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Brown v. Pro Football, Inc.: Labor's Antitrust Touchdown Called Back; United States Supreme Court Reinforces Nonstatutory Labor Exemption from Antitrust Laws

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NOTES

BROWN v. PRO FOOTBALL, INC.: LABOR'S ANTITRUST TOUCHDOWN CALLED BACK; UNITED STATES SUPREME COURT REINFORCES NONSTATUTORY LABOR EXEMPTION FROM ANTITRUST LAWS

I. INTRODUCTION

Justice Breyer opined that the question presented in *Brown v. Pro Football, Inc.* arose "at the intersection of the Nation's labor and antitrust laws."[1] That this intersection has always been the source of confusion and uncertainty is an understatement. Peruse any newspaper. Watch any television news program. Listen to any radio broadcast. It appears that athletes and their employers compete as vigorously in the courts as they do on their respective playing fields.[2] Fortunately, the Court left all future travelers through this intersection a useful compass with which to navigate this infamous convergence of law and public policy.

Although *Brown* ostensibly involved professional athletes, by declining to distinguish athletes from other organized workers, the Court has provided a

1. Brown v. Pro Football, Inc., 116 S.Ct. 2116, 2119 (1996).

2. *See* Pete Foley, *Can the NFL and the Players Be Successful as Partners?*, N.Y. TIMES, Jan. 10, 1993, § 8, at 9 (discussing the "rancorous nature of the parties' past legal battles" and questioning their ability to work together).

legacy which affects the entire organized workforce.[3] The Court's decision "was the culmination of over two decades of litigation that focused largely around the issue of whether and when player unions can bring antitrust suits against league practices in order to enhance their leverage in collective bargaining with the leagues."[4]

Beginning with the passage of the Sherman Act in 1890,[5] Congress enacted legislation to foster and protect competition in the American marketplace.[6] The Sherman Act embodied both a national economic and social policy.[7] At the time the Act passed, there was no cohesive federal labor policy and many of the early antitrust cases were directed against labor unions.[8] The Clayton Act of 1914 exempted labor from antitrust enforcement,[9] and strictly limited the role of the courts in most labor-antitrust matters.[10] However, in *Duplex Print-*

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3. Although Justice Breyer and the majority of the Court recognized that there were some unique aspects to the sports business, the Court dismissed these as irrelevant to the labor exemption question. In his dissent, Justice Stevens pointed to various features of the "parties' collective bargaining relationship which, in the dissent's view make this case "atypical," the Court concluded that "[u]ltimately, we cannot find a satisfactory basis for distinguishing football players from other organized workers. We therefore conclude that all must abide by the same legal rules." *See Brown*, 116 S.Ct. at 2126. In essence, the Court's holding is a "blanket finding that the employers in all multiemployer groups, in sports or not, have the right to unilaterally implement new terms of employment post-impasse without being subject to antitrust liability." *See* Gary R. Roberts, *Collective Bargaining in Sports After Brown v. Pro Football, Inc.*, THE SPORTS LAWYER (Sports Lawyers Assoc., Reston, Va.), Volume XIV, Fall 1996, at 14.

4. Roberts, *supra* note 3, at 1.

5. 15 U.S.C. §§ 1-7 (1992).

6. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) ("The Sherman Act is designed to promote the national interest in a competitive economy . . . .") (quoting American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968)); *see generally* I.P. AREEDA & D. TURNER, ANTITRUST LAW, ch 1B (1978); R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, ch. 2 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE, ch. 2 (1976); H. THORELLI, THE FEDERAL ANTITRUST POLICY 226-27 (1954); and R. HOFSTADTER, WHAT HAPPENED TO THE ANTITRUST MOVEMENT?, IN THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 205-11 (1965).

7. Senator Sherman stated:

> [t]he purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations . . . that have been applied in the several states. . . . It aims at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition. . . . If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity. 12 CONG. REC. 2455ff (1890).

See also H. Thorelli, *The Federal Antitrust Policy* 226-227 (1954) as quoted in Phillip Areeda & Louis Kaplow, *Antitrust Analysis* 53-54 (4th ed. 1988).

> Perhaps we are even justified in saying that the Sherman Act is not to be viewed exclusively as an expression of economic policy. In safeguarding rights of the "common man" in business "equal" to those of the evolving more "ruthless" and impersonal forms of enterprise the Sherman Act embodies what is to be characterized as an eminently "social" purpose. A moderate limitation of the freedom of contract was expected to yield a maximization of the freedom of enterprise.

8. *See* W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 123-28, 155-61 (1965); *see generally* Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 183, 1192-95 (1980) (discussing application of antitrust law to two early twentieth century labor cases).

9. Section 6 of the Clayton Act states:

> [t]he 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 purpose 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.

15 U.S.C. §§ 12-27 (1994).

10. The Clayton Act Section 20 provides in part that:

ing Press Co. v. Deering,[11] the Court narrowly construed Section 20 of the Clayton Act, holding that a legitimate secondary boycott was not sheltered from prosecution under the antitrust laws.

Congress responded by enacting the Norris-LaGuardia Act of 1932.[12] The Act declared that it is "the public policy of the United States that employees be permitted to organize and bargain collectively free of employer coercion . . . and in most cases barring altogether the issuance of injunctions in a 'labor dispute.'"[13] Congress protected labor until the mid-1930's by not regulating the "combat between labor and management, with each side mustering its economic resources—the union by striking and picketing, and the employer by discharge—to bring pressure upon the other."[14]

Congress then passed the Wagner Act, or National Labor Relations Act of 1935 ("NLRA"),[15] which forms the "heart of labor relations policy in the United States."[16] In *NLRB v. Jones & Laughlin Steel Corp.*, the Court sustained the constitutionality of the NLRA.[17] "Collective bargaining seeks to order labor markets through a system of countervailing power."[18] Employers commonly bargain as a group rather than singly, and the Court has explicitly declared multi-employee bargaining to be authorized by the NLRA.[19]

The conflict between labor and antitrust policy is apparent. All the buyers (employers) to which sellers (employees) can sell their services have agreed not to purchase these services except on certain terms, which is clearly a *per se*

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[n]o restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, 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, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

29 U.S.C. § 52 (1994).

11. 254 U.S. 443 (1921). The Court held that the Clayton Act only applied to controversies between employees and their immediate employers. *See id.* at 478.

