting of *mechanical* work and thus clearly left open the possibility of Connell subcontracting other jobsite work to non-union firms.[84] Indeed, the Union itself admitted that the Connell agreement was a sword to aid in its organizational efforts rather than a shield to protect its members from common-situs employment with non-union construction

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[78] *See id.* at 629-31.

[79] *Id.* at 632-33. In a "top-down" organization campaign, a union uses its economic weapons, pickets and boycotts, to compel an employer to unionize. Consequently, the employer's employees are deprived of a free choice of bargaining agent and, indeed, of their right to decide if they wish to join a union. *See id.* at 632.

[80] 29 U.S.C. § 158(b)(7) (1970). Section 8(b)(7) regulates in detail the recognitional picketing in which unions may engage.

[81] Section 8(b)(4) provides that it is an unfair labor practice for a union

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing
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> . . . .

29 U.S.C. § 158(b)(4) (1970).

[82] 421 U.S. at 632.

[83] *Id.* at 631.

[84] *Id.*

workers.[85] As such, it clearly fell outside the scope of the construction industry proviso to section 8(e).[86]

While the Court seems correct in its conclusion that the Connell agreement is outside the scope of the section 8(e) proviso, the general rule which it enunciated for determining the scope of the proviso seems poorly crafted to effectuate the underlying congressional policy. The Court stated that the construction industry proviso authorizes subcontracting agreements only in the context of a collective bargaining relationship and is "possibly" limited to common-situs relationships on a "particular" jobsite.[87] By limiting the proviso to agreements executed within a collective bargaining relationship, the Court has in many cases prevented full realization of the congressional purpose which it attributed to the proviso. It is not uncommon for a general contractor to subcontract an entire job and thus not directly employ any laborers of its own.[88] Therefore, if all of the subcontractors are not unionized, the employees of unionized subcontractors will be forced to work side-by-side with the employees of non-union subcontractors, since *Connell* prohibits their obtaining a hot cargo agreement from the general contractor with whom they do not have a collective bargaining relationship. The employees' only recourse, it appears, would be to execute a hot cargo agreement with their subcontracting employer to the effect that the employer will not accept work on projects which are not all union.[89]

Depending on the degree of area unionization, however, a subcontractor's agreement to this type of restriction could seriously affect his ability to secure contracts, and hence his ultimate economic survival.[90] Moreover, if a union subcontractor stands to lose a contract due to such an agreement, it follows that union employment will suffer. By executing a hot cargo agreement with a subcontractor, the union, therefore, would effectively jeopardize employment opportunities for its members. Clearly such a result would be contrary to the union's interest.

It is submitted, therefore, that the Court in *Connell* incorrectly limited the construction industry proviso to collective bargaining relationships. The evil which the Court sought to prevent was the use of

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[85] *Id.*

[86] *Id.* at 635.

[87] *Id.* at 633.

[88] W. HABER, INDUSTRIAL RELATIONS IN THE BUILDING INDUSTRY 57 (1930).

[89] This type of agreement was approved by the National Labor Relations Board in Plumbers Local 217, 152 N.L.R.B. 1672, 1677, 59 L.R.R.M. 1371, 1373 (1965). The specific agreement was disapproved, however, because the construction industry proviso was not intended to protect self-enforcing hot cargo agreements. *Id.*, 59 L.R.R.M. at 1373-74.

[90] The subcontracting agreement in Plumbers Local 217, 152 N.L.R.B. 1672, 59 L.R.R.M. 1371 (1965), was challenged by the employer who had signed the agreement, evidently because it prevented him from performing profitable subcontracting work. *Id.* at 1673, 1674, 59 L.R.R.M. at 1372.

the proviso as a weapon to force unionization with a specific union.[91] This evil could have been prevented merely by requiring that there be a nexus between the executed agreement and the purpose behind the proviso—the elimination of problems which attend a multiemployer jobsite. Under this standard, the agreement in *Connell* would have been permissible only if it had related to jobsites at which the Union's members were to be employed and only if it had provided generally that union labor, whether or not affiliated with Local 100, was to work alongside Local 100's members. Such an interpretation of the proviso would give full effect to the congressional purpose while at the same time prevent the use of subcontracting agreements as a weapon designed to advance the interests of a specific union in expanding its membership.

