



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 75 | Number 3

Article 6

---

3-1-1997

# Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity over the Entire Playing Field and Leaving the Game

Jonathan P. Heyl

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Jonathan P. Heyl, *Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity over the Entire Playing Field and Leaving the Game*, 75 N.C. L. REV. 1030 (1997).

Available at: <http://scholarship.law.unc.edu/nclr/vol75/iss3/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## ***Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity over the Entire Playing Field and Leaving the Game***

Throughout this century, courts have struggled in their attempt to harmonize the often-conflicting policies of labor relations and antitrust protection.<sup>1</sup> While labor policy favors the formation of collective bargaining agreements between labor and management,<sup>2</sup> with disputes between the two parties being resolved by the National Labor Relations Board (the “NLRB”) rather than the courts,<sup>3</sup> those agreements often contain terms that restrain trade in violation of the Sherman Antitrust Act.<sup>4</sup> The primary difficulty faced by the courts has been determining whether and when to intervene in labor relations and apply antitrust law to situations which labor laws allow or even encourage.

In a recent class action brought by professional football players, the Supreme Court once again addressed the conflict between labor policy and antitrust law. After the expiration of a collective bargaining agreement in 1987, the National Football League (the “NFL” or the “League”) and the National Football League Players Association (“the players” or “the Players Association”) were unable to reach a new agreement.<sup>5</sup> In 1989, still operating without an agreement, the League proposed a plan that would allow each team to carry a “developmental squad” of six players on its roster, with each player on the squad to be paid a fixed salary.<sup>6</sup> When the players re-

---

1. See *infra* notes 82-239 and accompanying text; see also Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1184 (1980) (“Accommodating antitrust policy and labor policy is not an easy task. The conflict between the two is fundamental: the antitrust statutes promote competition and economic efficiency, while the federal labor statutes sanction activity that is arguably anticompetitive.”); Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 678 (1965) (referring to the “uncertainties that fundamentally arise from the absence of a principle for harmonizing the conflict between the policy of commercial competition and of collective bargaining”).

2. See 29 U.S.C. §§ 151, 157-58 (1994).

3. See *id.* §§ 153, 156; Charles D. Bonanno *Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 413 (1982); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

4. See 15 U.S.C. § 1 (1994) (“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.”).

5. See *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 129 (D.D.C. 1991), *rev’d*, 50 F.3d 1041 (D.C. Cir. 1995), *aff’d*, 116 S. Ct. 2116 (1996).

6. See *id.* at 127.

fused to agree to this plan, the League determined that a bargaining impasse had been reached and unilaterally implemented the proposal over the objections of the players.<sup>7</sup> In *Brown v. Pro Football, Inc.*,<sup>8</sup> the Supreme Court held that the League's actions were shielded from antitrust liability by the judicially created "nonstatutory labor exemption" to the antitrust laws.<sup>9</sup>

This Note discusses the facts of *Brown*, its history in the lower courts, and the Supreme Court's resolution of the issues presented by the case.<sup>10</sup> The Note then examines the history of the interplay between labor and antitrust law, the courts' confusion concerning their role in the interplay, and the evolution of the judicial "nonstatutory labor exemption" to antitrust law.<sup>11</sup> It also addresses how the courts have dealt with the *scope* of the exemption in recent years, particularly regarding the duration of the exemption and the range of exempt actions.<sup>12</sup> Finally, the Note discusses the possible ramifications of the Court's decision, its relation to precedent, and the possible motivation behind the Court's repositioning in regard to labor issues.<sup>13</sup>

The NFL was in its second year without a collective bargaining agreement when the team owners voted to adopt Resolution G-2 in the spring of 1989.<sup>14</sup> The resolution, developed by the League's plan-

---

7. See *id.* at 128.

8. 116 S. Ct. 2116 (1996).

9. See *id.* at 2121. Although the principle had been applied in earlier cases, the Court first expressly recognized the "nonstatutory labor exemption" from the antitrust laws in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The *Connell* Court noted that unions enjoyed a *statutory* exemption from antitrust liability because labor statutes declared that unions are not "combinations or conspiracies in restraint of trade," and exempted certain union activity from antitrust liability. *Connell*, 421 U.S. at 621-22 (citing 15 U.S.C. § 17 (1994); 29 U.S.C. §§ 52, 104-05 (1994)). However, nothing in the statutes specifically exempted concerted action between unions and management, which meant that the collective bargaining agreements between the two were not statutorily protected from antitrust liability. See *id.* at 622. In order to remedy this situation, the Court stated that "a proper accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that *some union-employer agreements be accorded a limited nonstatutory exemption* from antitrust sanctions." *Id.* (emphasis added).

10. See *infra* notes 14-81 and accompanying text.

11. See *infra* notes 82-194 and accompanying text.

12. See *infra* notes 195-239 and accompanying text.

13. See *infra* notes 240-368 and accompanying text.

14. See *Brown*, 116 S. Ct. at 2119. Due to the history of labor disputes in the NFL, "long and difficult negotiations over a new collective bargaining agreement" were expected. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 339. In an unsuccessful attempt to prompt a new agreement, the players

ning committee,<sup>15</sup> grew out of the concern that certain team owners were attempting to evade roster limits by "stashing" players on the injured reserve list.<sup>16</sup> The League's solution was to allow each team to have a developmental squad of six first-year players who would practice with the team and occasionally substitute for injured players.<sup>17</sup> The players would be paid a fixed, League-mandated salary of \$1,000 per week and individual negotiations with such players were "not permitted."<sup>18</sup>

There had been no similar arrangement in the recently expired 1982-1987 agreement, which had expressly given each player the right to individually negotiate his own salary.<sup>19</sup> The players adamantly refused to relinquish this right and made clear that they would not submit to an agreement permitting the League to set the salaries of certain players.<sup>20</sup> In June of 1989, the League concluded that a bargaining impasse had been reached in regard to the proposal,<sup>21</sup> and it unilaterally implemented Resolution G-2 when the season began that September.<sup>22</sup> A number of players from the developmental squads brought an antitrust class action suit against the League in the spring of 1990.<sup>23</sup>

The district court granted summary judgment in favor of the players on the issue of whether the NFL's actions were shielded from antitrust liability by the "nonstatutory labor exemption."<sup>24</sup> The court

---

conducted a strike for 24 days at the beginning of the 1987 season. *See id.* at 340 & n.8.

15. *See Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 127 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996).

16. *See Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1069 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 116 S. Ct. 2116 (1996).

17. *See Brown*, 116 S. Ct. at 2119.

18. *Brown*, 782 F. Supp. at 128.

19. *See Brown*, 116 S. Ct. at 2130 n.3 (Stevens, J., dissenting). Justice Stevens noted that the League's decision to fix the salaries of the developmental squad players was a particularly significant departure from prior practice because the individual negotiation of players' salaries had "prevailed even prior to collective bargaining." *Id.* at 2130 (Stevens, J., dissenting).

20. *See Brown*, 782 F. Supp. at 128. Eugene Upshaw, the representative of the players union, sent a letter to the League stating the union's stance that "'all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the [players union].'" *Id.*

21. *See id.* The "bargaining" over the proposal consisted of one meeting and several letters and phone calls over the course of several months. *See id.* at 127-28.

22. *See id.* at 128. In September, Pete Rozelle, the Commissioner of the NFL, sent a memorandum to each NFL team, reiterating the salary terms of developmental squad players and warning against individual negotiations with the players or the provision of compensatory perquisites. *See id.*

23. *See id.*

24. *See id.* at 131; *see also supra* note 9 (discussing the nonstatutory exemption).

explained that the nonstatutory exemption was created to protect labor-management *agreements* from antitrust liability.<sup>25</sup> The exemption no longer applies when an agreement expires “because the reason for the exemption no longer exists: the union no longer agrees to the restraint and therefore continuation of the restraint violates the Sherman Act.”<sup>26</sup> The jury trial that followed resulted in a treble-damage award of over \$30,000,000 against the NFL.<sup>27</sup>

A divided panel of the Court of Appeals for the District of Columbia Circuit reversed.<sup>28</sup> The court stated that the case called for a determination of “whether the nation’s labor laws or antitrust policy control[led],”<sup>29</sup> and concluded that the dictates of labor policy took precedence over the considerations of antitrust law.<sup>30</sup> Because the

---

25. See *Brown*, 782 F. Supp. at 132. The district court quoted language from *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975), stating that labor policy requires that “‘some union-employer agreements be accorded a limited nonstatutory exemption from antitrust liability.’” *Brown*, 782 F. Supp. at 130 (alteration in original).

26. *Brown*, 782 F. Supp. at 132. The court alternatively held that if the exemption did not expire with the agreement, then it expired at impasse. See *id.* at 134. Noting that some authority favored extending the exemption beyond expiration of the agreement, the district court conceded that it understood the policy promoted by such an approach—namely, the provision of a non-coercive atmosphere in which the parties could try to reach a new agreement without the employer fearing antitrust liability. See *id.* at 135. The district court explained, however, that when negotiations toward a new agreement stalled at impasse, extension of the exemption beyond that point simply allowed the employer to force unagreed-upon terms on the union; thus, new agreements would be less likely to be reached because the employer would favor bargaining to impasse. See *id.* at 135-36.

Yet another alternative holding was that the nonstatutory exemption did not apply at all because the NFL had implemented terms that had not been in the expired collective bargaining agreement. See *id.* at 137. Again, the district court embraced the idea that the exemption pertained to certain *agreements*, see *id.* at 138, and reasoned that there was no basis for extending it to cover the imposition of terms to which one party had never agreed. See *id.* at 138-39.

27. See *Brown*, 116 S. Ct. at 2119.

28. See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1058 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996).

29. *Id.* at 1045.

30. See *id.* at 1056. The court of appeals noted that the National Labor Relations Act, see 29 U.S.C. §§ 151-69 (1994), had not been interpreted as forbidding employers from making unilateral changes after impasse, provided those changes were proposed in pre-impasse bargaining. See *Brown*, 50 F.3d at 1051. The court also noted that labor policy provides both unions and employers with economic weapons, and that allowing the unions the ability to bring antitrust claims would give them a “powerful new weapon” that would distort the carefully created balance. *Id.* at 1052. Furthermore, the court stated that antitrust law should be applied primarily to restraints in a product market, not a labor market. See *id.* at 1054. The court therefore concluded that “when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way.” *Id.* at 1056.

labor laws allowed the unilateral imposition of terms after impasse<sup>31</sup> and the NFL's actions "primarily affect[ed] only a labor market organized around a collective bargaining relationship,"<sup>32</sup> the court held that the nonstatutory exemption should extend beyond expiration of the agreement and beyond impasse in order to protect the "entire collective bargaining process."<sup>33</sup>

The Supreme Court affirmed,<sup>34</sup> although it slightly narrowed the appellate court's interpretation of the scope of the exemption.<sup>35</sup> According to the Court, four characteristics made the NFL's actions fall within the scope of the "nonstatutory labor exemption." (1) the actions "took place during and immediately after a collective-bargaining negotiation"; (2) they "grew out of, and [were] directly related to, the lawful operation of the bargaining process"; (3) they involved a mandatory subject of bargaining under the federal labor laws; and (4) they "concerned only the parties to the collective-bargaining relationship."<sup>36</sup>

Characterizing the nonstatutory exemption somewhat differently than it had in the past, the Court described it as being applicable "where needed to make the collective-bargaining process work."<sup>37</sup> The Court reasoned that the exemption was necessary as a matter of "both history and logic."<sup>38</sup> Historically, the Court explained, the exemption reflected Congress's intent that labor laws, not the antitrust

---

31. See *Brown*, 50 F.3d at 1051.

32. *Id.* at 1048.

33. *Id.* at 1051. The appellate court concluded that "injecting antitrust liability into the system for resolving disputes between unions and employers would both subvert national labor policy and exaggerate federal antitrust concerns." *Id.* at 1056.

34. See *Brown*, 116 S. Ct. at 2119. Justice Breyer wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg. Justice Stevens wrote a dissenting opinion. See *id.* at 2128 (Stevens, J., dissenting).

