FACULTY COMMENT

THE ACCOMMODATION BETWEEN ANTITRUST AND LABOR LAW: THE ANTITRUST LABOR EXEMPTION

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INTRODUCTION

The existence and viability of collective bargaining as an institutionalized force in the private sector of the United States is beyond question. Its impact upon labor markets, industry, and the economy has been staggering. This importance has resulted in part from congressional support in the form of the Wagner Act[1] and the Taft-Hartley Act,[2] both of which expressed a strong national policy of promoting the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.[3]

At the same time, the essential mechanisms involved in collective bargaining do violence to just as fundamental a national policy:

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[1] National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–168 (1976).

[2] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–144, 171–187 (1976).

[3] 29 U.S.C. §§ 171, 174; *see id.* §§ 141, 151, 158(d). The Taft-Hartley Act declared it to be

> the policy of the United States that . . . sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees.

Id. § 171. Employers, employees, and their representatives were enjoined to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions." *Id.* § 174(1).

encouragement of competition.[4] The basic organizational weapons of labor unions involved activities which, if engaged in by business entities, would violate the antitrust laws. However, recognizing that labor could obtain comparable bargaining power with management only if permitted to organize, Congress provided an exemption from the antitrust laws for certain specific trade union activities including strikes, pickets, and boycotts, regardless of their impact upon competition.[5] Although this statutory exemption does not itself apply to collective bargaining agreements, the United States Supreme Court eventually acknowledged that in order for the collective bargaining process to be effective the resulting agreement must also be granted some immunity from antitrust regulation.[6] Accordingly, the Supreme Court recognized that a proper accommodation must be reached between the competing congressional policies favoring collective bargaining on the one hand and competition on the other.[7] The Supreme Court's attempts to reconcile these two opposing national policies have resulted in conferring upon collective bargaining agreements a limited, but ill-defined non-statutory exemption. The uncertainties of the non-statutory exemption have created a number of problems for business, labor and the judiciary. This Comment will explore these problems through a discussion of the development, application and limitations of both the statutory and non-statutory labor exemptions from the antitrust laws.[8]

THE STATUTORY EXEMPTION

Although it is debatable whether Congress intended the Sherman Act to apply to labor union activity,[9] employers succeeded in utilizing

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[4] This policy has been clearly expressed through the federal antitrust statutes. *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1–7 (1976); Clayton Act, 15 U.S.C. §§ 12–27 (1976) & 29 U.S.C. §§ 52–53 (1976); Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1976).

[5] *See* notes 9–23 *infra* and accompanying text.

[6] *See, e.g.*, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975).

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

[8] For a comprehensive discussion of this entire area, see Roberts & Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L.J. 395 (1978).

[9] The Sherman Act provided: "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 (1976). It also provided that "[e]very 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 felony. . . ." *Id.* § 2.

For a comprehensive discussion of the Sherman Act and the congressional intent behind it, see E. BERMAN, LABOR AND THE SHERMAN ACT 11–54 (1930). *See also* F. FRANKFURTER &

the antitrust laws to attack the struggling trade union movement at the turn of the century.[10] In *Loewe v. Lawlor*,[11] sometimes known as the *Danbury Hatters* case, a hat manufacturer instituted a treble damage action against the officers and members of the hatters union alleging that the union's initiation of a nationwide secondary boycott against the hat company constituted an illegal restraint of trade.[12] The United States Supreme Court indicated that unions were indeed vulnerable to such actions under the Sherman Act since the Act "provided that 'every' contract, combination or conspiracy in restraint of trade was illegal."[13] This literal interpretation of the Sherman Act[14] threatened the very existence of trade unions[15] whose avowed purpose was to eliminate competition in the labor market.

Understandably, the trade union movement responsed with an intensive lobbying effort for passage of the Clayton Act[16] in 1914, which was designed in part to immunize unions from the sweep of the antitrust laws. Two provisions of the Act were intended to accomplish this purpose: one section declared that "[t]he labor of a human being is not a commodity or article of commerce," and consequently the antitrust laws should not be construed to forbid labor organizations from carrying out their legitimate objects,[17] and another

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N. GREENE, THE LABOR INJUNCTION 5–17 (1930); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30–32 (1963).