A second problem with the Court's interpretation arises where the general contractor does have employees with whom he has an established collective bargaining relationship. In such cases, the Court's test fails to prohibit use of the collective bargaining agreement as an organizational weapon. If an agreement between a general contractor and his unionized employees specified not only that the employees would not be required to work on jobsites with non-union workers but also that only firms whose employees were members of particular unions would receive subcontracting jobs, the agreement would fall within the proviso's ambit since it meets the criteria set forth by the Court—execution within a collective bargaining relationship and limited to a common-situs relationship on a particular jobsite.[92] Yet, a provision of this nature would enable the general contractor's employees to blacklist a specific subcontracting employer or group of employers whose workers were non-union. Moreover, the provision could be used to aid the named subcontractor's employees in their organizational campaigns. For example, Local 100 of the Plumbers Union, which did not have a collective bargaining relationship with General Contractor *X*, might persuade a friendly union which did have a collective bargaining relationship with that contractor to include in its subcontracting agreement a provision that the contractor would subcontract plumbing work only to firms whose employees were represented by Local 100. This result would be contrary to the Court's statement in *Connell* that the section 8(e) proviso does not tolerate the use of subcontracting agreements as organizational weapons for specific unions.[93]

Therefore, by limiting the proviso to all subcontracting agreements executed within a collective bargaining relationship and restricted to common-situs relationships on a particular jobsite,[94] rather than simply requiring a nexus between the executed agreement and

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[91] 421 U.S. at 633.
[92] *Id.*
[93] *Id.* at 633.
[94] *Id.* at 635.

the proviso's purpose, the Court has placed an interpretation on the proviso which is on the one hand underinclusive of the type of conduct which Congress intended to legalize and on the other hand overpermissive of the type of conduct which Congress did not intend the proviso to authorize. It is submitted, therefore, that the Court should have concluded that a subcontracting agreement falls within the proviso's ambit if it is designed to protect the members of the contracting union from having to work alongside non-union laborers without advancing at the same time the interest of a particular union in expanding its organization.

Additional problems arise from the Court's limitation of the scope of 8(e) subcontracting agreements. In concluding its general interpretation of the proviso, the Court stated that it authorized only agreements made within the collective bargaining context *and* "*possibly*" restricted to common-situs relationships on a "particular" jobsite.[95] It is unclear from *Connell* whether a jobsite restriction is necessary if a collective bargaining relationship exists, or if a jobsite restriction alone would be dispositive of the proviso issue. Moreover, it is unclear what the Court meant by a "particular" jobsite. By limiting hot cargo agreements to collective bargaining relationships, the Court may have intended that "particular" refer to *any* jobsites on which the general contractor's union employees work. This meaning would be consistent with the purposes attributed to such agreements: the elimination of problems which arise when union and non-union employees work side-by-side.[96] Any broader interpretation, not limited to jobsites on which the general contractor's employees work, would be outside the ambit of the construction industry proviso since there would be no assurance of a relationship between the proviso's purpose and the executed agreement. Thus, at a minimum, the Court must have intended that "particular" refer to any jobsite on which the general contractor's union employees work.

The Court may have also intended a narrower interpretation of "particular" which would limit agreements to a *named* jobsite. If the Court intended such an interpretation it could mean that a single, general agreement between a union and a contractor covering all jobs on which the contractor's union employees were to be utilized would be invalid. Indeed, the union would be required to negotiate a new hot cargo agreement for each jobsite to which the contractor's employees were assigned. Such a requirement would be unduly burdensome in light of the actualities of construction industry employment.

The Supreme Court's interpretation of the section 8(e) proviso in *Connell* will have a swift and sharp impact on the construction industry. Unlike the manufacturing industry, where the employer and employees generally have a permanent employment relationship, employment in the construction industry fluctuates seasonally and in re-

[95] *Id.* at 633.
[96] *Id.* at 630-31.

sponse to the general economy's upswings and downswings.[97] Thus, general contractors and subcontractors, unless exceptionally large, maintain only a skeletal working force consisting of a few supervisory personnel.[98] Work forces are expanded as contracts are awarded. Therefore, a single laborer may be employed by a number of different employers during any one given year, and the length of employment will vary with the particular job and climatic conditions.