35. See *id.* at 2119. The D.C. Circuit distinguished between antitrust applicability to product market restraints and to labor market restraints, see 50 F.3d at 1050-51; *supra* note 30, and essentially held that *all* labor market restraints that apply to parties in a collective bargaining relationship are exempt from antitrust scrutiny. See *Brown*, 50 F.3d at 1056. The scope of the exemption as the Supreme Court defined it, although very broad, does not absolutely preclude application of the exemption in a labor context. See *infra* notes 66-67 and accompanying text.

36. *Brown*, 116 S. Ct. at 2127.

37. *Id.* at 2119. When the Court first expressly recognized the nonstatutory exemption, it described it as applying to "some union-employer agreements." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); see also *supra* note 9 (discussing the nonstatutory exemption).

38. *Brown*, 116 S. Ct. at 2120.

statutes, be used to resolve labor disputes.<sup>39</sup> Logically, it would be inconsistent to legislatively require labor and management to bargain together and then hold their agreements—which often restrain trade in some way—illegal under the antitrust laws.<sup>40</sup>

The Court reasoned that in order to protect the collective bargaining process, the scope of the exemption must be broad and the exemption must apply to employers as well as employees.<sup>41</sup> Having established this, the Court reached the issue of whether the scope was broad enough to cover a multi-employer bargaining unit's unilateral imposition of terms after a bargaining impasse.<sup>42</sup> The Court concluded that the scope was sufficiently broad to cover such actions.<sup>43</sup> It recognized that labor law (acting apart from antitrust law) allows employers to unilaterally implement new or changed terms after a bargaining impasse is reached, provided that those terms were "reasonably comprehended" in the employer's previous proposals<sup>44</sup> and the employer does not bargain in bad faith.<sup>45</sup> The Court noted that this "reflect[s] the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process," and thus should be shielded from antitrust liability by the nonstatutory exemption.<sup>46</sup>

As additional support for its conclusion, the Court reasoned that a multi-employer bargaining group would be put in an extremely difficult position if it were potentially subject to antitrust liability after bargaining reached impasse.<sup>47</sup> If every employer in a multi-employer group were to impose the same new terms after impasse, they could

---

39. *See id.* The Court noted that Congress's enactment of labor statutes in 1914 and in the 1930s was designed to keep courts and antitrust law out of "labor disputes." *Id.* Those statutes, however, focused primarily on preventing employers from using the antitrust laws against the unions. *See* 15 U.S.C. § 17 (1994); 29 U.S.C. §§ 52, 102, 104, 113 (1994).

40. *See Brown*, 116 S. Ct. at 2120. The national labor laws impose an obligation on employers and employees to bargain collectively regarding "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *accord* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

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

42. *See id.*

43. *See id.*

44. *See id.* (citing *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989); *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968)).

45. *See id.* (citing *Akron Novelty Mfg. Co.*, 224 N.L.R.B. 998, 1002 (1976)).

46. *Id.* (emphasis added); *see infra* notes 307-19 and accompanying text (discussing different views on whether impasse and the subsequent unilateral imposition of terms are part of the "bargaining process").

47. *See Brown*, 116 S. Ct. at 2122-23.

each be liable under antitrust laws.<sup>48</sup> If any employer separated from the group and imposed different terms, that employer would be subject to an unfair labor practice charge under the labor laws.<sup>49</sup> Finally, if all the employers simply maintained the status quo by continuing to operate according to the terms of the expired agreement, and the union thought those terms were unfavorable, the employers could again face antitrust liability if there was evidence that they acted in concert.<sup>50</sup> "All this is to say that to permit antitrust liability [in the context of labor negotiations] threatens to introduce instability and uncertainty into the collective-bargaining process" because antitrust law often forbids what collective bargaining requires.<sup>51</sup>

The Court stated that although the above problem could theoretically be solved by allowing "antitrust courts"<sup>52</sup> to determine the reasonableness of employers' actions on a case-by-case basis, such a course was impractical.<sup>53</sup> It would result in "a web of detailed rules spun by many different nonexpert antitrust judges and juries,"<sup>54</sup> rather than a cohesive set of rules created by the NLRB.<sup>55</sup> The Court stressed that the NLRB was composed of experts in the field and that

---

48. *See id.* The antitrust liability would arise from the fact that the individual employers were acting identically, and their "prior or accompanying conversations"—that is, their collective proposal of terms during the prior bargaining process or their discussions over which new terms to implement—would evidence a "common understanding or agreement." *Id.* at 2123. Presumably, this would allow the employers to be characterized as a combination or conspiracy in restraint of trade.

49. *See id.* Labor law deems it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of their rights [to collectively bargain]," 29 U.S.C. § 158(a)(1) (1994), and to "refuse to bargain collectively with the representatives of his employees," *id.* § 158(a)(5). In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), the Court held that an employer had violated these sections and committed an unfair labor practice when it withdrew from a multi-employer bargaining group after impasse and refused to abide by the agreement that was subsequently reached between the union and the remaining employers in the group. *See id.* at 406. The Court endorsed the NLRB's position that "an impasse is not an unusual circumstance justifying [an employer's] withdrawal" from a multi-employer bargaining unit. *Id.* at 412.

50. *See Brown*, 116 S. Ct. at 2123.

51. *Id.*

52. The Court used this term at several points in the opinion, *see, e.g., id.* at 2122, 2125, presumably to emphasize the distinction between courts that are capable of applying antitrust law and the NLRB, which reviews and attempts to resolve labor disputes within the confines of labor law.

53. *See id.* at 2123.

54. *Id.*

55. *See id.* The NLRB was created in 1935 by the National Labor Relations Act (Wagner Act), ch. 372, § 3, 49 Stat. 449, 451 (1935) (codified as amended at 29 U.S.C. § 153 (1994)). The NLRB's functions include overseeing the collective bargaining process and addressing complaints of unfair labor practices.



Congress intended that the NLRB, rather than the courts, oversee the collective bargaining process.<sup>56</sup> One of the objectives of the labor laws “was to take from antitrust courts the authority to determine . . . what is socially or economically desirable collective-bargaining policy.”<sup>57</sup>

The Court rejected the contention that “impasse” should be the point at which the exemption expires, reiterating that this would put employers in the aforementioned difficult situation when impasse occurred.<sup>58</sup> Further, the Court noted that an “impasse” line would be difficult to draw because “‘impasse’ is often temporary” and is often merely one stage in the bargaining process.<sup>59</sup> Additionally, it would require nonexpert courts to determine when impasse had actually occurred, a task for which courts are unsuited and one which should be left to the NLRB.<sup>60</sup>

---

56. See *Brown*, 116 S. Ct. at 2123, 2125. The Court has shown varying degrees of deference to the NLRB in the past. For example, in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) one issue was whether a disputed term was a “term or condition of employment.” *Id.* at 684. Although the union in that case claimed the issue “was peculiarly within the competence of the Board,” *id.*, the Court nevertheless asserted that it had “experience in classifying bargaining subjects” and had jurisdiction over the case, *id.* at 686.

In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), the Court displayed more deference, supporting an NLRB finding and stating that “the dissenting Justices would have us substitute our judgment for those of the Board with respect to the issues that Congress intended the Board to have.” *Id.* at 418. In dissent, Chief Justice Burger, joined by then-Associate Justice Rehnquist, argued that “[t]he Court’s deferral to the Board’s conclusion that its rules advance the national labor policy . . . represents just the kind of uncritical judicial rubber stamping we have often condemned.” *Id.* at 423 (Burger, C.J., dissenting). Although Chief Justice Rehnquist was part of the *Brown* majority that appeared to adopt a somewhat different stance, it is perhaps relevant that, in *Bonanno*, Justice Rehnquist supported an argument to allow employers “‘self-help . . . when legitimate interests of employees and employers collide.’” *Id.* at 422 (Burger, C.J., dissenting) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). For a discussion of *Truck Drivers*, see *infra* note 150.

57. *Brown*, 116 S. Ct. at 2123.

58. See *id.* at 2124; see also *supra* notes 47-51 and accompanying text (discussing the attributes of this difficult situation).

59. *Brown*, 116 S. Ct. at 2124-25; see also *infra* notes 307-11 and accompanying text (discussing “impasse” and its significance in regard to the bargaining process and the duration of the nonstatutory exemption).

60. See *Brown*, 116 S. Ct. at 2125. The Court also rejected the suggestion that the exemption should be extended beyond impasse only in certain circumstances—for example, when the employer needs time to obtain legal advice as to whether impasse has actually occurred, or when the employer engages in a lockout, which is allowed under the labor laws. See *id.* The Court noted that even such a “softened” rule would still involve courts in the bargaining process, leaving employers in the unenviable position of having to design their bargaining strategies based on “what they predict or fear that antitrust courts, not labor law administrators, will eventually decide.” *Id.*

The Court also rejected the proposal that employers' post-impasse *tactics* should be exempt, but not their post-impasse *terms*.<sup>61</sup> Stating that "the imposition of 'terms' [is often] a bargaining 'tactic,'" the Court noted that such a rule would require nonexpert courts to make an "amorphous" inquiry into employers' subjective motives.<sup>62</sup> The Court repeated its concerns about performing such a role and suggested that the collective bargaining process was no place to have courts and judges "roaming at large."<sup>63</sup>

Finally, the Court made clear that professional sports cases did not merit "special" treatment under the collective bargaining system.<sup>64</sup> Noting that "it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players," the Court concluded that the players were indistinguishable from other workers and thus "must abide by the same legal rules."<sup>65</sup>

Although the Court's holding extends the nonstatutory exemption beyond impasse and covers the post-impasse unilateral imposition of terms by employers, the Court stated in dicta that it was possible that some impositions may not be immune from anti-trust laws.<sup>66</sup> If the actions of employers were "sufficiently distant in time and in circumstances from the collective-bargaining process," and applying antitrust law would not interfere with the bargaining process, then the application of such law may be appropriate.<sup>67</sup> Short of such a situation, however, the bargaining process and labor relations presumably would be beyond the reach of "antitrust courts."

---

61. *See id.*

62. *Id.*

63. *Id.* at 2126 (quoting Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 716 (1965) (separate opinion of Goldberg, J.)).

64. *See id.* The players argued that regardless of how the nonstatutory exemption applied in other collective bargaining relationships, the unique characteristics of professional sports warranted different legal rules. *See id.*; *infra* note 213. In particular, professional athletes fare better by negotiating their salaries individually, whereas in other labor contexts the employees benefit from being able to collectively negotiate uniform wage levels. *See Brown*, 116 S. Ct. at 2126. *Compare Lock*, *supra* note 14, at 409 (arguing that professional sports merit special treatment under the labor laws), with Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 9 (1971) (arguing that unions of professional athletes should not be treated differently than other unions under the antitrust and labor laws).

65. *Brown*, 116 S. Ct. at 2126.

66. *See id.* at 2127.

67. *Id.* The Court suggested that if a collective bargaining relationship "collapsed," perhaps due to the decertification of a union or the disintegration of a multi-employer bargaining unit, then perhaps antitrust law would be applicable. *See id.* For a discussion of union decertification, see *infra* notes 284-91 and accompanying text.

In dissent, Justice Stevens argued that the broad scope of the exemption as defined by the majority would frustrate national labor policy.<sup>68</sup> He noted that while antitrust law serves to ensure free competition and the resulting optimal price levels,<sup>69</sup> it is the policy of national labor legislation to prevent such competition among job-seeking laborers in the interest of avoiding depressed wages.<sup>70</sup> Thus, the labor statutes exempt union activity from antitrust liability in an effort to give laborers more bargaining power through collective action, allowing them to negotiate for higher wage levels than they would obtain in a "free" labor market.<sup>71</sup> In the same vein, the judicial nonstatutory exemption protects the agreements these unions reach with employers from antitrust sanctions.<sup>72</sup> Justice Stevens concluded that fashioning an exemption that allows employers to collectively take actions that depress wages *below* free market levels is not supported by the policies of either labor or antitrust law.<sup>73</sup>

Justice Stevens further argued that the case had unique features and that the majority erred in treating the case as a typical collective-bargaining dispute.<sup>74</sup> First, Justice Stevens noted that professional athletes want the market to determine their individual wage levels, as opposed to other laborers who must bargain in groups for uniform wage levels in order to avoid the effects of the free market.<sup>75</sup> Second, the League's proposal of Resolution G-2 was not made in an effort to reach a new agreement, but was instead intended to control team owners' evasion of roster limits.<sup>76</sup> Third, Justice Stevens argued that there had been no legitimate bargaining over the proposal at all, but instead the League effectively had announced the terms and subsequently implemented them.<sup>77</sup>

---

68. *See Brown*, 116 S. Ct. at 2128 (Stevens, J., dissenting).