[10] During the first seven years of the Sherman Act's existence, the period from 1890 to 1897, the federal courts invoked the statute 12 times against labor unions and only once against business groups. E. BERMAN, *supra* note 9, at 3.

[11] 208 U.S. 274 (1908).

[12] *Id.* at 304–06. The complaint thereby alleged a violation of Section One of the Sherman Act, quoted in note 9 *supra*. *See* 208 U.S. at 304–09.

[13] 208 U.S. at 301; *see* note 8 *supra*. The Court noted that attempts within the Congress to exempt labor organizations from the proscriptions of the Act had failed. 208 U.S. at 301.

[14] Chief Justice Fuller, speaking for the Court, stated that the Sherman Act made no distinctions among classes of contracts or combinations and applied to labor organizations as well as to any other combination in restraint of trade. 208 U.S. at 301–02.

[15] *See* P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 216–18 (1964).

[16] Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–27 (1976) & 29 U.S.C. §§ 52, 53 (1976)).

[17] 15 U.S.C. § 17 (1976). The section provided in full:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

section limited the use of federal injunctions by management in labor disputes.[18]

Despite the broad language and seemingly clear intent of the Clayton Act, in a series of cases the Supreme Court persisted in narrowly defining the "legitimate objects" of trade unions and thereby authorized antitrust suits against unions that pursued goals or utilized means, deemed unlawful, such as nationwide secondary boycotts.[19] Again the labor unions sought legislative relief, which was obtained in the form of the Norris-La Guardia Act of 1932.[20] This act directed the courts to give a more expansive reading to the term "labor dispute," which was defined to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[21] Moreover, it deprived the federal courts of the jurisdiction to issue injunctions in most labor disputes.[22]

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[18] 29 U.S.C. § 52 (1976). This section provided in pertinent part:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case . . . involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law. . . .
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> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Id.

[19] *See, e.g.*, Duplex Printing Co. v. Deering, 254 U.S. 433, 465–72 (1921) (limiting Clayton Act's immunity to immediate employees of embattled employer); Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37, 47, 54–55 (1927) (restraint of trade will not be condoned if other less intrusive alternatives are available). In *Deering*, the Supreme Court reasoned that the legislature had "assum[ed] the normal objects of a labor organization to be legitimate." 254 U.S. at 469. The Clayton Act therefore extended protection to labor organizations only when "lawfully carrying out their *legitimate* objects," *id.* (emphasis in original), but not when actually engaging in a conspiracy in restraint of trade. *Id.* The Court concluded that the Clayton Act could not be interpreted "as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws." *Id.*

[20] Ch. 90, §§ 1–15, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101–115 (1976)).

[21] 29 U.S.C. § 113(c) (1976).

[22] *Id.* §§ 104–05. These sections of the Norris-La Guardia Act provided in pertinent part:

In construing the Norris-La Guardia Act, the Supreme Court has recognized a broad, statutory exemption for labor unions, although limiting the scope of that statutory immunity to those situations in which the union acts unilaterally in its own self-interest and not in combination with a non-labor group.[23] When unions act within these limitations, their essential activities—strikes, picketing, and boycotts—enjoy absolute statutory immunity from the antitrust laws. Paradoxically, this congressional grant of immunity does not extend to the product and goal of successful union activity: the collective bargaining agreement. The sole protection available in regard to the collective bargaining agreement is derived solely from the judicially extrapolated non-statutory exemption.

THE NON-STATUTORY EXEMPTION

The non-statutory exemption springs from Congress' strong expression of support in the Norris-La Guardia Act[24] and the Wagner Act[25] for the collective bargaining process and for judicial restraint in labor controversies. Its contours have developed from an accommoda-

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> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> (b) Becoming or remaining a member of any labor organization or of any employer organization. . .;
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> . . . .
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> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute. . .;
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> . . . .
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> 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 act enumerated. . . .

Id.; *see* F. FRANKFURTER & N. GREENE, *supra* note 9, at 200.

[23] United States v. Hutcheson, 312 U.S. 219, 231–37 (1941).

[24] *See* notes 20–22 *supra* and accompanying text.