12. 29 U.S.C. § 101 (1994) ("No court of the United States . . . shall have jurisdiction to issue any restraining order or permanent injunction in a case involving or growing out of a labor dispute . . . .").

13. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 4 (1976).

14. *Id. See, e.g.*, Apex Hosiery v. Leader, 310 U.S. 469 (1940) (the Court limited the reach of the Sherman Act as applied to labor unions); United States v. Hutcheson, 312 U.S. 219 (1941) (holding that the Norris-LaGuardia Act not only barred injunctions but also immunized labor activities against antitrust actions for treble damages and criminal relief).

15. 29 U.S.C. §§ 151-169 (1994).

16.

Workers involved in interstate commerce, which includes professional team sports, are covered by the National Labor Relations Act (NLRA), as amended. Section 7 of this law provides three basic rights that form the heart of labor relations policy in the United States: (1) the right to self-organization, to form, join, or assist labor organizations; (2) the right to bargain collectively through representatives of their own choosing; and (3) the right to engage in "concerted activities" for employees' mutual aid or protection. In short, workers are permitted to unionize, bargain collectively, and use pressure tactics (e.g., strike and picket) to achieve their legitimate objectives. Administration is carried out by the National Labor Relations Board (NLRB) and the federal courts.

RAY YASSER ET AL. SPORTS LAW 444-448 (3rd ed. 1996) (quoting PAUL D. STAUDOHAR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS 7-13 (1996)).

17. *See* 301 U.S. 1 (1937).

18. *Cf.* NLRB v. Truck Drivers' Union, 353 U.S. 87 (1957).

19. *See id.*

violation of the antitrust laws (price fixing).[20] On the other hand, when the employees (sellers) submit demands to the employers (buyers), the employees are themselves engaged in collusive conduct (all the sellers agree not to sell their services except on certain terms which would also be a *per se* violation of the antitrust laws (price fixing)).[21] If this structure of "countervailing power" is protected and encouraged by law, then "logically the antitrust claims between employers and employees must be extinguished."[22]

This Note examines the Court's opinion regarding the issue of whether antitrust liability should accrue as a result of the collective bargaining process. The Court, in reaching its decision, properly relied on its precedents and the applicable statutes and legislative history. The Court held that the federal labor laws shield the collective bargaining process, as long as the parties are engaged in conduct authorized by labor law. Although the Court termed its analysis the nonstatutory exemption, its reasoning is similar to historical statutory exemption analysis.[23] By either analysis, the Court resolved the issue of whether leagues can invoke the labor exemption when sued by a players union during collective bargaining efforts.[24] The Court's analysis was well reasoned and common sensical. Thus, this Note concludes that the judgement of the Supreme Court was well-founded.

Part II of this note describes the procedural and factual background of the *Brown v. Pro Football, Inc.* case. Part III reviews the legal background of the case *vis a vis* the antitrust and labor laws, and their intersection which created the statutory and nonstatutory labor exemptions from the antitrust laws. Part IV analyzes the reasoning of the Court's opinion, and discusses the major precedents upon which the Court relied.

II. STATEMENT OF THE CASE

A. Facts

The collective bargaining agreement between the NFL, a multi-employer bargaining unit, and the NFL Players Association ("NFLPA"), a labor union, expired in 1987.[25] This agreement governed the terms and conditions of employment for all professional football players.[26] After two years of bargaining to no avail, but during the course of contract negotiations, the NFL amended its

20. Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 21 (1971).

21. *See id.* at 21-22.

22. *Id.*

23. *See* Roberts, *supra* note 3, at 13.

24. *See id.* at 14.

25. *See Brown*, 116 S.Ct. at 2119. It should be noted that on January 6, 1993, the NFL and the Players Association agreed to a new seven year collective bargaining agreement. Gary Myers, *NFL, Players Reach Accord*, N.Y. DAILY NEWS, Jan. 7, 1993, at 59.

26. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1046 (D.C. Cir. 1995).

constitution by adopting Resolution G-2.[27] This resolution permitted each team to establish a "developmental squad" of six rookies, or first year players who had not earned a position on a regular player roster.[28] The plan provided that these "developmental squad" players would play in practice games, or during the regular season as substitutes for injured players.[29] Resolution G-2 further provided that each club would pay these squad players a fixed salary of $1,000 per week, with severe sanctions imposed on owners who paid developmental squad players more or less than $1,000 per week.[30]

The NFLPA balked at this proposal, insisting that the NFL give developmental squad players benefits and protections similar to those provided regular players, as well as the freedom to negotiate their individual salaries.[31] Prior to the implementation of Resolution G-2, it was customary practice in the NFL for player salaries to be determined through individual negotiation.[32] The NFL and NFLPA bargained vigorously for two months, but negotiations on the issue of the developmental squad salaries and benefits reached an impasse.[33]

The NFL then unilaterally imposed the developmental squad program on the union when they included the provisions of Resolution G-2 in the players' uniform contract.[34] The NFL teams were advised that deviation from the terms of Resolution G-2 would result in disciplinary action which may include the loss of future draft choices.[35]

B. Procedural History

On May 9, 1990, plaintiffs, professional football players on developmental squads of the twenty-eight National Football League teams during the 1989 regular and post-seasons, brought this class action.[36] Defendants are each of the teams which comprise the National Football League, and the National Football League (NFL) itself.[37] Plaintiffs alleged that defendants engaged in price-fixing, in violation of the Sherman Act, by fixing plaintiffs' salaries at $1,000 per week.[38]