69. *See id.* (Stevens, J., dissenting).

70. *See id.* (Stevens, J., dissenting); *see also* *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (noting the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions").

71. *See Brown*, 116 S. Ct. at 2128-29 (Stevens, J., dissenting); *see also* 15 U.S.C. § 17 (1994) (exempting union activity from antitrust liability); 29 U.S.C. §§ 52, 104, 105, 113 (1994) (same).

72. *See Brown*, 116 S. Ct. at 2129 (Stevens, J., dissenting).

73. *See id.* (Stevens, J., dissenting).

74. *See id.* at 2130 (Stevens, J., dissenting).

75. *See id.* (Stevens, J., dissenting); *infra* notes 333-36 and accompanying text.

76. *See Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting); *infra* notes 337-38 and accompanying text.

77. *See Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting); *infra* note 339 and accompanying text.

Finally, Justice Stevens criticized the majority for ignoring Court precedent.<sup>78</sup> He noted that, in the past, the Court had considered the application of the nonstatutory exemption only in regard to *agreements* between employers and employees, and that even when those agreements pertained to terms that were mandatory subjects of bargaining under national labor law, they did not automatically qualify for the exemption.<sup>79</sup> Further recognizing the absence of any attempt to balance the policies of labor and antitrust law, which the Court had undertaken in earlier cases,<sup>80</sup> Justice Stevens concluded that “the Court’s analysis would seem to constitute both an unprecedented expansion of a heretofore limited exemption, and an unexplained repudiation of the reasoning in a prior, non-constitutional decision that Congress itself has not seen fit to override.”<sup>81</sup>

The conflicting policies at issue in *Brown* have a long history in antitrust and labor law. The Sherman Antitrust Act<sup>82</sup> was enacted by Congress in 1890. Aimed at the business “trusts”<sup>83</sup> that had been developing, the Act broadly proclaimed in relevant part that “[e]very 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.”<sup>84</sup> It was unclear at the time of the Act’s passage whether organized labor was included in the “combinations” that were subject to antitrust liability.<sup>85</sup> The lan-

78. See *Brown*, 116 S. Ct. at 2131 (Stevens, J., dissenting).

79. See *id.* at 2132 (Stevens, J., dissenting). Justice Stevens referred to the Court’s prior decision in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). For a discussion of *Pennington*, see *infra* notes 160-65 and accompanying text.

80. See *Brown*, 116 S. Ct. at 2132 (Stevens, J., dissenting).

81. *Id.* (Stevens, J., dissenting).

82. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

83. See Morris D. Forkosch, *Antitrust in the United States: Some Thoughts on Historical and Recent Developments*, 11 GONZ. L. REV. 892, 899 (1976) (“Big business, getting bigger and bigger, formed into groups which were monopolies or oligopolies or else exercised similar control. These ‘trusts’ dominated the American economic scene.” (footnote omitted)). In *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897), the first Supreme Court decision to find a violation of the Sherman Act by a business combination, Justice Peckham noted that the targets of the Act included:

the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, [and] the Whiskey Trust . . . , [all of which] had acquired a power which [was] dangerous to the whole country, and . . . their existence was directly antagonistic to [the country’s] peace and prosperity.

*Id.* at 319.

84. Ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (1994)).

85. See *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 801 (1945) (noting that after the Sherman Act’s passage, “[s]harp controversy soon arose as to whether [it] ap-

guage was broad and did not specifically establish an exemption for labor unions. While some claimed the statute was aimed only at large business organizations trying to gain control of a market, others thought there was no reason that unions should be beyond the reach of the Act "if their activities . . . physically interrupted the free flow of trade or tended to create business monopolies."<sup>86</sup>

Lower federal courts subscribed to the view that unions could be held liable under the Act,<sup>87</sup> and in 1908 the Supreme Court expressed the same view in *Loewe v. Lawlor*.<sup>88</sup> In *Loewe*, the Court held that a union's secondary boycott<sup>89</sup> of a hat manufacturer violated the anti-trust laws.<sup>90</sup> According to the Court, the union was restraining trade, and the Sherman Act clearly stated that "every" combination in re-

plied to unions"). Compare EDWARD BERMAN, LABOR AND THE SHERMAN ACT 1-98 (1930) (reviewing congressional history and arguing that Congress did not intend the Act to apply to labor unions), with ALPHEUS T. MASON, ORGANIZED LABOR AND THE LAW 119-42 (1925) (arguing that congressional history indicates that the Act was intended to apply to labor unions). One commentator has written that "[h]istorians of organized labor's encounter with the Sherman Act often write in a bitterly ironic tone. Through a triumph of sharp lawyering, so the story goes, a statute passed with the support of organized labor to punish the robber barons was turned into a scourge of trade unionism." Daniel R. Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151, 1151 (1989).

86. *Allen Bradley*, 325 U.S. at 801-02.

87. See *United States v. Cassidy*, 67 F. 698 (N.D. Cal. 1895); *United States v. Debs*, 64 F. 724 (C.C.N.D. Ill. 1894); *In re Charge to Grand Jury*, 62 F. 828 (N.D. Ill. 1894); *United States v. Agler*, 62 F. 824 (C.C.D. Ind. 1894); *Thomas v. Cincinnati, N.O. & T.P. Ry. Co.*, 62 F. 803 (C.C.S.D. Ohio 1894); *United States v. Elliott*, 62 F. 801 (C.C.E.D. Mo. 1894); *Waterhouse v. Comer*, 55 F. 149 (C.C.S.D. Ga. 1893); *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (C.C.E.D. La. 1893), *aff'd*, 57 F. 85 (5th Cir. 1893). Most of these cases resulted from the Pullman Strike of 1894. See BERMAN, *supra* note 85, at 3 & n.5.

88. 208 U.S. 274 (1908). This case is sometimes referred to as the "Danbury Hatters" case.

89. A secondary boycott occurs when a union boycotts parties other than the employer that it is targeting. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921) (distinguishing "primary boycott," when a union merely refrains from dealing with its employer and peacefully tries to dissuade customers from dealing with the employer, from a "secondary boycott," when a union pressures, coerces, or threatens actual and prospective customers of the employer in such a way that they fear "loss or damage to themselves should they deal with [that employer]").

In *Loewe*, the members of a local hatters' union tried to force the hat factory in which they worked to unionize. See *Loewe*, 208 U.S. at 305. When the factory owner resisted, the local union joined forces with the American Federation of Labor and threatened wholesale hat buyers with a boycott if they purchased hats from the targeted factory. See *id.* at 305-06. They also threatened to boycott any retailers who bought the factory's hats through wholesalers. See *id.* at 306-07. The wholesalers and retailers whom the union threatened to boycott included some outside of the state, meaning that the union's actions had an effect on interstate commerce. See *id.* at 307-08.

90. See *Loewe*, 208 U.S. at 309.

straint of trade was illegal.<sup>91</sup> The Court explained that "[t]he act made no distinction between classes,"<sup>92</sup> and that "it include[d] combinations which are composed of laborers."<sup>93</sup>

Congress responded to the Court's decision in *Loewe* by passing the Clayton Act<sup>94</sup> in 1914.<sup>95</sup> Among other provisions, section 6 of the Act<sup>96</sup> declared that labor was not an "article of commerce" and that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, . . . from lawfully carrying out the legitimate objects thereof."<sup>97</sup> Section 20 of the Act<sup>98</sup> expressly limited the ability of courts to issue injunctions or restraining orders in response to many kinds of labor union activity.<sup>99</sup> It further stated that the labor activities listed in the Act should not "be considered or held to be violations of any law of the United States."<sup>100</sup> Despite the language of the Clayton Act, controversy remained over the extent to which the activities of organized labor were exempt from the Sherman Act.<sup>101</sup> While some viewed the Clayton Act "as labor's 'Magna Carta,' wholly exempting labor from any possible inclusion in the Anti-trust legislation,"<sup>102</sup> others saw it as merely maintaining the status quo and continuing to forbid actions such as secondary boy-

91. *See id.* at 301.

92. *Id.*

93. *Id.* at 302.

94. Ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.).

95. *See Ernst, supra* note 85, at 1151 ("[*Loewe*] reinvigorated the sporadic campaign of the American Federation of Labor (AFL) for legislation that would exempt organized labor from the scope of the Sherman Act.").

96. Ch. 323, § 6, 38 Stat. at 731 (codified at 15 U.S.C. § 17 (1994)).

97. *Id.*

98. Ch. 323, § 20, 38 Stat. at 738 (codified at 29 U.S.C. § 52 (1994)).

99. *See id.* ("No restraining order or injunction shall be granted . . . in any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . .").

100. *Id.*

101. *See, e.g., Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 803-05 (1945) (discussing the controversy); *United States v. Hutcheson*, 312 U.S. 219, 230 (1941) (same).

102. *Allen Bradley*, 325 U.S. at 804-05; *see also Ernst, supra* note 85, at 1172 ("Doubtless some hoped . . . that by excluding labor from the category of 'articles of commerce' the Act would immunize organized labor from proceedings under the Sherman Act by putting it beyond the commerce power of the federal government."); Joseph Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749, 765 (1947) (arguing that congressional history makes it clear that Congress intended to exempt labor unions from the reach of the Sherman Act).

cotts.<sup>103</sup>

The Supreme Court adopted the latter view in *Duplex Printing Press Co. v. Deering*,<sup>104</sup> which held that the Clayton Act did not exempt secondary boycotts from antitrust liability.<sup>105</sup> The Court stated that the Clayton Act applied only to parties who were in an employer-employee relationship; thus, if union members who worked for other employers sympathetically joined a boycott, the combined unions' actions were subject to the antitrust laws.<sup>106</sup> Justice Brandeis, joined by Justices Holmes and Clarke, wrote a vigorous dissent, advocating the view that the Clayton Act was written to allow competitive relations between labor and management and that courts should not intervene and impose their own views of what is or is not appropriate.<sup>107</sup>

Congress again enacted new legislation in the form of the Norris-LaGuardia Act of 1932.<sup>108</sup> Perhaps in response to the dissenting views of Justice Brandeis,<sup>109</sup> the new Act was clearly "intended to discourage judicial activism in labor disputes" by further restricting courts'

---

103. See Ernst, *supra* note 85, at 1166.

104. 254 U.S. 443 (1921).

105. See *id.* at 478. Labor supporters felt that the Court had subverted Congress's intent. See Ernst, *supra* note 85, at 1166. Others thought that Congress had not made its intent clear and "placed the blame for confusion over the statute at the feet of 'a pusillanimous Congressional committee of lawyers who were willing to draft a deceitful statute and shield themselves of the wrath of labor behind the Supreme Court of the United States.'" *Id.* at 1166-67 (quoting *Labor is Not a Commodity*, 9 NEW REPUBLIC 112, 114 (1916)); see also Kovner, *supra* note 102, at 760 ("Did the Court read the [congressional] debates and then decide . . . that Congress had compromised a hot issue by leaving it to the courts to interpret deliberately ambiguous language?").

106. See *Duplex*, 254 U.S. at 472. The Court noted that "Congress had in mind particular industrial controversies, not a general class war." *Id.* One commentator has written that the Court of the 1920s developed an approach that "emptied the vague labor clauses of the Clayton Act of any significance." Meltzer, *supra* note 1, at 665; see also Kovner, *supra* note 102, at 765 (stating that the *Duplex* Court "refused to give [section 6 of the Clayton Act] any meaning or authority").