The traditional refusal of construction union members to work on the same jobsite as non-union laborers is a direct response to these unemployment uncertainties in the industry. The object of this refusal is twofold: to prevent the hiring of a non-union contractor and to force him to unionize.[99] Typically in the industry, a building contract will be awarded to a general contractor who, in turn, will subcontract all or a major portion of the work to contractors specializing in various crafts.[100] Thus, since it is the general contractor who controls the award of subcontracts, if the union is to accomplish its goal of providing employment at union wage rates for its members, the general contractor and not the subcontractor must be the target of the union's efforts.[101]

NLRB v. Denver Building & Construction Trades Council[102] frustrated these efforts by barring a union's picketing of a neutral general contractor to force him to cease doing business with a non-union subcontractor.[103] However, the unions circumvented this decision by executing subcontracting agreements with general contractors.[104] Historically, Building and Construction Trades Councils, which take into affiliation all crafts engaged in the industry, have entered into contracts with general contractors or their associations, establishing contract rights for their crafts.

> These agreements are not intended to require recognition of the Council nor are they intended to encompass bargaining on wages, hours and working conditions of employees employed by the signatory contractors. The single purpose behind these agreements is to provide an orderly procedure for the contracting and subcontracting of work by these signatory contractors on a basis that is fair to workmen in all of the building and construction trades crafts, as well as to the contractor's competitors. . . . [T]he policy of

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[97] HABER, *supra* note 88 at 95.

[98] *Id.* at 57.

[99] Note, 100 U. PA. L. REV. 141, 143 (1951).

[100] HABER, *supra* note 88, at 57.

[101] Recognitional picketing of subcontractors, who generally hire only a small number of laborers, is frustrated by the relative ease with which the subcontractor can hire workers who are willing to cross picket lines. *See* Local 501, IBEW v. NLRB, 181 F.2d 34, 41, 25 L.R.R.M. 2449, 2455 (2d Cir. 1950) (dissenting opinion).

[102] 341 U.S. 675 (1951).

[103] *Id.* at 688-89.

[104] *See, e.g.*, Teamsters Local 47 (Texas Indus., Inc.), 112 N.L.R.B. 923, 924, 36 L.R.R.M. 1117, 1118 (1955).

> the building trades unions, through their affiliation with the Council, and the execution by the Council of these agreements with various contractors is *to place on the general contractor the obligation of dealing only with subcontractors who have executed current working agreements with appropriate craft unions* having jurisdiction of the work performed by their employees. These subcontractor-oriented agreements never were and are not now intended to deal with the general contractor's relations with his own employees. Rather, they are intended only to deal with his contracting and subcontracting of work and thereby his relations with other employers in the building and construction industry. This is the typical situation or procedure of building and construction trades unions throughout the country.[105]

By confining the construction industry proviso to agreements made within the collective bargaining context and restricted to particular jobsites, *Connell* has, in addition to frustrating congressional purpose, effectively prevented the Councils from executing subcontracting agreements. In Los Angeles alone, at the time *Connell* went to trial, the Los Angeles Building and Construction Trades Council had executed 9,722 agreements similar to the one contested in *Connell*.[106] Unless Congress never intended that Building and Trades Councils assume the role they have in the industry, Congress will have to expressly define, once again, the area of authorized secondary activity in the construction industry.

III. ANTITRUST REMEDIES FOR SECTION 8(e) VIOLATIONS AFTER *CONNELL*

The third major issue addressed by the Court in *Connell* was whether Congress, by providing damage and injunction remedies in the NLRA for unfair labor practices, intended to foreclose an antitrust remedy where a union and an employer enter into a proscribed hot cargo agreement. Because the Union-Connell agreement was outside the purview of the construction industry proviso, it constituted an unfair labor practice under section 8(e):[107] secondary activity enlisting a neutral employer's aid in an organizational campaign. Moreover, the Union's picketing to obtain the unlawful agreement was also an unfair labor practice under section 8(b) (4) (A) of the NLRA.[108] These unfair labor practices may be remedied under sections 10(*l*)[109] and 303[110] of

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[105] Lane-Coos-Curry-Douglas Counties Bldg. & Constr. Trades Council v. NLRB, 415 F.2d 656, 661, 72 L.R.R.M. 2149, 2153 (9th Cir. 1969) (dissenting opinion).

[106] Brief for Petitioner at 28 n.6, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

[107] 421 U.S.at 635.

[108] 29 U.S.C. § 158(b)(4)(A) (1970). See note 81 *supra*.

[109] *Id.* § 160(*l*). See note 21 *supra*.