The next four years of litigation proved victorious for the plaintiffs. On

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27. *See id.* at 1046.
28. *See Brown*, 116 S.Ct. at 2119.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See Brown*, 50 F.3d at 1046.
33. *See id.* Impasse is a term of art that refers to "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *See generally* ROBERT A. GORMAN, *supra* note 13, at 448. Impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." N.L.R.B v. Tex-Tan, Inc., 134 N.L.R.B. 253 (1961), *modified on other grounds* 318 F.2d 472 (5th Cir. 1963). In *N.L.R.B. v. Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enf'd sub nom. AFTRA v. N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968), the court made it clear that an employer may make unilateral changes that are reasonably comprehended within pre-impasse proposals.
34. *See Brown*, 50 F.3d at 1047.
35. *See id.*
36. *See* Brown v. Pro Football, Inc., 782 F.Supp. 125, 127 (D.D.C. 1991).
37. *See id.*
38. *See id.*

March 10, 1992, the District Court held that the defendants' agreement to fix the developmental players' salaries violated the Sherman Act, and the court permitted the case to reach a jury on the issues of antitrust injury and damages.[39] The jury awarded damages, which were subsequently trebled in accordance with Section 4 of the Clayton Act,[40] procuring a judgement against the teams, as well the NFL, in the amount of $30,349,642.[41] In addition, the court permanently enjoined the teams and the NFL from ever agreeing on "a uniform regular-season salary for any category of players whom defendants may at any time employ."[42] The plaintiffs were awarded attorney fees and expenses in the amount of $1,744,578.41.[43]

The Court of Appeals (by a split 2-to-1 vote) reversed, holding that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[44] Consequently, the Court of Appeals held that the NFL and its teams were shielded by the nonstatutory labor exemption from any antitrust liability.[45]

The Supreme Court granted the plaintiff players' petition for a writ of certiorari, but affirmed the judgement of Judge Edwards of the Court of Appeals by an 8-1 decision, holding that the federal labor laws shielded the defendants' actions from antitrust attack.[46]

C. The Issue Before the United States Supreme Court

The issue before the Court was whether the Court of Appeals properly determined that the labor laws "waiv[ed] antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[47] In analyzing this issue, the Court reviewed both labor and antitrust laws, precedent and policies. The Court affirmed, holding that the "implicit ('nonstatutory') antitrust exemption applies to the employer conduct at issue" in this case.[48] However, the Court declined to hold that every joint imposition of terms by employers would be insulated from antitrust review.[49] In addition, the Court declined to draw exact boundaries for the antitrust-labor playing field, holding that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule

39. *See id.* at 139.
40. 15 U.S.C. § 15 (1988).
41. *See Brown*, 50 F.3d at 1047.
42. *Brown*, 821 F.Supp. 20, 25 (D.D.C. 1993).
43. *Brown*, 846 F.Supp. 108, 120 (D.D.C. 1994).
44. *Brown*, 50 F.3d at 1056.
45. *See id.* at 1058.
46. *See Brown*, 116 S.Ct. at 2119.
47. *Brown*, 116 S.Ct. at 2119 (quoting *Brown*, 50 F.3d at 1056).
48. *Id.* at 2127.
49. *See id.*

permitting antitrust intervention would not significantly interfere with that process."[50]

III. LEGAL BACKGROUND

A. *Antitrust Law*

The purpose of federal antitrust law, as embodied in the Sherman Act of 1890,[51] is to promote competition.[52] Section 1 of the Sherman Act, if literally interpreted,[53] would condemn many legitimate and necessary business activities.[54] The Court, recognizing that all agreements can be said to restrain trade in some manner, rejected a literal interpretation of the statute, and instead adopted the "Rule of Reason" approach holding that the general language of Section 1 prohibits only "unreasonable restraints" on trade.[55] The threshold question in antitrust law is whether the restraint at issue is to be evaluated under "Rule of Reason" analysis or to be characterized as a *per se* violation of the Sherman Act.[56]

The reasonableness of a challenged restraint depends on the outcome of an inquiry into the restraint's effect on competition: balancing the anticompetitive effects of the restraint with any procompetitive effects;[57] an analysis of the history, purpose and effect of the restraint;[58] and, whether there are less restrictive

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50. *Id.*

51. 15 U.S.C. §§ 1-7 (1992).

52. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985) (The "Sherman Act is designed to promote national interest in a competitive economy."); Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986) (The "Supreme Court . . . has instead stressed that the antitrust laws seek to protect competition.").

53. 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1995).

54. *See, e.g.*, Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Applying the Sherman Act literally would destroy the free market system.); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) ("The express language of the Sherman Act is broad enough to render illegal nearly every type of agreement between businessmen.").

55. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 65-66 (1911) (Anticompetitive acts are tested by "the rule of reason, in light of the principles of law and the public policy which the act embodies.").

56. There are a myriad of legal commentaries *vis a vis per se* and rule of reason standards. *See generally*, Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Parts I & II*, 74 YALE L.J. 775 (1965); von Kalinowski, *The Per Se Doctrine — An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569 (1964); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1164); Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

57. *See, e.g., Chicago Bd. of Trade*, 246 U.S. at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978) (procompetitive benefits must offset anticompetitive effect).

58. *See* National Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978) (competitive effect analyzed by evaluating the business involved, the history of the restraint, and the reasons for the restraint).

means or alternatives to realize legitimate, procompetitive objectives.[59] To determine what is reasonable requires extensive judicial inquiry into the nature, purpose, and effect of the restraint by considering "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable."[60] In addition, an analysis must be conducted of "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained."[61]

There are, however, certain practices that the Court has concluded are so unreasonable and anticompetitive that they are unreasonable *per se*.[62]

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[63]

The *per se* rule is generally applied to business situations with which the courts have had significant experience dealing with the challenged practice.[64] So, not all restraints on trade are illegal, only those judged to be unreasonable.[65] The courts have found various business arrangements unreasonable *per se* such as price fixing,[66] market allocation,[67] group boycotts,[68] resale price maintenance,[69] and vertical territorial restrictions.[70]

During the 1970's the Court altered its antitrust stance by overruling or limiting applications of the various *per se* categories.[71]

> These and similar decisions protected antitrust defendants from *per se* rulings of illegality on motions for summary judgement. In each of the

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59. *See Smith*, 593 F.2d at 1187-89 (significantly less anticompetitive alternatives exist to challenged draft system).