107. See *Duplex*, 254 U.S. at 488 (Brandeis, J., dissenting). Justices Holmes and Brandeis again dissented in a similar case decided six years later. See *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 54-55 (1927) (holding that a union violated the Sherman Act when it tried to pressure a limestone producer into re-unionizing by having its union members in other areas refuse to handle the producer's stone); *id.* at 51 (Brandeis, J., dissenting).

108. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (1994)).

109. The Court in *Brown* noted that Congress enacted the labor statutes "in part to adopt the views of dissenting justices in *Duplex*." *Brown*, 116 S. Ct. at 2120; see also Local 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 725 (1965) (separate opinion of Goldberg, J.) (stating that Congress "expressly repudiated [the holding of *Duplex*] in favor Mr. Justice Brandeis' dissenting views").

ability to issue restraining orders and injunctions.<sup>110</sup> This time, Congress carefully enumerated exempt activities and included a separate definitional section<sup>111</sup> in which "labor dispute" was defined broadly to exempt the type of union activity that the Court had attacked in *Duplex*.<sup>112</sup> Congress's intent to protect organized labor activity was clear, as the Act spoke of the "individual unorganized worker [being] commonly helpless to exercise actual liberty of contract."<sup>113</sup> More legislation followed three years later when Congress enacted the National Labor Relations Act (the "Wagner Act"),<sup>114</sup> a statute that went beyond merely discouraging judicial activism by speaking of the "right" of employees to organize in the interest of fostering collective bargaining.<sup>115</sup> The Wagner Act also established the NLRB to review unfair labor practices of employers.<sup>116</sup>

Following this legislation, the Court for the first time retreated from interjecting antitrust law into labor disputes in *Apex Hosiery Co. v. Leader*.<sup>117</sup> While it recognized that union members had impeded interstate commerce by engaging in a sit-down strike in the factory and refusing to allow shipments to go out,<sup>118</sup> the Court held that the union members' actions were not the type at which the Sherman Act was directed.<sup>119</sup> Looking to the legislative history of the Act and the type of activity it was intended to proscribe,<sup>120</sup> the Court concluded that the Act's target had been business trusts that were trying to achieve market control by suppressing competition.<sup>121</sup> The statute was not aimed at "policing" the movement of goods in interstate commerce.<sup>122</sup> The Court noted that it was not the union's intent to restrain competition, but merely to pressure the employer into meeting the union's demands.<sup>123</sup> As such, the union's actions were unlike the secondary boycotts previously held unlawful under the

---

110. Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 471 (1981).

111. Ch. 90, § 13, 47 Stat. at 73 (codified as amended at 29 U.S.C. § 113 (1994)).

112. *See Duplex*, 254 U.S. at 463 (describing activity of a secondary boycott).

113. Ch. 90, § 2, 47 Stat. at 70 (codified as amended at 29 U.S.C. § 102 (1994)).

114. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

115. *See id.* § 1, 49 Stat. at 449 (codified as amended at 29 U.S.C. § 151 (1994)).

116. *See id.* § 3, 49 Stat. at 451 (codified as amended at 29 U.S.C. § 153 (1994)).

117. 310 U.S. 469 (1940).

118. *See id.* at 486.

119. *See id.* at 501.

120. *See id.* at 489.

121. *See id.* at 492-93.

122. *See id.* at 490.

123. *See id.* at 501.



Sherman Act.<sup>124</sup>

Labor scored another victory a year later in the landmark Supreme Court decision *United States v. Hutcheson*.<sup>125</sup> In *Hutcheson*, union workers who had lost work to a competing union responded by calling a strike against an Anheuser-Busch plant, picketing it, and asking other union members to join in boycotting Anheuser-Busch products.<sup>126</sup> Criminal antitrust charges were brought against the striking union.<sup>127</sup> By reading the Clayton Act and the Norris-LaGuardia Act together, the Court held that the union's activities were not subject to the antitrust laws.<sup>128</sup> The Court pointed to language in the Clayton Act stating that certain enumerated union activities should not be held to violate any federal laws<sup>129</sup> and reasoned that it was only logical that such language should also be applied to activities that the Norris-LaGuardia Act immunized from injunctions.<sup>130</sup> In short, any activity that was protected against injunctions by the two labor statutes was also immune from the antitrust laws; such reasoning would extend immunity to the secondary boycotts held to violate the antitrust laws in the Court's prior decisions.<sup>131</sup>

*Apex* and *Hutcheson* thus established a new trend conferring

---

124. See *id.* at 506-07. In the same year, the Court decided *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products*, 311 U.S. 91 (1940). In that case, unionized milk drivers began picketing stores that were buying discount milk from non-unionized, independent milk "peddlers." See *id.* at 94-96. The stores brought suit under the Sherman Act, claiming the union drivers were engaging in an illegal secondary boycott. See *id.* at 96. The Court, however, stated that it was not a secondary boycott, but a valid "labor dispute" as broadly defined in the Norris-LaGuardia Act. See *id.* at 100. As such, it was not susceptible to antitrust law: "Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act. . . . [To hold a violation of the Sherman Act here] would reverse the declared purpose of Congress." *Id.* at 103.

125. 312 U.S. 219 (1941).

126. See *id.* at 227-28.

127. See *id.*

128. See *id.* at 235-36.

129. See *id.* at 236. For the relevant text of the Clayton Act, see *supra* notes 96-100 and accompanying text.

130. See *Hutcheson*, 312 U.S. at 234. The Court noted that immunizing an activity from injunction, but then holding it susceptible to criminal prosecution, "is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison." *Id.* at 234-35. Nonetheless, one commentator characterized the Court's assessment of the interdependence of the two statutes as a "startling conclusion." Theodore J. St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 607 (1976).

131. See Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 265 (1955) ("[T]he practical consequence [of *Hutcheson*] was to make the Sherman Act inapplicable to all combinations of employees regardless of the objective.").

broad antitrust immunity upon unilateral union activity. The two cases had not, however, addressed whether an employer-employee *agreement* that restrained trade would be similarly immune.<sup>132</sup> Initially, it would seem that agreements made as a result of required bargaining activity should enjoy exemption from antitrust scrutiny because national labor policy encourages such agreements, even if they incidentally restrain trade.<sup>133</sup> Alternatively, if such agreements could be made to the detriment of third-party competitors, the labor exemption theoretically should not provide a haven for activity which the Sherman Act was meant to prohibit.<sup>134</sup>

The Court addressed this issue four years after *Hutcheson* and, despite its recently evident predisposition not to apply antitrust law to labor issues, concluded in *Allen Bradley Co. v. Local Union No. 3*<sup>135</sup> that there remained certain labor situations where antitrust law must be applied.<sup>136</sup> In *Allen Bradley*, the Court ruled that it was a Sherman Act violation for labor unions, even if acting in pursuit of their own legitimate interests, "to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."<sup>137</sup> New York City electrical workers, in an attempt to secure better wages and working conditions, had gradually unionized the shops of most electrical manufacturers.<sup>138</sup> As a consequence, the manufacturers agreed to sell only to contractors that employed union members.<sup>139</sup> Eventually, the unions, the manufacturers, and the local contractors all began working together to boycott local contractors who would not unionize, as well as outside equipment suppliers who tried to sell in the city.<sup>140</sup> The three groups

---

132. After *Apex* and *Hutcheson*, "[w]hat remained for the Court was further elucidation of the problem adumbrated in *Hutcheson*—the treatment of union-employer combinations that achieved price restraints, production allocation or other market-control schemes, proscribed for employers acting without labor unions." Meltzer, *supra* note 1, at 669.

133. See, e.g., *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 711-12 (1965) (separate opinion of Goldberg, J.).

134. See, e.g., *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 808 (1945) ("[W]e think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").

135. 325 U.S. 797 (1945).

136. See *id.* at 809.

137. *Id.* at 798; see also *id.* at 810 (stating that labor unions should not be free to engage in conduct that restrains trade).

138. See *id.* at 799-800.

139. See *id.*

140. See *id.*

soon completely monopolized the New York City market.<sup>141</sup>

The Court stated that if the unions had been acting alone and their activities incidentally had resulted in a monopoly, the labor laws would have exempted them from Sherman Act liability.<sup>142</sup> This exemption would have applied even if the same monopolistic, higher price levels obtained as a result of the unions' unilateral actions.<sup>143</sup> However, because the unions had "participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts."<sup>144</sup>

Although *Apex*, *Hutcheson*, and *Allen Bradley* established fairly clear guidelines regarding the permissible scope of union activity under the antitrust laws,<sup>145</sup> political perceptions of the scope of permissible union activity under the labor laws changed in the years following these three cases.<sup>146</sup> Congress, concluding that the Norris-LaGuardia Act and the Wagner Act had created unfair favoritism toward labor,<sup>147</sup> sought to "correct the imbalance"<sup>148</sup> by amending the Wagner Act with the Taft-Hartley Act<sup>149</sup> in 1947. The language of the

---

141. *See id.* at 800.

142. *See id.* at 809.

143. *See id.*

144. *Id.*

145. It has been argued that the "trilogy" of *Apex*, *Hutcheson*, and *Allen Bradley* established the correct balance between antitrust and labor law and thus delineated the circumstances in which it was proper for courts to intervene and apply antitrust law in the labor arena. *See* Handler & Zifchak, *supra* note 110, at 482-83 (explaining the balance set forth by these cases); *id.* at 513-14 (urging the Court to "return to the tenets of the *Apex-Hutcheson-Allen Bradley* trilogy"); *cf.* ALBION GUILFORD TAYLOR, LABOR AND THE SUPREME COURT 100-04 (1961) (stating that the "[*Apex*] analysis," which was utilized in *Allen Bradley*, "represents a reasonable and workable guide"). The framework of the three cases dictated that if unions acted unilaterally and their activities were immune from injunctions under the labor statutes, then the courts would refrain from applying antitrust law to the resultant labor situations unless the union actually conspired with employers to implement price and market restraints and injure competitors. *See* Handler & Zifchak, *supra* note 110, at 483.

146. *See* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 377-78 (1950) (recounting the 1947 Senate debates during which "stress was placed on the fact that the Wagner Act and the Norris-La Guardia Act were experimental in nature, and that the experiment, though not entirely unsuccessful, showed that changes were necessary"); *see also* 93 CONG. REC. 4131 (1947) (statement of Sen. Alender) (discussing defects in previous legislation).

147. *See* MILLIS & BROWN, *supra* note 146, at 377-78.

148. *See* Handler & Zifchak, *supra* note 110, at 472.

149. Ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-66 (1994)).

Wagner Act was changed to make its policy more two-sided,<sup>150</sup> and certain forms of secondary boycotts,<sup>151</sup> as well as closed-shop agreements,<sup>152</sup> were outlawed.<sup>153</sup> The Wagner Act was amended again by the Landrum-Griffin Act of 1959,<sup>154</sup> which further sought to restrict the realm of legal union activity. Although Congress declared certain labor activity unlawful,<sup>155</sup> the remedies for violations were set out expressly in the labor laws with no mention of the applicability of antitrust law.<sup>156</sup>

---

150. See ch. 120, § 1, 61 Stat. at 136-37 (codified as amended at 29 U.S.C. § 151 (1994)). While the original policy statement of the Wagner Act had spoken primarily of the right of labor to organize and the disadvantages of not allowing it to do so, the amended version added language suggesting that labor was just as capable as management of being a destructive force on commerce:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce . . . which impair the interest of the public . . . . The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

*Id.*

The Court utilized the Taft-Hartley Act to give some leeway, or protection, to employer activity in *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) (often referred to as "Buffalo Linen"). The Court held that it was not an unfair labor practice for a multi-employer bargaining group to lock out its employees during contract negotiations, see *id.* at 97, even though the union was not striking against all the employers in the unit at the time, see *id.* at 90. The Court noted the several references to "lock-outs" in the Taft-Hartley Act, concluding that this was "statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *Id.* at 92-93. This is one of the earlier decisions in which the Court advocated the ability of the employer to engage in "self-help." *Id.* at 96.

151. See ch. 120, § 8(b)(4), 61 Stat. at 141, amended by Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 158(b)(4) (1994)).