[110] *Id.* § 187. See note 20 *supra*.

the NLRA. Section 10(*l*) expressly provides for injunctive relief, at the behest of the National Labor Relations Board (the Board), for section 8(e) or section 8(b)(4) unfair labor practices.[111] Section 303 expressly provides for actual damages, but only for section 8(b)(4) unfair labor practices.[112] In the case of a purely voluntary agreement (uncoerced by section 8(b)(4) pressures) which violates section 8(e), the NLRA provides no damages.[113]

Congress enacted section 8(b)(4) in 1947 to proscribe unilateral secondary union activity.[114] At the same time, Congress rejected an attempt to remove the antitrust exemption which this activity enjoyed under the Clayton and Norris-LaGuardia Acts.[115] Instead, it provided the actual damages remedy under section 303 of the NLRA.[116] The *Connell* Court rejected the Union's argument that this legislative history was relevant to a determination of the remedy available for a violation of the proscription of hot cargo agreements in section 8(e),[117] enacted in 1959 as part of the Landrum-Griffin Amendments.[118] Rather, the Court viewed the congressional rejection of antitrust remedies in 1947 as significant only insofar as it bore on the choice of remedies available when a union, *acting alone,* engages in illegal secondary activities.[119] Thus, the Court appears to have drawn a line between unilateral secondary union activity proscribed by section 8(b)(4) and union-employer hot cargo agreements proscribed by section 8(e). This line traces that drawn by the Court between the statutory and nonstatutory antitrust exemptions.[120]

Focusing solely on section 8(e), the Court found nothing in the legislative history of the Landrum-Griffin Amendments to suggest that Congress intended that agreements entered into in violation of section 8(e) were to be redressed exclusively under the NLRA.[121] Unfortunately, the Court failed to reconcile this viewpoint with Congress' express amendment of section 10(*l*) to provide Board injunctive relief for 8(e) violations.[122] It is at least arguable that Congress' creation of an injunctive remedy was to be the sole recourse for a party injured by an uncoerced hot cargo agreement. Ignoring this possible interpretation of the legislative history, the Court appears to have based its conclusion on two factors. First, Congress did not expressly amend section 303 to provide a damage remedy for 8(e) violations.[123] Second,

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[111] Id. § 160(*l*). See note 21 *supra.*
[112] Id. § 187. See note 20 *supra.*
[113] 421 U.S. at 649 n.9 (Stewart, J., dissenting).
[114] 421 U.S. at 634.
[115] *Id.* at 634 & n.15.
[116] *Id.*
[117] *Id.* at 634.
[118] Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519.
[119] *See* 421 U.S. at 634.
[120] *See id.* at 621-22.
[121] *Id.* at 634.
[122] *See* 29 U.S.C. § 160(*l*) (1970). See note 21 *supra.*
[123] 421 U.S. at 634 n.16.

Congress in 1959 rejected proposals by Representatives Hiestand and Alger which not only would have subjected the concerted action of two or more labor unions to the antitrust laws but also would have subjected any arrangement between a union and employer, whether voluntary or coerced, to the antitrust laws if it resulted in "restrictive trade practices."[124] The Court reasoned, however, that the rejection of an antitrust remedy in these circumstances did not indicate an intent either to extend labor's antitrust immunity to union-employer agreements *or* to displace whatever union-employer liability might exist under the antitrust laws: "That the Congress rejected these extravagant proposals hardly furnishes proof that it intended to extend labor's antitrust immunity to include agreements with non-labor parties, or that it thought antitrust liability under the existing statutes would be inconsistent with the NLRA."[125] Thus, in concluding that an antitrust remedy was not inconsistent with the NLRA remedial scheme, the Court's reasoning appears to be based simply on a failure to find a congressional intent that the Sherman Act be displaced by the NLRA.[126]

Joined by Justices Douglas, Brennan, and Marshall, Justice Stewart dissented[127] because he found a contrary congressional intent expressed in the legislative histories of the 1947 Taft-Hartley Act[128] and the 1959 Landrum-Griffin Amendments. Looking first at the 1947 legislative history of the Taft-Hartley Act, Justice Stewart found that Congress had deliberately foreclosed antitrust remedies for secondary labor activities which were proscribed by section 8(b)(4)[129] and which previously, in the absence of a union-employer conspiracy, had been protected from the antitrust laws by the Norris-LaGuardia

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[124] *Id.*; *see* 105 CONG. REC. 12137 (remarks of Rep. Alger), reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1508 (1959).