60. *Chicago Bd. of Trade*, 246 U.S. at 238 (1918).

61. *Id.*

62. *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980) (vertical price fixing); United States v. Topco Ass'n, 405 U.S. 596, 609-11 (1972) (horizontal market allocation); Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) (group boycotts and concerted refusals to deal where intent is to restrain competition).

63. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1956).

64. *See Topco Ass'n*, 405 U.S. at 607-08 ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

65. *See, e.g.*, Standard Oil v. United States, 221 U.S. 1 (1911).

66. Price fixing occurs when competitors at the same level such as wholesale and retail, reach agreements which have the effect of lessening price competition. *See, e.g.*, United States v. Socony Vacuum, 310 U.S. 150 (1940); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); Doctor Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

67. Market allocation occurs when competitors mutually agree not to invade each others' sales territories. *See, e.g., Topco Ass'ns*, 405 U.S. at 596; Timken Roller Bearing Co. v. United States, 341 U.S. 373 (1951).

68. Group boycotts occur when commercial entities agree to refuse to deal with another entity for the purpose of improperly influencing the latter's business practices. *See, e.g., Klor's, Inc.*, 359 U.S. at 207; Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

69. *See, e.g., Doctor Miles Medical Co.*, 220 U.S. at 373.

70. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

71. *See, e.g.*, Broadcast Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1958); and Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36 (1977).

> cases described above, on remand from the Supreme Court the lower courts found the challenged conduct to be legal after careful Rule of Reason review, thus corroborating the Court's view that productive efficiencies generated by the challenged agreements might render them socially desirable. No longer, then, does the fact that an agreement decreases "competition" in a general sense automatically result in antitrust illegality.[72]

The past impotence of the antitrust laws in the sports context can be attributed to the Supreme Court's decision to grant antitrust immunity to baseball.[73] The Court's treatment of baseball characterized the antitrust status of the entire sports industry for the first several decades of this century.[74] It was not until the 1950's that the Court decided other sports would not enjoy the same status as baseball.[75] This effective immunity came to an abrupt halt in the early 1970's when each of the professional leagues in football, basketball and hockey was involved in antitrust litigation.[76] The contests involved some of the most basic attributes of the existing institutional structure, especially the contractual devices used to control the movement of players among league clubs.[77]

The surge in antitrust cases and the resultant decisions laid the groundwork for application of the labor exemption removing many player issues from the purview of the antitrust laws. This exemption is afforded to employment related agreements arrived at through collective bargaining agreements.[78] "If the play-

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72. PAUL C. WEILER & GARY R. ROBERTS, CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW 135 (West ed. 1993).

73. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972), *aff'g* 443 F.2d 264 (2d Cir. 1971), *aff'g* 316 F.Supp. 271 (S.D.N.Y. 1970); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *aff'g per curiam*, 200 F.2d 198 (9th Cir. 1952), *aff'g per curiam* 101 F. Supp. 93 (S.D. Cal. 1951); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Clubs, 259 U.S. 200 (1922), *aff'g* 269 F. 681 (D.C. Cir. 1920); Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101, *aff'g* 368 F.Supp. 1004 (D. Ore. 1974); Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970); Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc., 282 F.2d 680 (9th Cir. 1960); American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (1914); Wisconsin v. Milwaukee Braves, Inc., 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966); Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983); Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 725-41 (1981); Steinberg, *Application of the Antitrust and Labor Exemptions to Collective Bargaining of the Reserve System in Professional Baseball*, 28 WAYNE L. REV. 1301 (1982); Comment, *Nearly a Century in Reserve: Organized Baseball, Collective Bargaining and the Antitrust Exemption*, 8 PEPPERDINE L. REV. 313 (1981); Comment, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403 (1973); Note, *Antitrust Laws and Professional Sports: Attacks on Player Restraints and League Controls of Competition*, 1980 N. ILL. U.L. REV. 15, 17-21; Note, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemptions*, 7 IND. L. REV. 541 (1974).

See generally RAY YASSER ET AL, SPORTS LAW CASES AND MATERIALS 449 (3rd ed. 1996).

Professional baseball was held exempt from the reach of the antitrust statutes in the *Federal Club of Baltimore* case in 1922. The United States Supreme Court, in 1972, ruled that professional baseball was a matter of interstate commerce, but respected and followed *stare decisis* to uphold baseball's exemption from the antitrust laws. Other professional sports leagues have not received the benefit of an exemption from the statutes.

74. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 477 (1979).

75. *See id.*

76. *See id.*

77. *See, e.g., Mackey*, 543 F.2d at 606; Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D.N.Y. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462 (E.D. Pa. 1972).

78. *General Citations*: Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975);

ers unions and clubs undertake to settle player-related issues at the bargaining table, and if agreement results from good faith bargaining, the labor exemption will likely operate to preclude the courts from undertaking a substantive review of the terms agreed upon."[79]

B. *Labor Law*

The National Labor Relations Act[80] contains the corpus of federal law pertaining to labor-management relations.[81] Originally known as the Wagner Act of 1935, the NLRA made collective bargaining the rule rather than the exception.[82] The NLRA granted workers the right to engage in "concerted action" by protecting such action from employer retaliation.[83] The statute also established a structure for the recognition of unions as exclusive bargaining representatives for workers, and imposed on employers a duty to bargain with them.[84] Because the NLRA is based upon the commerce clause of the Consti-

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American Fed'n. of Musicians v. Carroll, 391 U.S. 99 (1968); UMW v. Pennington, 381 U.S. 657 (1965); Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945); *Apex Hosiery Co.*, 310 U.S. at 469; Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921);

Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094 (1962); Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B. U. L. REV. 317 (1966); Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14 (1963); Comment, *Labor's Antitrust Exemption*, 55 CALIF. L. REV. 254 (1967); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966); Comment, *Labor Law and Antitrust: "So Deceptive and Opaque Are the Elements of These Problems,"* 1966 DUKE L.J. 191; Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684 (1968).