152. See ch. 120, § 8(a)(3), 61 Stat. at 140 (codified as amended at 29 U.S.C. § 158(a)(3) (1994)). A "closed-shop agreement" results when an employer agrees to employ only union members in a particular location. An "open-shop" employs both union and non-union personnel. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 462 (1921) (discussing "open-shop" versus "closed-shop" policy).

153. Two commentators, writing shortly after the passage of the Taft-Hartley Act, stated that it "changed the legal framework rather drastically . . . . [T]he hands of the clock . . . were turned back so as to give the federal government a substantially different labor policy from that adopted in the 1930's, one much less acceptable in many respects." MILLIS & BROWN, *supra* note 146, at 456.

154. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at scattered sections of 29 and 45 U.S.C. (1994)).

155. See *id.* § 704(a), 73 Stat. at 542-43 (codified as amended at 29 U.S.C. § 158(b)(4)(i) (1994)) (further restricting secondary boycotts); *id.* § 704(b), 73 Stat. at 543-44 (codified as amended at 29 U.S.C. § 158(e) (1994)) (outlawing most "hot cargo" agreements, which occur when an employer enters agreement with its employees that it will not deal with certain other employers).

156. See *id.* § 704(e), 73 Stat. at 545 (codified as amended at 29 U.S.C. § 187(a) (1994)); TAYLOR, *supra* note 145, at 107. *But cf.* MILLIS & BROWN, *supra* note 146, at

Nevertheless, in the 1960s and 1970s, the Court expressed a renewed willingness to apply antitrust law to the labor arena.<sup>157</sup> Perhaps the Court intended to reinforce the philosophy behind the Taft-Hartley and Landrum-Griffin Acts—the imposition of a bargaining “balance” between labor and management.<sup>158</sup> However, some commentators have argued that the Court went too far, perhaps resulting in an “overcorrection” that put courts and antitrust law intrusively back into labor law and impinged on the jurisdiction of the NLRB.<sup>159</sup>

On the same day in 1965, the Court decided two related cases that raised the issue of “whether a collective bargaining agreement on a mandatory subject was a basis for antitrust liability.”<sup>160</sup> In the first case, *United Mine Workers v. Pennington*,<sup>161</sup> unionized mine workers had negotiated a wage scale with a multi-employer group of large mining companies and agreed to impose the same scale on the smaller mining competitors, regardless of the smaller competitors’ ability to pay the agreed upon wages.<sup>162</sup> The Court<sup>163</sup> noted that al-

500 (writing in 1950 that “[t]he possible impact of [the remedy section of the Taft-Hartley Act] upon cases against unions under the Sherman Antitrust Act is not entirely clear . . . . While the antitrust acts were not specifically mentioned or amended, . . . a new statutory framework was created into which Antitrust Act decisions must be fitted.”).

157. See, e.g., *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

158. See *supra* notes 147-56 and accompanying text (discussing the effects of, and Congress’s intention in passing, the Taft-Hartley and Landrum-Griffin Acts).

159. See *Handler & Zifchak, supra* note 110, at 513 (criticizing the *Pennington/Jewel Tea Courts’* approach as “resurrecting the most hateful labor-antitrust precedents”).

160. *Id.* at 483; see *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under the labor laws regarding collective bargaining, “mandatory subjects” of such bargaining are “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d) (1994); see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

161. 381 U.S. 657 (1965).

162. See *id.* at 660. Allegedly, the union and the large mining companies had agreed that the problems of the coal industry related to overproduction. Thus, they sought to pressure the smaller mining companies out of business. See *id.*

163. In both cases, the Justices were split into three groups. Justice White, joined by Chief Justice Warren and Justice Brennan, wrote the opinion of the Court in each. See *id.* at 659; *Jewel Tea*, 381 U.S. at 679. Justices Douglas, Black, and Clark concurred in the judgment in *Pennington*, but would have based the decision on *Allen Bradley* rather than employing a balancing test. See *Pennington*, 381 U.S. at 672 (Douglas, J., concurring). These three Justices dissented in *Jewel Tea*, again advocating the application of *Allen Bradley*. See 381 U.S. 676, 735-36 (Douglas, J., dissenting). Justices Goldberg, Harlan, and Stewart disagreed with the reasoning in both of the Court’s opinions; Justice Goldberg wrote a single separate opinion “dissenting from the opinion but concurring in the reversal” of *Pennington*, which was remanded, and concurring in the judgment of *Jewel Tea*. See *Pennington*, 381 U.S. at 697 (separate opinion of Goldberg, J.); *infra* notes 171-77 and accompanying text.

though wages were a mandatory subject of bargaining under the labor laws, the agreement between the union and the employers was not automatically exempt from antitrust law.<sup>164</sup> It then sought to balance the interests of the national labor policy and the policies behind the antitrust law, and concluded that antitrust policies prevailed.<sup>165</sup>

The second case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,<sup>166</sup> addressed an agreement between a butchers' union and a group of retail grocery stores in Chicago that limited the hours during which the stores could sell fresh meat.<sup>167</sup> Jewel Tea wanted to sell fresh meat outside of those hours by way of a self-serve meat counter, and when the union refused to agree to this, Jewel Tea brought an antitrust suit.<sup>168</sup> The Court once again engaged in a balancing test between the interests of labor law and antitrust policy, this time finding that the interest of the union in controlling working conditions<sup>169</sup> outweighed antitrust considerations.<sup>170</sup>

---

164. See *Pennington*, 381 U.S. at 664-65. The Court conceded that wages "lie at the very heart" of mandatory subjects of bargaining under the NLRA and that a union's reaching an agreement on wages with a multi-employer bargaining group does not violate the antitrust laws. See *id.* at 664. However, the Court explained that the NLRA must be harmonized with the Sherman Act, and thus "there are limits to what a union or an employer may offer or extract in the name of wages." *Id.* at 665. The fact that employers and employees must bargain over wages "does not mean that the agreement reached may disregard other laws." *Id.*

165. See *id.* at 666-69. The Court noted that while labor policy encourages employees to bargain as a group and permits them to obtain uniform wage levels, it is not a goal of the national labor policy to have the employees and employers in one bargaining unit determine the wages (or other terms of employment) for other bargaining units or for the whole industry. See *id.* at 666. The policy behind antitrust law, on the other hand, is to prevent such an agreement. See *id.* at 668. Moreover, the Court noted that when a union agrees with one employer to seek a certain wage level from other employers, it "surrenders its freedom of action with respect to its bargaining policy," which constitutes a restraint that conflicts with antitrust policy. *Id.*

166. 381 U.S. 676 (1965).

167. See *id.* at 680.

168. See *id.* at 679-81.

169. Working "conditions" are among the mandatory subjects of bargaining under the NLRA. 29 U.S.C. § 158(d) (1994).

170. See *Jewel Tea*, 381 U.S. at 689-90. The Court explained that the restriction on hours was "so intimately related to [the mandatory bargaining subjects of] wages, hours and working conditions" that national labor policy protected it from antitrust attack. *Id.* While acknowledging that the restriction on hours would have an effect on competition, "perhaps more so than in the case of the wage agreement [in *Pennington*]," the Court noted that the union's interest in the restriction was "immediate and direct" and thus outweighed the concerns of antitrust law. *Id.* at 691.

As one commentator notes, "[t]he opinion, however, failed to provide a broad perspective on how to identify labor and antitrust interests, much less how to weigh them." Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets*, 1989 UTAH L. REV. 617, 651; see

Justice Goldberg wrote a lengthy separate opinion,<sup>171</sup> vehemently disagreeing with the Court's approach in both cases.<sup>172</sup> He sharply criticized the Court for interjecting antitrust law into labor disputes, which he asserted was contrary to clear congressional intent and represented a foray into a field in which the Court had no expertise.<sup>173</sup> Justice Goldberg called the Court's willingness to intervene "a throwback to past days"<sup>174</sup> and said that labor legislation was designed

---

also Meltzer, *supra* note 1, at 725 (suggesting that the Court's "balancing approach" in *Jewel Tea* was not in fact very balanced because it primarily took account of the union's interests while essentially ignoring the antitrust considerations).

As far as reconciling *Pennington* with *Jewel Tea*, one commentator offers the following distinction: "[I]n *Jewel Tea* the allegedly anticompetitive effect of the agreement fell solely on grocers who were members of the employer bargaining unit, whereas in *Pennington* the anticompetitive impact fell on plaintiff parties who were outside the bargaining unit and whose . . . interests were thus not represented at the bargaining table." Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 67 (1986).

171. *Local 189 Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 697 (1965) (separate opinion of Goldberg, J.). In this single separate opinion, Justice Goldberg dissented from the opinion in *Pennington* and concurred in the judgment in *Jewel Tea*. See *id.* at 697 (separate opinion of Goldberg, J.). The opinion expressed disagreement with the reasoning in both cases. See *id.* at 697-700, 714-30 (separate opinion of Goldberg, J.). It is mentioned here because it figured prominently in the *Brown* majority opinion. See *Brown*, 116 S. Ct. at 2120, 2121, 2123, 2125-26; *infra* notes 322-30 and accompanying text. A significant part of Justice Goldberg's separate opinion, dealing with the history of the Sherman Act's application to labor issues, has been characterized as an "essay" that was "an instrument of advocacy rather than of inquiry." Meltzer, *supra* note 1, at 729.

172. See *Jewel Tea*, 381 U.S. at 697-700, 714-30 (separate opinion of Goldberg, J.). Commentators have criticized the Court's opinions in *Pennington* and *Jewel Tea* as well. One commentator has stated that the decisions not only "failed to shed much light on a dark corner of the law," but "failed also to exhibit . . . even a serious effort by the members of the Court to state clearly and to grapple with the problems raised by the competing approaches of their colleagues and by the precedents." Meltzer, *supra* note 1, at 734. Another criticized the adoption of a balancing test, maintaining that such a test "tends to lead to unprincipled and inconsistent decisionmaking. Justice White's opinion [in *Jewel Tea*] tells courts to balance the importance of a particular restraint to union members against the magnitude of its anticompetitive effect," which is impracticable and leads to decisions made on the basis of a judge's personal perceptions. Leslie, *supra* note 1, at 1217.

173. See *Jewel Tea*, 381 U.S. at 697 (separate opinion of Goldberg, J.). "The judicial expressions in [*Jewel Tea*] represent another example of the reluctance of judges to give full effect to congressional purpose in this area and the substitution by judges of their views for those of Congress as to how free collective bargaining should operate." *Id.* at 726 (separate opinion of Goldberg, J.). The lack of expertise that "antitrust courts" have in regard to labor issues was a theme which both Justice Goldberg and the *Brown* Court stressed. Interestingly, at least one commentator has suggested that perhaps courts lack the expertise to apply even antitrust law. See Michael Boudin, *Observations*, 59 ANTITRUST L.J. 131, 131-33 (1990). The suggestion is that an administrative agency, presumably analogous to the NLRB in the labor relations area, would be better able to bring consistency, expertise, and predictability to antitrust law. See *id.*

174. *Jewel Tea*, 381 U.S. at 700 (separate opinion of Goldberg, J.). "The Court in

to prevent "the lawfulness of union conduct [from turning on] subjective judgments of purpose or effect."<sup>175</sup> Urging a return to judicial abstention in the vein of *Apex* and *Hutcheson*,<sup>176</sup> he stated that "[t]o apply the antitrust laws at this late date to [labor agreements] would endanger the stability which now characterizes collective bargaining."<sup>177</sup>

Choosing not to subscribe to the views of Justice Goldberg, the Court declined the request to reconsider the *Pennington* holding in 1971,<sup>178</sup> and in 1975 decided *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*.<sup>179</sup> In a decision that some thought "compounded the errors of *Pennington* and *Jewel Tea*,"<sup>180</sup> the Court for the first time expressly recognized a "nonstatutory labor exemption" from the antitrust laws.<sup>181</sup> In *Connell*, a union pressured a contractor into signing a contract wherein he promised to subcontract mechanical work only to firms with whom the union currently had an agreement.<sup>182</sup> After signing under protest, the contractor brought an antitrust claim against the union.<sup>183</sup>

The *Connell* Court noted that while labor statutes such as the Norris-LaGuardia and Clayton Acts expressly exempt certain union

[*Pennington*] today ignores [the] history of the discredited judicial attempt to apply the antitrust laws to legitimate collective bargaining activity . . ." *Id.* at 713 (separate opinion of Goldberg, J.).