[25] *See generally* Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960).

tion made by the courts between Congress' conflicting preferences for collective bargaining and a competitive marketplace.[26] Therefore agreements between employers and unions which produce market restraints are carefully scrutinized by the courts. Such agreements gain immunity under the non-statutory exemption in far more limited situations than do unilateral actions of unions under the statutory exemption.[27]

The limitation upon the scope of the statutory exemption that the union must have acted in its own self-interest has been applied to the non-statutory exemption as well.[28] However, the Supreme Court imposed additional limitations in *Allen Bradley Co. v. Local 3, IBEW*,[29] a case involving a union charged with conspiring with employers who manufactured electrical equipment to secure a price fixing arrangement in the New York City area.[30] The union participated in the scheme by mounting an aggressive campaign to obtain closed shop agreements with all manufacturers and contractors in the area, under which agreements the contractors were obligated to purchase equipment only from those manufacturers who also had closed shop agreements with the union.[31] Although the union was doubtless motivated by its own self-interest,[32] the Court held that the employer could not invoke the aid of the union in its attempt to establish a sheltered market.[33] The Court ruled that when a union and employer conspire to violate the antitrust laws through a collective bargaining agreement, both forfeit any right to the labor exemption.[34]

Two decades later the Supreme Court had the opportunity to review the scope of the labor exemption in the context of more subtle forms of anticompetitive behavior. In the first of two companion cases, *United Mine Workers v. Pennington*,[35] the union was charged with antitrust violations by a small independent coal producer premised upon an industry-wide agreement entered into between the

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[26] *See* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945).

[27] *E.g.*, Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 623, 625 (1975).

[28] Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 808 (1945).

[29] Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945).

[30] *Id.* at 798–800.

[31] *Id.*

[32] *Id.* at 799. The union clearly desired to increase union membership and wages and to expand employment opportunities for its members. *Id.*

[33] *Id.* at 809. After all, "if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." *Id.* at 810.

[34] *Id.* at 809–10.

[35] 381 U.S. 657 (1965).

union and the large coal producers to substantially increase wages.[36] It was claimed that this amounted to a conspiracy to destroy the smaller, less efficient coal operators who could not afford to pay the uniform wage scale.[37] Consistent with its earlier decision in *Allen Bradley Co.*, the Court held that if the allegations were proven the labor exemption would not apply since "[o]ne group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."[38] Furthermore, the Court held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[39] Thus, a union and the employer act at their own peril if, as part of a collective bargaining agreement, the union restricts its discretion in future negotiations outside the bargaining unit. A union may legitimately pursue a policy of bargaining for uniform industry-wide wage rates, unless the strategy of the union is suggestive of collusion and conspiracy with the employer. The Court further stated that it was "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers."[40]

On the other hand, in *Pennington's* companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[41] the collective bargain-

[36] *Id.* at 659–60.

[37] *Id.* at 663.

[38] *Id.* at 665–66.

[39] *Id.* at 665.

[40] *Id.* at 664; *see* NLRB v. Truck Drivers Local 449, 353 U.S. 87, 94–96 (1957). Justice White, speaking for the Court, emphasized that, although wages are a mandatory subject of collective bargaining, limits existed as "to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." 381 U.S. at 665.

In concurring opinion, Justice Douglas agreed that if, for the purpose of forcing some employers out of business, an industry-wide collective bargaining agreement established a wage scale exceeding the financial capabilities of some operators, then both the union and the conspiring employers would be guilty of violating the antitrust laws. *Id.* at 672–73 (Douglas, J., concurring). In addition, Justice Douglas argued that "[a]n industry-wide agreement containing those features is prima facie evidence of a violation," *id.* at 673, and noted:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 673 (quoting Interstate Circuit v. United States, 306 U.S. 208, 227 (1939)) (citations omitted).

[41] 381 U.S. 676 (1965).

ing agreement under attack was held exempt from the antitrust laws.[42] The controversy arose when, in the course of negotiating a new contract, the union rejected proposals by a multi-employer group that it eliminate the existing contract restrictions on market operating hours.[43] At the final bargaining session, most of the employers agreed to sign a contract retaining the provision.[44] Jewel Tea, however, signed the agreement only under the threat of a strike.[45] Jewel Tea then brought an action against the union alleging that the marketing hours restriction was an illegal restraint on trade accomplished by the union's combining with a non-labor party, one of the other employers.[46]