Sports Citations: *Flood*, 407 U.S. at 293-06 (Marshall, J. dissenting); *Mackey*, 543 F.2d at 606, *modifying* 407 F. Supp. 1000 (D. Minn. 1975); *Robertson*, 389 F. Supp. at 867; Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); *Philadelphia World Hockey Club, Inc.*, 351 F. Supp. at 462; Boston Professional Hockey Ass'n. v. Cheevers, 348 F. Supp. 262 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972);

Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685 (1981); Steinberg, *Application of the Antitrust and Labor Exemptions to Collective Bargaining of the Reserve System in Professional Baseball*, 28 WAYNE L. REV. 1301 (1982); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971); Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining in Professional Sports*, 57 N.Y.U. L. REV. 164 (1982); Note, *The Battle of the Superstars: Player Restraints in Professional Team Sports*, 32 U. FLA. L. REV. 669 (1980); Comment, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Exemption*, 7 IND. L. REV. 541 (1974).

79. WEISTART & LOWELL, *supra* note 74, at 478.

80. 29 U.S.C. §§151-69 (1994).

81. *See generally* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976)

> The National Labor Relations Act is the primary body of federal law controlling labor-management relations in private industry. The Act was shaped in three major cycles: the Wagner Act in 1935, the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959. The basic principle of the NLRA is to be found in its section 7, granting to employees the right to form labor organizations, to deal collectively through such organizations regarding terms and conditions of employment and to engage in concerted activities in support of these other rights. The statute can best be understood as an effort by the Congress to create the conditions of industrial peace in interstate commerce by removing obstacles to-indeed, encouraging-the formation of labor unions as an effective voice for the individual worker.

Id.

82. *See id.*

83. *See id.*

84. *See id.* at 374, 379.

tution,[85] its coverage is coextensive with that clause's reach.[86] Therefore, in order to decide whether an industry is subject to the NLRA, a determination must be made as to whether that industry affects interstate commerce.[87]

There is no doubt that the NLRA covers the sports industry in light of the Supreme Court's holding that "[p]rofessional baseball is a business . . . engaged in interstate commerce."[88] The Court has made similar findings with respect to football,[89] basketball,[90] boxing,[91] hockey,[92] and golf.[93] A further question arises as to whether the players associations are "labor organizations," defined as "any organization . . . which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[94] Therefore, any employee group, including the players associations, that deals with employers about wages and other conditions of employment is classified as a labor organization. Although players' unions have been around for some time, they have only been engaged in collective bargaining since the formation of players' associations in each of the professional leagues in the 1960's.[95]

The conflict between antitrust and labor policy is ongoing. "Although labor legislation has been amended several times . . . to correct perceived imbalances, it has not always proven adequate to the task of fairly resolving industrial disputes."[96]

C. *The Intersection of Antitrust Law and Labor Law*

Antitrust laws and labor laws intersect in the form of the "labor exemption."

Simply put, the labor exemption from antitrust arises out of the need to

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85. U.S. CONST. art. I, § 8, cl. 3.

86. *See, e.g.*, N.L.R.B v. Fainblatt, 306 U.S. 601, 607 (1939); *Jones & Laughlin Steel Corp.*, 301 U.S. at 1; Pappas v. American Guild of Variety Artists, 125 F. Supp. 343, 344 (N.D. Ill. 1954).

87. *See Fainblatt*, 306 U.S. at 601.

88. *Kuhn*, 407 U.S. at 282.

89. *See, e.g.*, Radovich v. National Football League, 352 U.S. at 445; *Kapp*, 390 F.Supp. at 73.

90. *See, e.g.*, Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); *Robertson*, 389 F.Supp. at 867.

91. *See* United States v. International Boxing Club, 348 U.S. 236 (1955).

92. *See Philadelphia World Hockey Club, Inc.*, 351 F. Supp. at 462.

93. *See, e.g.*, Blalock v. Ladies Prof'l Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1967).

94. 29 U.S.C. § 152(5) (1994).

95. The Major League Players Association was formed in 1954; the National Football League Players Association was formed in 1956; the American Football League Players Association was formed in 1963, and the two associations were joined in 1970 after the leagues merged; the National Basketball Association Players Association was formed in 1962 and the American Basketball Association Players Association was formed in 1968; and the National Hockey League Players Association was formed in 1967. For an interesting account of the procedures used to turn the National Football Leagues Players Association into a viable collective bargaining participant, *see* Shulman & Baum, *Collective Bargaining in Professional Athletics — The NFL Money Bowl*, 50 CHI. B. REC. 173, 175 (1969). *See also* Soar v. National Football League Players Ass'n, 438 F. Supp. 337 (D.R.I. 1975), *aff'd*, 550 F.2d 1287 (1st Cir. 1977) (describing the development of the National Football League Players Association).

96. Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 2 (1983); *see also* The Clayton Act, ch 323, §§ 6, 20, 38 Stat. 730, 738.