175. *Id.* at 707 (separate opinion of Goldberg, J.). Justice Goldberg stated that the history of labor and antitrust law "makes clear that Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects." *Id.* at 716 (separate opinion of Goldberg, J.); *cf. Brown*, 116 S. Ct. at 2123, 2125-26 (refusing to construct a system of antitrust review where the courts would have to examine an employer's "purpose or motive").

176. *See Jewel Tea*, 381 U.S. at 709 (separate opinion of Goldberg, J.). "The Court's holding in [*Pennington*] today flies in the face of [*Apex*] and [*Hutcheson*] and restrains collective bargaining in the same way as did the holding of the majority in [*Duplex*]"—a holding which Congress has expressly repudiated in favor of Mr. Justice Brandeis' dissenting views." *Id.* at 725; *cf. Brown*, 116 S. Ct. at 2120 (stating that Congress enacted labor statutes in response to Justice Brandeis' dissent).

177. *Jewel Tea*, 381 U.S. at 732 (separate opinion of Goldberg, J.); *cf. Brown*, 116 S. Ct. at 2123 (stating that "to permit antitrust liability [in the context of this case] threatens to introduce instability and uncertainty into the collective-bargaining process").

178. *See Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 312-13 (1971) (declining request to reconsider its 1965 holding on facts similar to those in *Pennington*).

179. 421 U.S. 616 (1975).

180. *Handler & Zifchak*, *supra* note 110, at 486; *see also St. Antoine*, *supra* note 130, at 603 ("*Connell*, to say it straightaway, is an example neither of sound craftsmanship nor of balanced judgment.").

181. *See Connell*, 421 U.S. at 622.

182. *See id.* at 619-20.

183. *See id.* at 620-21.



activities from antitrust liability, nothing in the statutes exempts agreements between union and management that result from collective bargaining and often restrain trade.<sup>184</sup> The Court stated that it “ha[d] recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”<sup>185</sup> The Court nonetheless found that the exemption did not apply to the agreement in *Connell* and held that the union could be subject to antitrust sanctions because the agreement the contractor had been pressured into signing had “a potential for restraining competition in the business market in ways that would not follow naturally from [the legitimate union objectives of] elimination of competition over wages and working conditions.”<sup>186</sup>

Furthermore, the Court took the unprecedented step of suggesting that antitrust sanctions could apply to activities that were deemed unfair labor practices under labor law.<sup>187</sup> Before *Connell*, it appeared settled that only labor law remedies, as opposed to antitrust remedies, were available for violations of labor law proscriptions.<sup>188</sup> Following *Connell*, some lower courts began finding that labor law violations may “trigger[], rather than preclude[], an inquiry into the availability of an antitrust exemption.”<sup>189</sup> Thus, the effect of *Connell*

---

184. See *id.* at 621-22.

185. *Id.* at 622. This was essentially the same principle that was implicitly recognized, but unstated, in *Pennington*, *Jewel Tea*, and *Apex*. The *Connell* Court cited *Jewel Tea* in support of the existence of the nonstatutory exemption. See *id.*

186. *Id.* at 635. The Court explained that the agreement “indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods.” *Id.* at 623. Although the union’s goal of organizing as many workers as possible was legal, “the methods the union chose are not immune from antitrust sanctions simply because the goal is legal.” *Id.* at 625.

187. See *id.* at 634-35. Justice Stewart, expressing disagreement with such a step in his dissent, argued that in enacting the Taft-Hartley and Landrum-Griffin Acts, Congress “rejected efforts to give private parties injured by [certain activities described in the Acts] the right to seek relief under federal antitrust laws.” *Id.* at 639 (Stewart, J., dissenting); see also St. Antoine, *supra* note 130, at 626 (opining that allowing antitrust remedies in this type of situation was “[t]he most egregious failure of the *Connell* majority to take proper account of the policies of the labor laws”).

188. See Handler & Zifchak, *supra* note 110, at 486.

189. *Id.* at 489-90; see also Joshua Stein, Comment, Consolidated Express: *Antitrust Liability for Illegal Labor Activities*, 80 COLUM. L. REV. 645, 648 (1980) (discussing the post-*Connell* case *Consolidated Express, Inc. v. New York Shipping Ass’n*, 602 F.2d 494 (3d Cir. 1979), and noting that the circuit court “concluded that any violation of [a labor law] deprives the union of its [antitrust] exemption”).

seems to have been the further insertion of antitrust law *into* the labor arena.

Following *Pennington*, *Jewel Tea*, and *Connell*, the interplay between labor law and antitrust law was at best uncertain.<sup>190</sup> There is some merit in the argument that the philosophy behind those three decisions conflicts with congressional intent to keep antitrust law out of labor issues.<sup>191</sup> Those cases could also be seen as unwarranted departures from the precedent established by *Apex*, *Hutcheson*, and *Allen Bradley*, which some believed reflected the correct balance between antitrust and labor law.<sup>192</sup> Furthermore, the Court itself was divided in *Pennington*, *Jewel Tea*, and *Connell*.<sup>193</sup> If the Court wanted to curtail or even preclude application of antitrust law to the field of labor relations, it could find both judicial and scholarly support for such positions.<sup>194</sup>

Regardless of the confusion following *Connell* as to the proper role of antitrust law in labor relations, it was clear that a "nonstatutory labor exemption" to the antitrust laws existed and would be applied under certain circumstances. What remained unclear was the *scope* of the exemption.<sup>195</sup> The courts were largely in

---

190. "*Pennington*, *Jewel Tea* and *Connell* . . . have placed the courts in the position of resurrecting the most hateful labor-antitrust precedents. They are replete with ambiguity and have produced chaos in the field of labor-antitrust." Handler & Zifchak, *supra* note 110, at 513. These commentators conclude that, following *Connell*, the courts are applying "a confused body of law, whose principal attribute is uncertainty." *Id.* at 514. Another commentator writes that "the Court's labor and antitrust analysis [in *Pennington*, *Jewel Tea*, and *Connell*] was confused and the subject of great criticism." Goldman, *supra* note 170, at 652.

191. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 697, 700-09 (1965) (separate opinion of Goldberg, J.).

192. See Handler & Zifchak, *supra* note 110, at 482-83, 513-14; TAYLOR, *supra* note 145, at 100-04.

193. *Connell* was a five-to-four decision. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, wrote a dissenting opinion, arguing that labor remedies should have been exclusive and that it was counter to congressional intent to apply antitrust law in that situation. See *id.* at 639-55 (Stewart, J., dissenting). Justice Douglas also wrote a separate dissenting opinion. See *id.* at 638 (Douglas, J., dissenting). For the division of the Court in *Pennington* and *Jewel Tea*, see *supra* note 163.

194. See, e.g., Handler & Zifchak, *supra* note 110, at 513 ("We urge that the Court return to the tenets of the *Apex-Hutcheson-Allen Bradley* trilogy."); Jacobs & Winter, *supra* note 64, at 22 (arguing that antitrust law is inapplicable with respect to parties in a collective bargaining relationship). Long before *Connell*, the wisdom of applying antitrust law to the labor arena was questioned. See Cox, *supra* note 131, at 261. Professor Cox argued that "[s]ince the general run of labor disputes has little to do with the preservation of a *competitive* economy, antitrust doctrines throw scant light on the best means of resolving the conflicts of interest among employers, employees and labor unions." *Id.*

195. See, e.g., *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1045, 1048 (D.C. Cir. 1995)

conflict as to the activities that enjoyed the exemption and the breadth with which the exemption should be applied in order to protect the collective bargaining process.<sup>196</sup>

The *Connell* Court stated that certain "union-employer agreements" must be protected by the exemption<sup>197</sup> because labor law obligated employers and employees to bargain on certain mandatory terms of employment.<sup>198</sup> The agreements that resulted from this bargaining, looked at in isolation, would appear to have terms that restrained commerce in violation of the Sherman Act.<sup>199</sup> While the labor statutes expressly exempted organized labor activity that took place during the bargaining process, no statute expressly exempted the resulting agreement.<sup>200</sup> Thus, in order to avoid the absurd result of encouraging collective bargaining agreements under the labor laws only to find those agreements illegal under the antitrust laws, the courts were forced to immunize the resulting agreements from antitrust attack.<sup>201</sup>

---

(noting that "there has been much debate over the years regarding the scope of the exemption" and that it "never has been conclusively delimited"), *aff'd*, 116 S. Ct. 2116 (1996); *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976) (noting that "the precise contours of [the exemption] are neither clear nor entirely coherent"), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Lock*, *supra* note 14, at 352 ("The scope of [the] nonstatutory labor exemption is not precisely defined."); Kieran M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1052 (1994) ("The breadth of the exemption . . . is essentially based upon issues of public policy. Courts make decisions with no precise congressional guidance, and therefore a particular decision-maker's political philosophy or economic orientation can greatly influence the outcome. Consequently, the exemption has been applied and interpreted with considerable inconsistency.").

196. *Compare Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 130-34 (D.D.C. 1991) (holding that the exemption should expire when the agreement expires), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996), *with Powell v. National Football League*, 930 F.2d 1293, 1302-03 (8th Cir. 1989) (stating that the exemption survives the expiration of the agreement and can possibly last beyond impasse); *see also infra* notes 211-39 and accompanying text (discussing courts' differing interpretations of the scope of the exemption).

197. *See Connell*, 421 U.S. at 622.

198. The NLRA imposes an obligation on employers and unions to bargain collectively "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1994).

199. *See Connell*, 421 U.S. at 622. The Court noted that employees, bargaining collectively as a union, can obtain more standardized wages than they could if they bargained individually. *See id.* This standardization of wages "ultimately will affect price competition among employers," which would theoretically give rise to antitrust liability. *Id.*

200. *See id.*

201. *See id.* (noting that while standardized wages that unions bargain for "ultimately will affect price competition among employers, . . . the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws").

Yet it became clear that immunizing only the collective bargaining *agreement* might not go far enough in promoting the collective bargaining *process*.<sup>202</sup> With only the agreement itself exempted, employers would be subject to antitrust liability the moment an agreement expired.<sup>203</sup> This consequence had the potential to frustrate the national policy of collective bargaining because it could serve to reduce the incentive of employees to continue bargaining toward a new agreement after a former one had expired.<sup>204</sup> Armed with the threat of an antitrust suit, employees might be reluctant to come to a quick and fair agreement.<sup>205</sup> In addition, employer groups would be inhibited in their bargaining offers due to fear of antitrust sanctions.<sup>206</sup> In order to protect the collective bargaining process, many thought that the nonstatutory exemption should continue to shield the activities of the process after expiration of an agreement.<sup>207</sup>

However, because most *employee* bargaining activities already enjoyed statutory exemptions under labor law,<sup>208</sup> extending the nonstatutory exemption to "protect the bargaining process" effectively meant extending antitrust protection to the activities of *employers*.<sup>209</sup>

---

202. See, e.g., *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 965 (D.N.J. 1987) (arguing that viewing the exemption as expiring with the agreement is "unrealistic" because post-expiration negotiations toward a new agreement are still subject to the dictates of labor law and should thus be protected from antitrust law); Roberts, *supra* note 170, at 81 ("The NLRA does not mandate agreements, it mandates a process. This fact is central to the theme that the nonstatutory exemption protects more than just agreements.").

203. See *Bridgeman*, 675 F. Supp. at 965 (arguing that it would be anomalous to maintain that bargained-for restraints "lose [their] immunity automatically upon expiration of the agreement").

204. See Lock, *supra* note 14, at 383 (noting that NFL team owners argue that allowing unions to bring antitrust suits "effectively permits the union to dictate terms of employment, thereby creating a strong disincentive for the union to bargain in good faith").