Although holding that the labor exemption did apply, the Supreme Court did not agree upon a rationale for the decision.[47] Justice White stated that the coverage of the antitrust laws had to be accommodated to the national labor policy.[48] Noting that bargaining in the areas of wages, hours, and working conditions was mandatory, Justice White indicated that "this fact weigh[ed] heavily in favor of antitrust exemption for agreements on these subjects."[49] However, he emphasized that in the absence of an actual conspiracy between union and employer, "[t]he crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members."[50] Justice White believed that the particular hours of the day in which employees were required to work was a mandatory subject of bargaining between employers and unions.[51] Furthermore, "although the effect on competition [was] apparent and real, . . . the concern of union members [was] immediate and direct."[52] Weighing their re-

[42] *Id.* at 688 (White, J., announcing judgment of Court).

[43] *Id.* at 680. The existing contract restricted working hours to "9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive," and also restricted market operating hours by providing that "[n]o customer shall be served who comes into the market before or after the hours set forth above." *Id.* at 679–80.

[44] *Id.* at 680.

[45] *Id.* at 681.

[46] *Id.*

[47] Justice White, who wrote the opinion of the Court in *Pennington*, announced the judgment of the Court and delivered an opinion which was joined in by the Chief Justice and Justice Brennan. Justice Goldberg, with whom Justices Harlan and Stewart joined, wrote an opinion concurring in the judgement in *Jewel Tea*, and dissenting from the opinion and concurring in the reversal in *Pennington*. Justice Douglas, joined by Justices Black and Clark, dissented in *Jewel Tea*.

[48] 381 U.S. at 689 (White, J.).

[49] *Id.*

[50] *Id.* at 690 n.5.

[51] *Id.* at 691.

[52] *Id.*

spective interests, Justice White concluded that "the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."[53] Thus, when the union's primary concern is so immediate and direct as to form an intimate relationship with the national policy in favor of collective bargaining, and the market restraint, although real, is not an immediate naked restraint, the non-statutory exemption from the antitrust laws will protect the agreement.

Justice Goldberg, on the other hand, contended that any collective bargaining agreement pertaining to mandatory subjects of bargaining was absolutely exempt from antitrust attack.[54] He believed that Justice White's balancing approach failed "to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining."[55]

Although the *Pennington* and *Jewel Tea* decisions demonstrated that the dimensions of the labor exemption had changed, they did little to specify the precise nature of the new perimeters. Lower courts were directed in appropriate cases to balance Congress' broad policy in favor of collective bargaining with its equally strong policy in favor of competition. However, the courts were provided scant guidance in determining the point at which the labor policies became "immediate and direct" or market restrictions rose above being merely "apparent and real." It has been argued that the underlying conflict between the Sherman Act and the legislation favoring collective bargaining "is so irreconcilable that, apart from entirely subordinating one to the other, the regulatory distinctions employed must be largely arbitrary—there are no general principles by which these policies can be harmonized."[56]

The confusion engendered by *Pennington* and *Jewel Tea* was heightened by the fact that the Court had split into three different groups, each composed of three members, and each supporting a different opinion.[57] Accordingly, the Supreme Court sought to take ad-

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[53] *Id.*

[54] *Id.* at 710 (Goldberg, J., concurring in the judgment).

[55] *Id.* at 697. Justice Douglas, on the other hand, would have denied the utilization of the labor exemption on the ground that there had been an illegal union-employer conspiracy to restrain trade. *Id.* at 737 (Douglas, J., dissenting).

[56] *See* Winter, *supra* note 9, at 16–17.

[57] *See* note 47 *supra* and accompanying text. Moreover, the Court's next opportunity to resolve these numerous ambiguities, American Federation of Musicians v. Carroll, 391 U.S. 99 (1968), proved unproductive. The Court did not adopt either Justice White's or Justice Goldberg's position, but merely held that the dispute involved two labor organizations, rather

vantage of the opportunity to reconcile its views in a later case, *Connell Construction Co. v. Plumbers Local 100.*[58] This case arose from the efforts of a building trade union to organize the mechanical subcontractors in the Dallas area.[59] The union's primary tactic was to picket general contractors in an effort to compel them to agree to deal only with subcontractors who were parties to the union's current collective bargaining agreement.[60] The union did not seek to represent the employees of the general contractors.[61] Connell Construction Co. reluctantly capitulated to the union pressure and signed the subcontracting agreement. Shortly thereafter, Connell instituted suit seeking a declaration that the agreement was an illegal restraint on competition.[62]