[125] 421 U.S. at 634 n.16. The Supreme Court has strongly disfavored repeals of the antitrust laws by implication, and has found a repeal only where there is a "plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 & n.28 (1963), *citing* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). In determining if there is a repugnancy, the courts will look at the specific language of the statute and any legislative history which might reveal an express congressional intent. Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971). The 1959 legislative history did not evidence an express congressional intent to immunize illegal hot cargo agreements from the antitrust laws. *Connell*, 421 U.S. at 634.

[126] The Court did not go beyond the express congressional intent to determine whether the antitrust laws' operation was, in fact, repugnant to the regulatory scheme of the NLRA. *See generally* Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971).

[127] 421 U.S. at 638-55 (Stewart, J., dissenting). Justice Stewart did not find it necessary to decide if the Union-Connell agreement was authorized by the construction industry proviso since in his view an antitrust remedy was precluded whether or not the agreement was authorized. *Id.* at 648 n.8.

[128] 29 U.S.C. § 141 *et seq.*

[129] 29 U.S.C. § 158(b)(4) (1970). See note 81 *supra.*

Act.[130] This 1947 legislative history was deemed pertinent by Justice Stewart because he regarded the subsequent 1959 legislation, dealing with union secondary activity, merely as closing "technical loopholes" in the secondary activities proscribed by the 1947 legislation.[131] Thus, he implied that the enactment of section 8(e) in 1959 was intended merely to prevent unions from circumventing the secondary boycott proscriptions of section 8(b)(4) by effecting a secondary boycott through execution of a coerced hot cargo agreement. Furthermore, he noted that Congress had also broadened the scope of sections 8(b)(4) and 303 in 1959 to make picketing of an employer, for the purpose of entering into a hot cargo agreement proscribed by section 8(e), an unfair labor practice for which damages were recoverable under section 303.[132] "Congress . . . provided an employer like Connell with a fully effective private damages remedy [under the NLRA] for the allegedly unlawful union conduct involved in this case."[133]

Moreover, where the union and the employer entered into a voluntary proscribed hot cargo agreement, an injured party could obtain injunctive relief under section 10(*l*).[134] Justice Stewart did acknowledge, however, that an injured party might also have a valid antitrust claim on the grounds that, as in *Allen Bradley Co. v. Local 3, IBEW*,[135] the union and the employer had conspired to restrain trade.[136]

Turning to the 1959 legislative history, he found that Congress again had evidenced its intent to exclude antitrust remedies for illegal secondary activities.[137] He noted, as had the Court, the rejection of the strong labor antitrust legislation proposed by Representatives Hiestand and Alger.[138] Justice Stewart further noted, however, that Representative Griffin, an author of the 1959 Landrum-Griffin legislation, had characterized the Amendments as a minimum bill without an antitrust provision and had stated that he would oppose any at-

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[130] 421 U.S. at 640, 645 (Stewart, J., dissenting). Justice Stewart noted that the Senate had rejected an attempt to include a provision in the Taft-Hartley Act which would have made secondary union activity subject to the antitrust laws. Instead, the Senate adopted a compromise damage provision which its author, Senator Taft, described as providing only actual damages in lieu of the treble damages available under the Sherman Act. Furthermore, Justice Stewart noted that in Conference a provision similar to the one rejected in the Senate was eliminated by the House members, who adopted instead the Taft compromise. *Id.* at 643-45.

[131] *Id.* at 646.

[132] *Id.* at 646-47.

[133] *Id.* at 647.

[134] *See id.* at 649 n.9. A signatory to such an agreement would be protected from any damages since section 8(e) provides that a proscribed agreement is "unenforcible and void." *Id., quoting* 29 U.S.C. § 158(e) (1970).

[135] 325 U.S. 799 (1945).

[136] 421 U.S. at 649 n.9 (Stewart, J., dissenting).

[137] *Id.* at 650.