205. See *id.*

206. Employers may be "reluctant to agree to potentially anticompetitive restraints, even where desired by their employees, for fear that such practices would expose them to antitrust suits during any period between agreements." *Bridgeman*, 675 F. Supp. at 966.

207. See *Powell v. National Football League*, 930 F.2d 1293, 1301-02 (8th Cir. 1989); *Bridgeman*, 675 F. Supp. at 965-66; Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 774-75 (1981); Goldman, *supra* note 170, at 671; *infra* notes 221-51 and accompanying text.

208. See, e.g., *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975) (noting that Clayton Act and Norris-La Guardia Act exempt certain union activity from antitrust liability).

209. One might conceive of the collective bargaining "process" as being composed of three elements: the activities of employees, the activities of employers, and the agreement that is reached between the two. With the activities of employees being (for the most part) immunized statutorily, and the agreements being immunized by the nonstatu-

Because the original purpose of the labor statutes had been to position employees on level bargaining ground with employers, one line of thought was that granting additional powers to the employers undermined the purpose of labor laws and created an unbalanced bargaining environment.<sup>210</sup>

In the cases following *Connell* and leading up to *Brown*, lower courts struggled with the scope of the exemption. Some adhered to the literal language of *Connell*, applying the exemption only to bargaining agreements.<sup>211</sup> To protect the bargaining activities of both sides, others advocated an approach that would extend the exemption beyond expiration of an agreement until the point when a bargaining impasse was reached, or even beyond.<sup>212</sup> None of these cases, however, reached the Supreme Court, and thus the scope of the exemption remained unclear. Because the most visible of these cases involved professional sports, and since *Brown* followed in their vein and addressed the specific issue they raised, the sports cases will be primarily used to show the differing positions.<sup>213</sup>

---

tory exemption as explained in *Connell*, presumably the only element left to be affected by a broadening of the nonstatutory exemption is the activities of employers.

At least one lower court examined the nonstatutory exemption in its early stages and concluded that it did not apply to protect employers at all. See *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975). Courts in subsequent cases held employers to be protected, but the degree of the employer's protection in each case was a function of how broadly or narrowly that particular court defined the scope of the exemption. See *infra* notes 214-39 and accompanying text.

210. The dissent in the D.C. Circuit decision in *Brown* argued that although collective bargaining seeks a balance in strength between employers and employees, "we must . . . be mindful that 'a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management . . . by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers.'" *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1064 (D.C. Cir. 1995) (Wald, J., dissenting) (alteration in original) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)), *aff'd*, 116 S. Ct. 2116 (1996).

211. See, e.g., *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979) (agreeing with other courts that exemption applies only in the presence of an agreement that is the result of arm's-length bargaining); *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976) ("[T]he thrust of the cases [is that] a scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the [scope of the] exemption unless and until it becomes part of a collective bargaining agreement . . ."), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

212. See *Powell*, 930 F.2d at 1302-03; *Bridgeman*, 675 F. Supp. at 966-67.

213. Sports cases have a unique relationship with the nonstatutory exemption. One commentator explains:

[In non-sports cases] the availability of the labor exemption is usually tested in a suit brought by an employer or third party who is adversely affected by a union-proposed restriction included within a collective bargaining agreement; the union typically seeks to avoid liability by asserting the labor exemption as a

Just one year after the Supreme Court had expressly recognized the nonstatutory exemption in *Connell*, the Eighth Circuit addressed the scope of the exemption in *Mackey v. National Football League*.<sup>214</sup> In *Mackey*, the players claimed that the League's enforcement of a rule restraining player movement among teams<sup>215</sup> violated the Sherman Act.<sup>216</sup> Although the court noted that the "nonstatutory labor exemption" applied to certain employer activity as well as employee activity,<sup>217</sup> the court held that the League's actions in these circumstances were not within the scope of the exemption.<sup>218</sup>

In discussing when labor policy would prevail over antitrust principles, thereby allowing the nonstatutory exemption to protect certain activities from antitrust ramifications, the *Mackey* court fashioned a three-part test: The nonstatutory exemption would apply when (1) only the parties to the bargaining agreement are primarily affected; (2) the term at issue is a mandatory subject of bargaining; and (3) the agreement "is the product of bona fide arm's-length bargaining."<sup>219</sup> Finding that the third prong of the test was not satisfied,

---

defense. However, in cases involving professional sports the plaintiff is generally a member of the union or the union itself, and the party raising the defense of labor exemption is typically the employer; the defense is raised not for the purpose of seeking immunity for a union-imposed restriction but rather to immunize an employer-devised restraint which may or may not have been approved by the union.

WARREN FREEDMAN, PROFESSIONAL SPORTS AND ANTITRUST 52 (1987); see also Roberts, *supra* note 170, at 62-63 (discussing the different factual settings of sports and non-sports cases in regard to the application of the exemption).

214. 543 F.2d 606 (8th Cir. 1976).

215. The "Rozelle Rule" provided that when a player's contract with one team expired, and he wanted to sign a contract with a different team, the new team had to compensate the player's former team. See *id.* at 609 n.1. If the two teams could not agree on a price, then the Commissioner could compensate the former team with players or draft choices as he saw fit. See *id.*

216. See *id.* at 609.

217. See *id.* at 612. The court stated that because the purpose of the nonstatutory exemption was to support the national policy favoring collective bargaining, and because it exempted agreements, "the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of the labor exemption." *Id.* Interestingly, the court cited Justice Goldberg's separate opinion from *Jewel Tea* in support. See *id.*; see also *supra* notes 171-77 and accompanying text (discussing Justice Goldberg's separate opinion). The court also cited several pre-*Connell* cases that had implied an exemption for employer activity in the collective bargaining process. See *Mackey*, 543 F.2d at 612 (citing *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972)).

218. See *Mackey*, 543 F.2d at 616.

219. *Id.* at 614. Several lower courts adopted the *Mackey* test in subsequent decisions. See *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979); *Zimmerman v. National Football League*, 632 F. Supp. 398, 403-04 (D.D.C. 1986); *Wood v.*

the court held that the agreement which embodied the disputed rule was not exempt from antitrust sanctions.<sup>220</sup>

As noted, *Mackey* dealt with a signed agreement that was still in effect, rather than with the issue of how long the exemption should be applied once an agreement has expired. This latter issue was addressed by the District Court of New Jersey in *Bridgeman v. National Basketball Ass'n.*<sup>221</sup> In *Bridgeman*, an agreement that contained three alleged restraints<sup>222</sup> on players had recently expired.<sup>223</sup> Without an agreement in place, the National Basketball Association (the "NBA") continued to adhere to the terms of the expired agreement and continued to impose the restraints.<sup>224</sup> The players claimed that the continued imposition of the restraints under the expired agreement constituted an antitrust violation and that the NBA's actions were not shielded by the nonstatutory exemption.<sup>225</sup>

The district court endorsed the *Mackey* test as a "starting point," but decided that because the case dealt with an expired agreement, it required "moving one step beyond *Mackey*."<sup>226</sup> After balancing labor and antitrust policies,<sup>227</sup> the court concluded that the interest of preserving the bargaining process necessitated leaving the exemption in place after expiration of an agreement.<sup>228</sup> It also declined to proclaim

---

National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

Criticizing the third prong of the *Mackey* test, one commentator argues that the inquiry into whether an agreement is the product of bona fide arm's-length bargaining "suggests that it is appropriate for a federal court to use the consumer welfare oriented antitrust laws as a pretext for intervening in the collective bargaining process . . . to apply its own judgment to determine the fairness of a bargained agreement." Roberts, *supra* note 170, at 78.

220. See *Mackey*, 543 F.2d at 616. The district court found that there had been no bona fide bargaining over the rule originally, but instead that the owners had unilaterally imposed it years earlier when the players union was new and in a weak bargaining position. See *id.* at 615-16. The district court had further found that although the rule appeared in subsequent collective bargaining agreements, a quid pro quo element was lacking because the union had received nothing in return for agreeing to it. See *id.* at 616.

221. 675 F. Supp. 960, 964-65 (D.N.J. 1987).

222. The players maintained that it was a violation of the antitrust laws for the NBA to enforce its college draft procedure, salary cap, and "right of first refusal." See *id.* at 961-62.

223. See *id.* at 963.

224. See *id.*

225. See *id.* at 961.

226. *Id.* at 965.

227. The court cited *Jewel Tea*, *Pennington*, and *Connell*, as well as *Mackey*, in support of this "balancing" approach. *Id.*

228. See *id.* at 965-66.

"impasse" as the point when the exemption expired.<sup>229</sup> The court noted, however, that the employer should not be able to enjoy the exemption "indefinitely" simply because it maintained the status quo under the expired agreement.<sup>230</sup>

The *Bridgeman* court ultimately settled on a test for expiration of the exemption that drew on the employer's subjective intent.<sup>231</sup> Under this test, the exemption survived as long as the employer continued to maintain the status quo and "reasonably believ[ed] that the practice or a close variant of it [would] be incorporated in the next collective bargaining agreement."<sup>232</sup> The court noted that utilizing this test meant that "[i]n any particular case, the exemption may expire before, during, or after impasse."<sup>233</sup>

Yet another test regarding the scope of the exemption emerged in relation to an expired agreement in *Powell v. National Football League*.<sup>234</sup> After a district court ruling that the League's antitrust exemption had expired at impasse,<sup>235</sup> the Eighth Circuit reversed, stated that *Mackey* was not controlling, but nevertheless purported to apply the "analytic framework" of *Mackey*.<sup>236</sup> The court found that the "impasse standard treats a lawful stage of the collective bargaining process as misconduct," in conflict with labor policy favoring NLRB-supervised resolution of employment disputes.<sup>237</sup> Furthermore, the

---

229. See *id.* at 966-67.

230. See *id.* at 966; see also *infra* notes 292-97 and accompanying text (discussing the problems presented by an indefinite exemption).

231. See *Bridgeman*, 675 F. Supp. at 967.

232. *Id.*

233. *Id.* For one criticism of the *Bridgeman* test, see Lock, *supra* note 14, at 370-72.

234. 930 F.2d 1293 (8th Cir. 1989). Like *Bridgeman*, *Powell* dealt with players' objections to a "right of first refusal" provision that had been in effect in previous agreements that were now expired. See *id.* at 1295-96. The League continued to enforce the provision in the absence of a new collective bargaining agreement. See *id.*

235. See *id.* at 1295.

236. See *id.* at 1298. Chief Judge Lay, who had written the *Mackey* opinion 13 years earlier, but was not on the panel that decided *Powell*, wrote an opinion dissenting from the court's denial of a rehearing en banc. See *id.* at 1307 (Lay, C.J., dissenting from denial of rehearing en banc). In his dissent, the Chief Judge argued that the court in fact had not applied *Mackey* but instead had "reject[ed] it by destroying its carefully constructed limitations." *Id.* at 1308 (Lay, C.J., dissenting from denial of rehearing en banc). He forcefully argued that the logic of *Mackey* would not allow extending the exemption past impasse, because the "bona fide bargaining process" has ended by that time. *Id.* at 1308-09 (Lay, C.J., dissenting from denial of rehearing en banc). The court responded to Chief Judge Lay's dissent: "We believe [*Mackey's*] language referring to the 'agreement sought to be exempted' applies to the 'product of bona fide arm's-length bargaining' before termination and continues afterward, whether to impasse or to some other point in time." *Id.* at 1298 n.6 (citations omitted).

237. *Id.* at 1302 (footnote omitted).



court noted that labor law provided ample remedies to both employers and employees after their bargaining had reached impasse.<sup>238</sup> Thus, the *Powell* court reasoned that courts should not allow the intervention of antitrust law into disputes when “ ‘the union has had a sufficient impact in shaping the content of the employer’s offers.’ ”<sup>239</sup>

The courts were not the only ones in disagreement over the scope of the exemption. Commentators offered a variety of views as to the interplay of antitrust and labor policy with equal disharmony. As with the courts, the commentators’ views ranged from cutting off the exemption at the expiration of the agreement<sup>240</sup> to effectively prohibiting antitrust claims in labor settings.<sup>241</sup> In an influential 1971 article,<sup>242</sup> two commentators argued that antitrust law should be inapplicable when a collective bargaining system is in place.<sup>243</sup> The

---

238. *See id.*

239. *Id.* (emphasis added) (quoting JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 5.06, at 590 (1979)).