The Court held that the union's activities were outside the labor exemption. Justice Powell, speaking for a majority of the Court,[63] attempted to clarify the opinions in *Pennington* and *Jewel Tea*, and in the process greatly extended the implications of those decisions. The Court found that the union's subcontracting agreement with Connell was a direct restraint on competition because it excluded some subcontractors from the market simply because they were non-union.[64] Due to the methods employed in pursuit of their legitimate union goal, the union was not entitled to the labor exemption since "[l]abor policy clearly does not require . . . that a union have freedom to impose direct restraints on competition among those who employ its members."[65] The Court was of the opinion that in the face of mar-

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than a conspiracy with a non-labor group, and thus the controversy fell firmly within the *Hutcheson* labor exemption. *Id.* at 105–07.

[58] 421 U.S. 616 (1975).

[59] *Id.* at 618–19.

[60] *Id.*

[61] *Id.* at 619.

[62] *Id.* at 620–21. However, it should be noted that Connell Construction Co. did not allege an unlawful conspiracy. *Id.* at 625 n.2.

[63] Justice Powell was joined in his opinion by Chief Justice Burger and by Justices White, Blackmun, and Rehnquist. Justice Douglas and Justice Stewart, who was joined by Justices Douglas, Brennan and Marshall, filed dissenting opinions.

[64] 421 U.S. at 623. Moreover, the Court stated:

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a non-statutory exemption from the antitrust laws.

Id. at 625.

[65] *Id.* at 622.

ket restraints whose nature offended the fundamental policies of the Sherman Act, the national labor policies carried little weight in view of the fact that the union had no interest in organizing the employees of the contractor whom they picketed.[66] The Court did not address the question of whether a more immediate and direct interest, such as the existence of a collective bargaining relationship between the parties, would have changed the results.[67]

When *Connell* is read in light of the prior decisions it embraced, an outline of the scope of the labor exemption may be seen. In regard to labor negotiations which result in a union-employer agreement, the courts have developed definite criteria by which to determine the applicability of the labor exemption. First, the exemption is inapplicable unless a bona fide union seeks to employ the agreement in furtherance of the union's self-interest. Second, even when the union is acting in its self-interest, it may not combine with non-labor groups in a conspiracy to impose market restraints. Third, the labor exemption does not apply when a union restricts its discretion in future negotiations outside the bargaining unit. Fourth, when a union pursues its own self-interest by entering into an agreement with a non-labor party in an alleged restraint of trade, it becomes necessary to weigh the relevant competing policy considerations inherent in the Sherman Act and the Wagner Act. *Jewel Tea* suggest that the Court will tip the scales in favor of labor in a case in which the national labor policy interests are strong and the antitrust ramifications are comparatively weak.[68] On the other hand, *Connell* demonstrates that the Court will have no hesitation in withholding the labor exemption when the effect on the national labor policy is minimal while, due to the existence of a direct restraint on competition, the antitrust considerations loom large.[69] Figure 1 summarizes the application of these criteria.

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[66] *Id.* at 626.