[138] *Id.* at 650-53; *see* 105 CONG. REC. 12135, 12136-37, reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1507-08 (1959).

tempt to include an antitrust provision, since it would upset the legislation's delicate balance.[139] Thus, Justice Stewart concluded that the 1947 and 1959 legislative histories clearly indicated that Congress did not intend to return to the pre-*Hutcheson*[140] era when the courts had held that secondary activity such as the Union had engaged in was subject to the antitrust laws.[141]

A major difference between the majority and the dissent appears to be the manner in which each treated the union antitrust liability proposals which Congress rejected in 1959. A rejection of those proposals did not signify to the Court that Congress had intended to extend liability to union-employer agreements or to displace liability which might exist under the antitrust laws. Instead, the congressional inaction left undisturbed whatever antitrust liability existed in 1959.[142] The Court, perhaps applying its statutory/nonstatutory distinction retroactively, concluded that in 1959 a hot cargo agreement transgressed the antitrust laws while section 8(b)(4) secondary pressures alone might be exempt.[143] To Justice Stewart, on the other hand, the rejection meant a continuation of the status quo as it existed at the time of the 1947 legislation,[144] when Congress had clearly rejected antitrust liability for a union's secondary pressures.[145] The 1959 Amendments, having a neutral antitrust effect, did not disturb the exemption for secondary activities, which Congress in 1947 had clearly intended.[146]

At the time of the 1959 Amendments, it was clear that a hot cargo agreement entered into by a union and several employers in furtherance of a business conspiracy to restrain trade was subject to antitrust liability. In *Allen Bradley Co. v. Local 3, IBEW*,[147] the union had entered into voluntary industrywide "understandings" with electrical equipment manufacturers and contractors by which non-union contractors and manufacturers were boycotted and equipment manufactured by employers who did not employ the union's members was barred from the market.[148] The Court found that the "understandings" were not protected from the antitrust laws by labor policy, since there was no congressional intent to immunize a labor union which conspires with employers to monopolize the business market.[149] Thus, Justice Stewart's acknowledgement that a non-coerced agreement could be remedied under the antitrust laws if an *Allen Bradley*

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[139] 421 U.S. at 652 (Stewart, J., dissenting); *see* 105 CONG. REC. 15535, reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1571-72 (1959).

[140] United States v. Hutcheson, 312 U.S. 219 (1941).

[141] 421 U.S. at 654-55 (Stewart, J., dissenting).

[142] 421 U.S. at 634 n.16.

[143] *Id.* at 634.

[144] *Id.* at 650 (Stewart, J., dissenting).

[145] *See id.* at 645-47.

[146] *Id.*

[147] 325 U.S. 797 (1945).

[148] *Id.* at 799-800.

[149] *Id.* at 809-10.

conspiracy was proven[150] was consistent with prior case law. Likewise, the Court's more general reasoning that immunity was not extened or liability displaced[151] would encompass an *Allen Bradley* situation.

It was less clear at the time of the 1959 Amendments, however, whether, in the absence of an *Allen Bradley* type conspiracy, a *coerced* hot cargo agreement could be the basis for an antitrust suit. *Hunt v. Crumboch,*[152] the companion case to *Allen Bradley,* appeared to indicate that coerced hot cargo agreements, in the absence of a conspiracy, were exempt from the antitrust laws. In *Hunt,* after a strike, the Great Atlantic & Pacific Tea Company (A & P) had entered into a closed shop agreement with the union which provided that the A & P would not contract to non-union haulers.[153] Subsequently, the union entered into a similar agreement with another company.[154] When the union refused to negotiate with the petitioning freight carrier, or to admit any of its employees to union membership, the employers, at the union's instigation and pursuant to the closed shop agreements, cancelled their contracts with the freight hauler.[155] Consequently, the freight hauler was put out of business.[156] Since there was no showing of an *Allen Bradley* type conspiracy by the freight hauler's competitors to put the petitioner out of business, the *Hunt* Court held that the union's activities *in refusing to deal with the freight hauler* were not a violation of the antitrust laws: "The only combination . . . was one of workers alone and what they refused to sell . . . was their labor."[157] The Court did not address itself to the possibility that in the absence of a conspiracy the closed shop agreement, evidently indistinguishable from a secondary boycott agreement, violated the antitrust laws. Nevertheless, it is at least arguable that the Court assumed that such agreements were as exempt from the antitrust laws as the union coercion which led to their execution.[158] Indeed, Justice Stewart appears to have relied directly on this interpretation of *Hunt*[159] as support for his contention that coerced hot cargo agreements were exempt from the antitrust laws at the time of the 1947 Taft-Hartley Amendments. Rejection of the Hiestand/Alger proposals in 1959 could thus have re-

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[150] 421 U.S. at 649 n.9 (Stewart, J., dissenting). See text at note 136 *supra.*

[151] 421 U.S. at 634 & n.16.

[152] 325 U.S. 821 (1945).