> reconcile the conflicting mandates of federal antitrust law, which requires separate persons to compete and not act in concert in order to influence output and prices, and federal labor law, which almost by definition requires collective action by groups of workers and good faith bargaining toward an agreement that often adversely affects output and prices. The underlying notion is because antitrust law primarily focuses on protecting consumers in the product market, and labor law reflects a policy judgement that collective bargaining is the most appropriate way of establishing terms and conditions of employment in the labor market, antitrust law can only be applied when it does not unduly burden or tend to undermine the fundamental tenets or pillars upon which collective bargaining rests.[97]

The antitrust labor exemption is characterized as either "statutory," partly arising from the express language of Section 6 of the Clayton Act of 1914, which provides in part that "[t]he labor of a human being is not a commodity or article of commerce,"[98] or "nonstatutory." The statutory exemption was further enhanced by the passage of the Norris-LaGuardia Act of 1932[99] and the National Labor Relations Act in 1937.[100] By broadening the scope of protected union activity,[101] and promoting collective bargaining between a union and its employer,[102] which effectively meant shared control of wages, hours, and other terms and conditions of employment,[103] Congress made labor a statutory field where federal regulations replaced competitive rules. However, "[f]or reasons that are not entirely clear, the express (or statutory) exemption has never been the focus of sports litigation . . . ."[104]

> Inasmuch as restraints impacting only on the labor market, and having no direct impact on product price or quality, affect only competition for the employment of the labor of a human being, the statutory language strongly suggests that such restraints have been removed from the scope of the Sherman Act.[105]

In 1965, the Supreme Court first recognized the nonstatutory labor exemption from the antitrust laws in *Local Union No. 189, Amalgamated Meat Cut-*

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97. Roberts, *supra* note 3, at 1.

98. *See supra* note 9 and accompanying text.

99. *See supra* notes 12-14 and accompanying text.

100. *See supra* notes 15-19 and accompanying text.

101. 29 US.C. § 102 (1994).

102. *See* 29 U.S.C. § 158(d) (1994). To bargain collectively requires that:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

103. *See, e.g.*, Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408 (1958) ("An employer must look upon labor as an equal partner, and . . . one partner cannot do anything without consulting the other partner . . . . Wages, hours, and conditions of employment should be determined by mutual consent."). *See also* Shawn Treadwell, Note, *An Examination of the onstatutory Labor Exemption From the Antitrust Laws, In the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955 (1996).

104. Roberts, *supra* note 3, at 11. *See also* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986).

105. Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 340 n.8 (1986).

ters v. Jewel Tea Co.[106] In *Jewel Tea,* the Court applied the exemption to a provision in a collective bargaining agreement between the Chicago butcher's union and a multi-employer bargaining group of large grocery stores. The agreement provided that the stores would not sell fresh meat after 6 p.m. in consideration that the union would not enter into a separate agreement with any other member of the grocers' bargaining unit not containing the same restriction on meat sales.[107] The Court stated the issue was:

> whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.[108]

The Court held that the agreement was the product of good faith bargaining between the employers and the unions, and concerned wages, hours, and working conditions which were all mandatory subjects for collective bargaining under the NLRA.[109] The Court balanced national labor policies against the antitrust implications of the collective bargaining agreement, and exempted the terms from antitrust scrutiny because they related to matters of fundamental employee interest under the NLRA.[110] The Court held that "national labor policy . . . places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."[111] The Court explained that it applied a labor exemption to the agreement to "accommodat[e] the coverage of the Sherman Act to the policy of the labor laws."[112]

In *Jewel Tea,* Justice Goldberg's separate opinion argued that since negotiating parties are under a legal duty to bargain about mandatory subjects of bargaining, all such subjects should be exempt from the antitrust laws.[113] Justice Goldberg concluded that:

> [T]he National Labor Relations Act . . . declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon the employers and unions engaged in such collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they

106. *See Jewel Tea,* 381 U.S. 676 (1965).
107. *See id.* at 676-81.
108. *Id.* at 689-90.
109. *See id.* at 689.
110. *See id.* at 691.
111. *Id.*
112. *Id.* at 689.
113. *See id.* at 700-09.

reach an agreement is to stultify the congressional scheme.[114]

In *United Mine Workers v. Pennington*,[115] decided the same day as *Jewel Tea*, the Court found that the exemption did not apply.[116] The exemption will not apply when unions "aid non-labor groups to create business monopolies."[117] In *Allen Bradley*, the Court added "the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combination with business groups."[118] However, in *Pennington*, the Court did explain that the exemption reflected the need for "harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.'"[119]

Subsequently, in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*,[120] the Court held that the nonstatutory labor exemption only applies to agreements made through collective bargaining.[121] In *Connell*, the union negotiated with contractors to compel them to subcontract only to businesses that had a collective bargaining agreement with the union.[122] The Court found that since the union did not have a collective bargaining relationship with the contractors, the agreement between the union and the contractors

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114. *Id.* at 711-12.

115. 381 U.S. 657 (1965). In *Pennington*, the challenged agreement provided for large wage increases for the employees of large mine operators using automated equipment that the union agreed to demand from small companies as well. *See id.* The Court found that the affect would be to eliminate the smaller coal companies. *See id.* The Court held:

> We have said that a union may make wage agreements with a multi-employer bargaining unit, and may, in pursuance of its own union interests, seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think 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. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

Id. at 665.

116. The Court had previously limited the labor exemption by its decision in *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945). In *Allen Bradley*, an electrical workers union in New York negotiated a closed-shop agreement with local manufacturers and contractors, and excluded all purchases of equipment manufactured outside their agreed territory. Some of the excluded manufacturers sued Local 3 under antitrust theory. The Court stated that "this combination of businessmen [the New York electrical manufacturers and contractors] has violated . . . the Sherman Act, unless its conduct is immunized by the participation of the union." *Id.* at 800. Justice Black concluded:

> There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

Id. at 811.

117. *Id.* at 808.

118. *Id.* at 810.

119. *Pennington*, 381 U.S. at 665 (quoting Fireboard Paper Prods. Corps. v. N.L.R.B., 379 U.S. 203, 211 (1964)).

120. 421 U.S. 616 (1975).

121. *See id.* at 635.