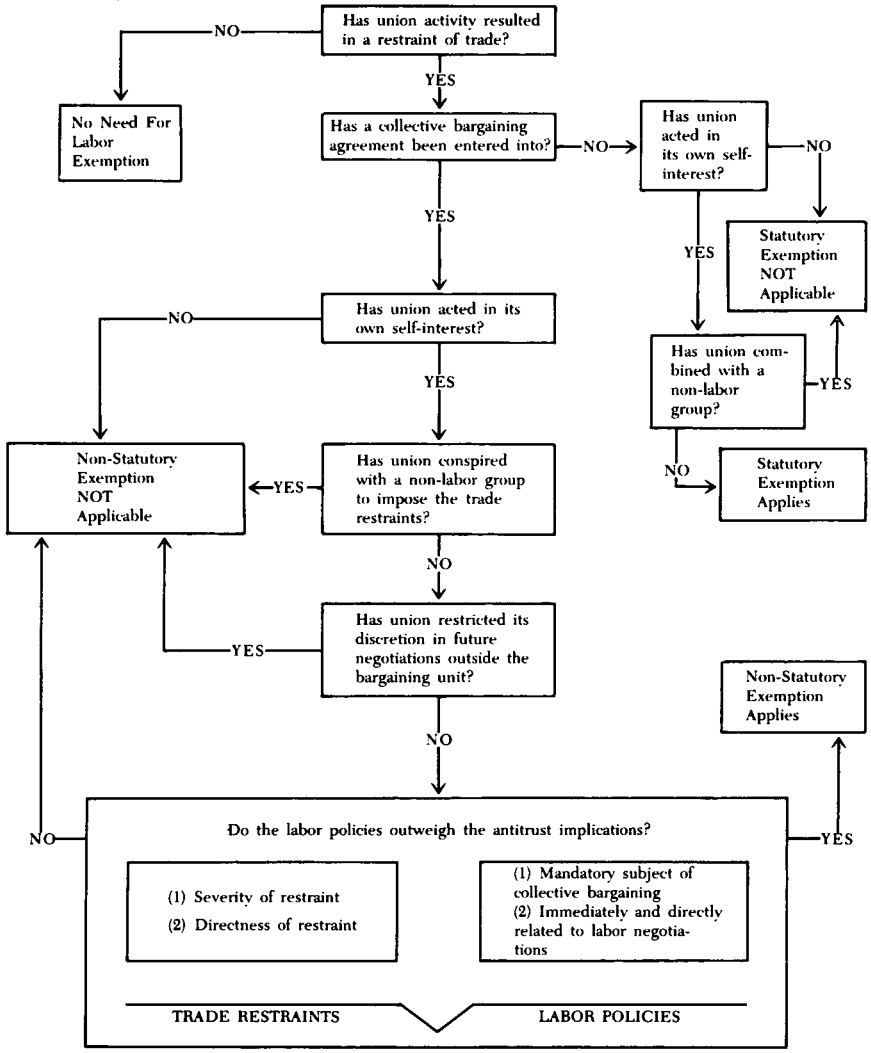
[67] The National Labor Relations Board and several courts have concluded that market restraints, similar to those which existed in *Connell*, are entitled to an antitrust exemption if a collective bargaining relationship exists between the signatories of the collective bargaining agreement. *See*, California Dump Truck Owners Ass'n Inc. v. Associated Gen. Contractors, San Diego Chapter, 562 F.2d 607 (9th Cir. 1977), Bullard Contracting Corp. v. Laborers Local 91, ___ F. Supp. ___ (W.D.N.Y. 1979), 100 L.R.R.M. 2951; Carpenters Local No. 94 v. Woelke & Romero Framing, Inc., 239 N.L.R.B. No. 40 (1978).

[68] *See* text accompanying notes 41–55 *supra*.

[69] *See* text accompanying notes 58–66 *supra*.

Figure 1

THE LABOR EXEMPTION



CONCLUSION

Two of Congress' fundamental policies—the advancement of labor-management harmony and free competition—frequently come into conflict with each other. In order to resolve this difficult quandary the United States Supreme Court has utilized two types of labor exemptions to antitrust law: statutory and non-statutory. Although the

statutory exemption absolutely immunizes the major weapons of union activity, strikes, pickets, and boycotts, it does not protect the results of these strategies: the collective bargaining agreement. The statutory exemption applies only to situations involving unilateral union activity, and not to instances in which a union joins with a non-labor party in a negotiated contract that creates market restraints.

Realizing the inability of such a system to adequately protect the national labor policy of encouraging collective bargaining, the Supreme Court has recognized a limited non-statutory exemption for collective bargaining agreements, provided certain requirements are met: (1) the agreement was the end result of bona fide negotiations; (2) the agreement was not a part of a union-employer conspiracy to restrain trade; and (3) the agreement did not restrict the union in its bargaining with third parties. If all of these threshold requirements are satisfied, the conflicting national policies of labor and competition are then balanced to determine whether application of the labor exemption is appropriate.

Unfortunately, the Court has not indicated how it would resolve a controversy involving both strong labor and strong antitrust policy considerations. Until such a dispute is resolved by the Supreme Court, the full extent and scope of the non-statutory antitrust labor exemption will remain in doubt.