[153] *Id.* at 822.

[154] *Id.* at 823.

[155] *Id.* The union refused to negotiate because during the strike one of the union men was killed and a member of the petitioning freight hauling partnership was tried for the homicide but acquitted. *Id.* at 822.

[156] *Id.* at 823.

[157] *Id.* at 824.

[158] United States v. Hutcheson, 312 U.S. 219 (1941), recognized that unilateral union activity, enumerated in § 20 of the Clayton Act, 29 U.S.C. § 52 (1970), and directed against a secondary employer, was exempt from the Sherman Act. 312 U.S. at 232. Picketing was interpreted by the *Hutcheson* Court as one of the activities falling within the scope of § 20. *Id.* at 233.

[159] *See* 421 U.S. at 640 (Stewart, J., dissenting).

sulted in a continued antitrust exemption for hot cargo agreements.

On the other hand, had it so desired, Congress could have explicitly created an antitrust exemption in 1959 by providing that section 303 was the *exclusive* remedy for section 8(e) violations, whether the agreement was coerced, voluntary or conspiratorial in nature.[160] That it did not do so could mean that no exemption from the antitrust laws was intended. The Court, in its stress on the lack of an express amendment to section 303 and its attribution of no significance to the rejection of the Hiestand/Alger legislation,[161] appears to have adopted this reasoning.

It is submitted that the 1947 and 1959 legislative histories compel neither Justice Stewart's nor the Court's interpretation. When a broad reading of *Hunt* is juxtaposed alongside this history, it appears that Justice Stewart's interpretation is the stronger of the two.[162] Nonetheless, from a practical standpoint, Justice Stewart's interpretation is weaker. His contention—that the type of remedy available for an illegal 8(e) agreement depends on whether the agreement is coerced, voluntary or conspiratorial—is unpersuasive because it encourages coercion and provides inconsistent remedies. Under his rationale, an injured third party would have an antitrust remedy only where a union and a secondary employer intentionally, for the purpose of restraining competition and injuring the third party,[163] entered into an agreement prohibited by section 8(e).[164] Thus, it encourages a union to use coercion to obtain the agreement rather than

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[160] [C]ongress knows how to spell out an exemption from the antitrust law when it wants to do so, e.g., the CAB and the FMC, where the agencies give consideration to antitrust policy but make the initial decisions themselves and in contrast to proceedings in the Federal Communications Commission, where any action by the FCC is specifically open to antitrust challenge.

Hecht v. Pro-Football, Inc., 444 F.2d 931, 943-44 (D.C. Cir. 1971).

[161] 421 U.S. at 634 n.16.

[162] The Court may have discounted *Hunt* since its enunciation of the "natural effects" test seemingly has overruled that decision, which turned on the lack of a conspiracy, not the anticompetitive effects of the agreement. *See* 325 U.S. at 824. By distinguishing among coerced, voluntary and conspiratorial hot cargo agreements, Justice Stewart may have rejected the Court's antitrust exemption test without directly so stating. On the other hand, Justice Stewart may have meant only that regardless of the status of the antitrust exemption today, at the time of the 1959 Amendments only conspiratorial hot cargo agreements were subject to the antitrust laws. In failing to expressly amend § 303, Congress recognized this distinction. Therefore, the distinction presently must be honored.

[163] The illegal purpose can be intended solely by the union acting to further the anticompetitive interests of a non-signatory employer. For example, if the Union had sought the illegal agreement from Connell solely as a means of furthering the desires of the Dallas Mechanical Contractors Association to restrain trade among *its* competitors, the requisite conspiracy would have been present.

[164] According to Justice Stewart, only conspiratorial hot cargo agreements were subject to antitrust liability after 1947. See text accompanying notes 134-36 *supra*. Justice Stewart did not reach the question of whether the Court's "natural effects" test is appropriate under other circumstances.

non-coercive persuasion, since coercion would ensure that only the NLRA remedy provision would be triggered. Coercion would not be encouraged if the union sought the agreement solely as a means of expanding its membership; the injured party would then be unable to prove a conspiracy to restrain trade, since no such conspiracy would exist. In such a case, however, the injured party would be relegated to the Board injunctive procedure under section 10(*l*), and a delayed Board injunction procedure alone would not serve as a deterrent to illegal hot cargo agreements.