122. *See id.* at 618-19.

could not be shielded by the nonstatutory labor exemption.[123] The Court held that the agreement did not pass antitrust muster because it negatively affected non-union companies which were not part of the collective bargaining relationship with the union.[124] The Court reasoned that the anticompetitive effects of the agreement on the non-union companies did not result from collective bargaining efforts, and therefore did "not follow naturally from the elimination of competition over wages and working conditions," which is what occurs between employees and employers in a collective bargaining relationship.[125]

In *Brown*, the legal existence of the labor exemption to the antitrust laws was conceded.[126] The parties also conceded that "where its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and employees."[127] Basically, this means that in order to claim the exemption, the parties exclusive to a collective bargaining relationship must bargain in good faith when negotiating hours, wages, and working conditions. The Court correctly found this to be the case in *Brown*.

IV. THE *BROWN* DECISION — AN ANALYSIS

In *Brown*, the Supreme Court affirmed the judgement of the Court of Appeals by an eight to one decision.[128] In so doing, the Court "interpreted the labor laws as 'waiv[ing] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining.'"[129]

In reaching its decision, the Court, speaking through Justice Breyer, took several analytical steps. First, the Court discussed the basis for the nonstatutory labor exemption from the antitrust laws.[130] The Court explained that this exemption reflects both history and logic, stating that Congress "hoped to prevent judicial use of antitrust law to resolve labor disputes—a kind of dispute normally inappropriate for antitrust law resolution."[131] The court further relied on its precedents, emphasizing that the:

> explicit "statutory" labor exemption reflected [the] view that "Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands." The implicit ("nonstatutory") exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area

123. *See id.* at 623.
124. *See id.* at 625.
125. *Id.*
126. Brown v. Pro Football, Inc., 116 S.Ct. 2116, 2121 (1996).
127. *Id.*
128. *See id.* at 2119.
129. *Id.*
130. *See id.* at 2120. *See supra* notes 79-125 and accompanying text.
131. *Id. See also* Local Union No. 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 700-09 (1965); *supra* notes 79-125 and accompanying text.

> of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations as to the appropriate legal limits of industrial conflict.[132]

Second, the Court analyzed the labor exemption *vis a vis* the antitrust laws. The Court reasoned that:

> [a]s a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, . . . to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.[133]

Next, the Court found that labor law regulates the type of behavior at issue in *Brown*—the postimpasse imposition of a proposed employment term concerning a mandatory subject of collective bargaining.[134] The Court noted specifically that both the NLRB and the courts have held that after impasse, "labor law permits employers unilaterally to implement changes in preexisting conditions, but only insofar as the new terms meet carefully circumscribed conditions."[135] The Court iterated some specific examples of these conditions.

For example, "the new terms must be 'reasonably comprehended' within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status."[136] In addition, the collective bargaining process itself must not be tainted by any unfair labor practices, such as a failure to bargain in good faith.[137] The Court explains that "[t]hese regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process."[138] The Court concludes that the practice at issue in Brown "plays a significant role in a collective-bargaining process that itself comprises an important part of the Nation's industrial relations sys-

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132. *Id.* (citations omitted).

133. *Brown*, 116 S.Ct. at 2120. *See* Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (federal labor law's "goals" could "never" be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws); *Jewel Tea*, 381 U.S. at 711 (national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining); United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965) (necessary to harmonize Sherman Act with "national policy of promoting the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation") (quoting Fireboard Paper Prods. Corp. v. N.L.R.B, 379 U.S. 203, 211 (1964)).

134. *See Brown*, 116 S.Ct. at 2121.

135. *Id.*

136. *Id.* at 2121. *See* Storer Communications, Inc., 294 N.L.R.B. 1056, 1090 (1989); Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *enf'd*, 395 F.2d 622 (D.C. Cir. 1968).

137. *See Brown*, 116 S.Ct. at 2121. *See* Akron Novelty Mfg. Co., 224 N.L.R.B. 998, 1002 (1976) (where employer has not bargained in good faith, it may not implement a term of employment).

138. *Brown*, 116 S.Ct. at 2121. *See* Bonanno Linen Serv., Inc., 243 N.L.R.B. 1093, 1094 (1979) (describing use of impasse as a bargaining tactic), *enf'd*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982); Colorado-Ute Elec. Assn., 295 N.L.R.B. 607, 609 (1989), *enf. denied on other grounds*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992).

tem."[139]

The Court then describes the consequences of subjecting collective bargaining practices to antitrust scrutiny. It concludes that requiring the courts to answer practical questions about how collective bargaining over wages, hours and working conditions is to proceed, would not only place the beneficial labor-related effects of multiemployer bargaining in jeopardy, but also be the "very result that the implicit labor exemption seeks to avoid."[140] These consequences occur

> because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever.[141] Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable,[142] or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision.[143] [144]

The Court then addresses the issue of what employers should do if impasse is reached in light of this dilemma. No matter which tactic the parties pursue, they invite antitrust liability. The Court blocked the Government's suggestion that antitrust courts try to evaluate particular kinds of employer understandings *vis a vis* their reasonableness in light of collective bargaining necessity.[145] The Court countered:

> any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.[146]

Other arguments, including many *amici*, were summarily blocked by the majority. The Solicitor General argued that the exemption should terminate at the point of impasse because "'employers no longer have a duty under the labor laws to maintain the status quo,' and 'are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union.'"[147]

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139. *Brown*, 116 S.Ct. at 2122.
140. *Id.*
141. *See, e.g.*, Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).
142. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 142-143 (1966).
143. *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 809-810 (1946); United States v. Masonite Corp., 316 U.S. 265, 275 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-227 (1939).
144. *Brown*, 116 S.Ct. at 2122.
145. *Id.* at 2123.
146. *Id.*
147. *Id.* at 2124 (quoting Brief for United States et al. as *Amici Curiae* 17).

First, the Court explained that employers are not completely free at impasse to act independently because the multiemployer bargaining unit remains intact.[148] In addition, the duty to bargain does not end and it is imperative that employers be prepared to resume bargaining.[149] The Court also pointed out that "individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with 'the duty to abide by the results of group bargaining.'"[150]

More importantly, according to the Court, "the simple 'impasse' line would not solve the basic problem we have described above [because after impasse the law permits employers] to engage in considerable joint behavior, including joint lockouts and replacement hiring."[151] Aggravating the problem is the fact that "impasse" is often temporary.[152] Again, the Court answers the problem with a question. How are employers to discuss future bargaining positions during a temporary impasse, and what if they guess wrong?[153]

The Solicitor General further suggests that the exemption be extended past impasse "'for such time as would be reasonable in the circumstances,'" that the exemption be reestablished once there is a "resumption of good-faith bargaining," and that the courts use antitrust law's rule of reason to shield certain joint actions.[154] However, the Court rejected these arguments explaining that it would result in "forcing . . . [the parties] to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide."[155]

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148. *See Brown*, 116 S.Ct. at 2124. *See also* Bonanno Linen v. N.L.R.B., 454 U.S. 404, 410-13 (1982).

149. *Brown*, 116 S.Ct. at 2124. *See also* Worldwide Detective Bureau, 296 N.L.R.B. 148, 155 (1989); Hi-Way Billboards, Inc., 206 N.L.R.B., 22, 23 (1973), *enf. denied on other grounds*, 500 F.2d 181 (5th Cir. 1974).

150. *Brown*, 116 S.Ct. at 2124 (quoting *Bonanno Linen*, 454 U.S. at 416.).

151. *Brown*, 116 S.Ct. at 2124. As a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union. *See generally* 1 HARDIN, THE DEVELOPING LABOR LAW, at 516-520, 696-699.

152. *Brown*, 116 S.Ct. at 2124-25. *See Bonanno Linen*, 454 U.S. at 412 (approving Board's view of impasse as a "recurring feature in the bargaining process . . . a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force").

> Both the labor team and the management team possess weapons for use in the process of collective bargaining. The player union may utilize the following tactics:
>
> 1. strikes with picketing;
> 2. formation of a new league;
> 3. generating a primary or secondary boycott of franchises.
>
> The player strike may be supported by funding from other unions or a developed strike fund. The union is instrumental in economically supporting the striking players during the strike. Management possesses the following tactics:
>
> 1. lockouts;
> 2. using loyal management ("scab") players;
> 3. cancellation of the season.
>
> Management is economically supported by strike insurance, a strike fund, or other reciprocal agreements among league franchise members. YASSER ET AL., *supra* note 16, at 448.

153. *See Brown*, 116 S.Ct. at 2125 ("Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.").

154. *Id.* (quoting Brief for United States et al. as *Amici Curiae* 24).

155. *Brown*, 116 S.Ct. at 2125. *See also* Dallas General Drivers, Warehousemen and Helpers, Local Un-

Finally, the Court dealt with the arguments that "irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is 'special.'"[156] Although the Court conceded that professional sports may be special in terms of "interest, excitement, or concern;" that football players "often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers;" and that the "clubs that make up a professional sports league are not completely independent economic competitors, as they depend on a degree of cooperation for economic survival;" Justice Breyer and the majority of the Court dismissed these somewhat unique aspects of sports as irrelevant to the labor exemption question.[157]

Giving further credence to the broad implications of the Court's holding, Justice Bryer stated: "Indeed, it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy."[158] The Court concluded there is no satisfactory basis for distinguishing football players from other organized workers, and therefore all workers must abide by the same rules.[159]

Despite a well reasoned dissent authored by Justice Stevens, the majority found that the nation's labor policy precluded finding an antitrust violation in the conduct at issue. Specifically, the Court held the nonstatutory antitrust exemption applied because the conduct (1) took place during and immediately after a collective-bargaining negotiation; (2) was part of and directly related to the lawful operation of the collective-bargaining process; (3) was a mandatory subject of collective-bargaining; and (4) concerned only the specific parties to the collective-bargaining relationship.[160]

Although the Court stated that its holding was "not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process,"[161] the Court declined to draw any boundary. Instead, the Court strengthened the position of the NLRB by stating that it would be inappropriate for the Court to draw boundary lines "without the detailed views of the Board, to whose 'specialized judgement' Congress 'intended to leave' many of the 'inevitable questions

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ion No. 745 v. N.L.R.B., 355 F.2d 842, 844-45 (D.C. Cir. 1966).

> The problem of deciding when further bargaining . . . is futile is often difficult for the bargainers and is necessarily so for the Board. But in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal . . . or better suited to the expert experience of a board which deals constantly with such problems.

Id.

156. *Brown*, at 116 S.Ct. at 2126.
157. *See id.*
158. *Id.*
159. *See id.*
160. *See id.* at 2127.
161. *Id.*

concerning multiemployer bargaining bound to arise in the future.'"[162]

V. CONCLUSION

The *Brown* decision specifically resolves the question of whether a league can invoke the labor exemption to the antitrust laws when sued by a union during efforts to conclude a new collective bargaining agreement. Because the Court refused to distinguish professional athletes from other workers, *Brown* will have a far reaching impact. It will give employers more leverage in their collective bargaining activities because the unions will not be able to threaten antitrust action to lobby for additional gains. Both employers and unions will have to resort to their traditional weapons of strikes and lockouts etc. .

The unions do have another choice, that is to decertify as a union. It is not clear what must be done to accomplish this drastic action. Previous attempts at decertification have resulted in settlement. Although discussion of this option is beyond the scope of this Note, look for some interesting maneuvers, involving union decertification allowing the antitrust laws to be used as a weapon, when the next round of collective bargaining agreements expire.

It does not appear that the Court could have decided this case any other way. To do so would jeopardize the entire labor management structure in the United States. Unions will have to live with the existing labor laws and policies. Although potential antitrust remedies exceed those available under labor law, labor law provide a more certain and structured playing field for both management and labor, which is much more practical given the nature of the economic system of the United States.

John J. Baroni

162. *Id.* (quoting N.L.R.B. v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957)); *see also* Local Union No. 1 189 Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 710 (1965).