Relegating a party injured by a voluntary, non-conspiratorial agreement to injunctive relief under section 10(*l*) is also an inadequate remedy. Only a party injured by a coerced agreement could get damages, although the party injured by the voluntary agreement would suffer an identical injury. At the same time, Justice Stewart's remedial scheme allows the party who *can* prove a conspiracy to collect treble damages[165] while the party injured by a coercively obtained agreement can collect only actual damages.[166] Thus, it provides inconsistent remedies for essentially identical injuries. However, if Justice Stewart correctly perceived the antitrust status quo for hot cargo agreements at the time of the 1959 Amendments, Congress is the source of this irrational result since Congress extended the NLRA remedial scheme to displace antitrust liability for coerced hot cargo agreements.

The Court's decision, on the other hand, provides a consistent remedy whether the illegal hot cargo agreement is coerced, voluntary or conspiratorial in nature. Furthermore, the Court's interpretation is consistent with the line drawn between the statutory exemption for unilateral union activities and the nonstatutory exemption for union-employer agreements. Nonetheless, the Court's approach encourages a non-labor party, subject to union coercion aimed at execution of an illegal hot cargo agreement, to do as Connell did—sign the agreement and bring an antitrust suit. In so doing, however, the non-labor party is hamstrung. Since section 8(e) provides that any illegal agreement is unenforcible and void, the signatory non-labor party would not be required to comply with the agreement, and would thus seem not to be injured by the agreement. Since demonstration of injury is a prerequisite to maintenance of a Sherman Act suit,[167] it would be questionable whether the signatory non-labor party would be able to maintain an antitrust action. Indeed, unless Connell incurred damages by complying with the district court's decision, it would appear that Connell's only damages are those caused by the Union's picketing. Clearly, however, Connell cannot recover those damages in its antitrust suit since they were not incurred as a result of any agreement in

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[165] 15 U.S.C. § 15 (1970).

[166] 29 U.S.C. § 187 (1970). See note 20 *supra*.

[167] 15 U.S.C. § 15 (1970) provides: "Any person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." (emphasis added).

restraint of trade and since the 1947 legislative history appears to demonstrate a congressional intent to preclude an antitrust recovery for secondary picketing.[168]

Thus, apart from general contractors who, prior to the Court's decision, had entered into agreements similar to the Union-Connell agreement, the only party to gain by the Court's decision would appear to be an injured third party. Section 10(*l*) allows the injured party to obtain an injunction through the Board to prevent further compliance with the agreement.[169] The NLRA does not, however, allow the injured party to recover damages suffered as a result of an express or implied illegal hot cargo agreement. The Court's recognition of a right in the injured third party to seek treble damages under the Sherman Act therefore is a small but sure advance.

CONCLUSION

In resolving whether the Union-Connell agreement was entitled to a nonstatutory antitrust exemption, the Supreme Court has interjected needed clarity into this troublesome area of the law. A labor union's nonstatutory antitrust exemption, in the absence of a conspiracy, is now to be determined by an inquiry into whether the anticompetitive effects of the union-employer agreement are a natural consequence of the union's legitimate interest in eliminating competition based on differences in wages, hours and working conditions. However, the interpretation which the Court has placed on the construction industry proviso to section 8(e) of the NLRA will have a significant impact on labor in that industry. If indeed Congress intended construction unions to utilize the proviso as a means of alleviating the problems which attend a multiemployer construction site, the Court has prevented full realization of this purpose by limiting the proviso's scope to agreements entered into only within a collective bargaining relationship. Moreover, this limitation fails to restrict the use of subcontracting agreements, authorized by the proviso, as "top-down" organizational weapons. Finally, this limitation eliminates what appears to have been a prevalent role for Building and Construction Trades Councils in the industry's pattern of collective bargaining. It is submitted that if Congress intended the construction industry proviso to protect union employees from having to work alongside non-union workers on a multiemployer construction site, Congress must legislatively overrule *Connell.* Moreover, although the Court's application of antitrust remedies to hot cargo agreements, whether coerced, voluntary, or conspiratorial in nature, provides consistent remedies for identical injuries, it is unclear from the legislative history that Congress sought such a result. Thus, if Congress intended that only conspiratorial hot cargo agreements be subjected to the antitrust laws, it

[168] *See* 421 U.S. at 645-46 (Stewart, J., dissenting).
[169] 29 U.S.C. § 160(*l*) (1970). See note 21 *supra.*

must act to re-establish an antitrust exemption for coerced and voluntary hot cargo agreements.

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