240. *See* Lock, *supra* note 14, at 400; Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 888-92 (1991).

241. *See* Jacobs & Winter, *supra* note 64, at 21; Roberts, *supra* note 170, at 62-63.

242. *See* Jacobs & Winter, *supra* note 64. The article has been cited both in court opinions and scholarly articles. *See Powell*, 930 F.2d at 1303; Roberts, *supra* note 170, at 89; John C. Weistart, *Judicial Review of Labor Agreements: Lessons from the Sports Industry*, 44 LAW & CONTEMP. PROBS. 109, 113 (Autumn 1981). In his dissent in *Brown*, Justice Stevens referred to it as “[t]he article that first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse.” *Brown*, 116 S. Ct. at 2133 (Stevens, J., dissenting).

243. *See* Jacobs & Winter, *supra* note 64, at 21. One focal point of the article was the then-pending Supreme Court case wherein baseball player Curt Flood was suing Major League Baseball. *See id.* at 1-14. Flood argued that baseball’s “reserve clause,” which essentially made a player the “permanent property” of the team that drafted him, violated the Sherman Act. *Id.* at 2. The article’s position was that because Flood was part of a union engaged in collective bargaining, he could not, as he wanted to, “exercise his individual bargaining power.” *Id.* at 7.

Flood lost his case against Major League Baseball. *See Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972). Interestingly, former Justice Goldberg represented Flood and argued that baseball’s reserve clause should not be protected from antitrust scrutiny by the “nonstatutory labor exemption.” *See* Reply Brief for Petitioner at 13-14, *Flood v. Kuhn*, 407 U.S. 258 (1972) (No. 71-32), *cited in Brown*, 116 S. Ct. at 2133-34 (Stevens, J., dissenting).

Incidentally, a primary reason for Flood’s loss may have been the anomalous exemption from antitrust law that baseball enjoys. *See* FREEDMAN, *supra* note 213, at 31-34. In a 1922 case, the Supreme Court held that baseball was a local activity, as opposed to interstate commerce, and thus was beyond the reach of a federal law like the Sherman Act. *See Federal Baseball Club v. National League of Prof’l Baseball Clubs*, 259 U.S. 200, 208-09 (1922). The Court has since refused to overturn this decision, based primarily on *stare decisis* and the idea that there has been considerable reliance on its 1922 decision. *See* FREEDMAN, *supra* note 213, at 35. The *Flood* Court made it clear that baseball alone enjoys the exemption. *See Flood*, 407 U.S. at 282. Even before *Flood*, the Supreme Court had refused to extend baseball’s exemption to professional football. *See Radovich v.*

authors noted that “[c]ollective bargaining seeks to order labor markets through a system of countervailing power. . . . If such a structure was to be protected by law, then logically the antitrust claims between employers and employees must be extinguished.”<sup>244</sup> Others, echoing this opinion, maintained that “the nonstatutory exemption should apply to all matters affecting only the employment relationship.”<sup>245</sup>

Another position advanced by commentators was that adopted by the *Powell* court—that the exemption should survive beyond impasse if the employees had some input in “shaping” the restraint that was eventually imposed.<sup>246</sup> Other commentators argued that only the terms that were eventually imposed were “offered to” the union prior to impasse.<sup>247</sup> One commentator proposed that the “exemption should apply until impasse, but not beyond, [regardless of] whether the challenged restraint remains unmodified, unless either (1) no party seeks to discuss the expired restraint, or (2) the union challenges a ‘parallel’ agreement among members of a multi-employer bargaining group.”<sup>248</sup> Another commentator propounded a simpler approach, arguing for an extension of the exemption for as long as the status quo under the expired agreement is maintained, but revoking the exemption if employers unilaterally impose new or different terms.<sup>249</sup> Still another countered that “the employer should not be able to hide behind a labor law principle requiring it to maintain the status quo,”<sup>250</sup> and argued that the exemption should expire when the employees no longer consent to the restraint being imposed upon them.<sup>251</sup>

Thus, the *Brown* Court undertook two interrelated tasks—first, to define the disputed scope of the nonstatutory exemption that it

NFL, 352 U.S. 445, 447-48 (1957).

244. Jacobs & Winter, *supra* note 64, at 22.

245. Roberts, *supra* note 170, at 89.

246. WEISTART & LOWELL, *supra* note 239, at 588-90.

247. Berry & Gould, *supra* note 207, at 774-75.

248. Goldman, *supra* note 170, at 671. A “parallel agreement” is an “identity of action or terms . . . among members of a multi-employer bargaining group, as opposed to a joint-employer restraint, such as a sports player draft, that could not be implemented by an individual employer.” *Id.* at 664.

249. See Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 172 (1982).

250. Lock, *supra* note 14, at 376.

251. See *id.*; see also Note, *supra* note 240, at 888 (“It seems logical . . . that if union consent attaches when the union enters a collective bargaining agreement, it should expire when the agreement expires.”).

had created in its previous cases and second, to declare the degree of involvement "antitrust courts" should have in areas covered by labor law. The Court settled the scope controversy by broadly extending coverage beyond impasse and allowing it to encompass the unilateral imposition of terms by employers.<sup>252</sup> By defining the scope expansively, the second task solved itself; the new unavailability of the antitrust suit in labor disputes means that courts are effectively dissociated from the field of collective bargaining, leaving appeals to the NLRB as the nearly exclusive recourse for disgruntled parties in collective bargaining relationships.<sup>253</sup>

Although the Court implied that it was simply clarifying the scope of the exemption,<sup>254</sup> it appears to have broadened it considerably. The Court's language in *Connell*—that the exemption applied to "some union-employer agreements"<sup>255</sup>—lends support to the conclusion that it did not extend to post-agreement bargaining.<sup>256</sup> Or, if one subscribes to the idea that the exemption was intended to endure for some time after expiration of the agreement in order to immunize the parties' actions while they attempted to reach a new agreement, it would not be illogical to assume that it expires once those parties' negotiations reached impasse.<sup>257</sup> If the Court's prior decisions sup-

---

252. See *supra* notes 34-51 and accompanying text.

253. See *supra* notes 52-65 and accompanying text.

254. The Court cited *Connell*, *Jewel Tea*, and *Pennington* as support for the existence of the nonstatutory exemption. See *Brown*, 116 S. Ct. at 2120. However, it did not quote its previous language from *Connell* declaring the exemption to apply to "some union-employer agreements." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). Rather, the Court insinuated that the exemption had always been broader in scope than those words suggest and stated that previous decisions had found that the exemption "applies where needed to make the collective bargaining process work." *Brown*, 116 S. Ct. at 2119. In another part of the opinion, the Court referred to the exemption as immunizing "some restraints on competition imposed through the bargaining process." *Id.* at 2120.

255. *Connell*, 421 U.S. at 622; see also *supra* notes 179-89 and accompanying text (discussing *Connell*).

256. Cf. Note, *supra* note 240, at 888 (arguing that a union consents to restraints in an agreement only for the duration of that agreement, and thus those restraints should lose their antitrust immunity once the agreement expires). In *Brown*, the players argued that the exemption applies only to agreements. See *Brown*, 116 S. Ct. at 2123. The Court rejected this argument, stating that the "agreement" language had been used previously simply because *Pennington*, *Jewel Tea*, and *Connell* had dealt with situations where there were agreements at issue. See *id.* Thus, the language reflected only the particular factual situations to which the exemption was being applied and did "not reflect the exemption's rationale." *Id.* (emphasis added); cf. Roberts, *supra* note 170, at 79-80 (arguing that although the Court spoke of "agreements" in *Jewel Tea*, "nothing in the opinion suggests that the Court intended to limit the exemption exclusively to conduct authorized by agreements").

257. See, e.g., *Powell v. National Football League*, 930 F.2d 1293, 1309 (8th Cir. 1989)

ported a broad interpretation of the exemption, which permitted extension beyond impasse and covered the unilateral imposition of new or different terms by employers, this was not clear to the lower courts.<sup>258</sup>

The Court did, however, have support for the general idea underlying its decision in *Brown*.<sup>259</sup> As discussed above, some commentators spoke of the general inappropriateness of antitrust law in labor relations and of how the initiation of an antitrust suit should not be an option for disgruntled parties in a labor dispute.<sup>260</sup> Proponents of this position argue that judicial interference via antitrust law is essentially a hindrance to the bargaining process.<sup>261</sup> Not only are judges and juries deciding complicated matters in areas of the law in

---

(Lay, C.J., dissenting from denial of rehearing en banc) ("If the exemption does not end at impasse, when does it end?"); see also Lock, *supra* note 14, at 394-95 (stating that even though labor law allows employers to unilaterally implement terms after impasse, "it is unlikely that a court would conclude that the labor exemption continues [after impasse and] even after the status quo has been altered").

258. See, e.g., *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (requiring an agreement that "is the product of bona fide arm's-length bargaining" in order for the exemption to apply); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987) (requiring, inter alia, that the employer maintain the status quo in order for the exemption to apply); *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976) ("[I]n any event, it seems apparent that the policy of the exemption . . . does not require and would not be served by extending the exemption to arrangements imposed unilaterally by employers."), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-87 (S.D.N.Y. 1975) (concluding that no labor exemption to the antitrust laws can be extended to protect the activities of the employer); *Kapp v. National Football League*, 390 F. Supp. 73, 86 (N.D. Cal. 1974) (stating that nonstatutory exemption did not immunize restraint in agreement because the restraint had "not been contractually accepted [by the players] as the result of collective bargaining"); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 485, 498-500 (E.D. Pa. 1972) (suggesting nonstatutory exemption does not apply when employer has initiated the restraint and there was no "arm's-length collective bargaining" in regard to it before its inclusion in an agreement); *Boston Prof'l Hockey Ass'n v. Cheevers*, 348 F. Supp. 261, 267-68 (D. Mass. 1972) (holding exemption did not apply because disputed clause, although embodied in the agreement, was not "the product of collective bargaining negotiations"). The pre-*Connell* cases inferred the existence of the exemption from *Jewel Tea*, where it had been applied but not expressly named. See, e.g., *Kapp*, 390 F. Supp. at 89 (noting that the League cited *Jewel Tea*, among others, in support of its contention that employer-employee agreements are immune from antitrust liability).

259. Among this support is Justice Goldberg's separate opinion in *Jewel Tea*. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 697 (1965) (separate opinion of Goldberg, J.); *supra* notes 171-77 and accompanying text. As noted, that separate opinion was a denunciation of the Court's reasoning in both *Jewel Tea* and *Pennington*. See *infra* notes 322-30 and accompanying text.

260. See *Jacobs & Winter, supra* note 64, at 21-22; *Roberts, supra* note 170, at 86-88.

261. See, e.g., *Roberts, supra* note 170, at 97 ("The nonstatutory exemption is intended to ensure that parties to the bargaining relationship resolve their differences at the bargaining table, not in the courts.").

which they have no expertise or perhaps even competence,<sup>262</sup> but the availability of the antitrust avenue to labor removes the employees' incentive to stay at the bargaining table and make a concerted effort to reach agreement.<sup>263</sup> The collective bargaining system, it is argued, should force both parties to stay at the table until agreement is reached.<sup>264</sup> If one side has recourse to the courts via antitrust law, this recourse effectively works to sabotage the system and bring instability to a process that would theoretically stabilize if left free from interference.<sup>265</sup>

The clear goal of the Court's decision in *Brown* was to promote the unhindered operation of the collective bargaining process. Keeping the "antitrust courts" out of the labor arena by exempting virtually the entire bargaining process was meant to encourage collective bargaining agreements, presumably by removing labor unions' fallback position of bringing antitrust claims.<sup>266</sup> The Court's attempt to promote collective bargaining, however, raises the question of whether collective bargaining will in fact be encouraged if employers can unilaterally impose new or different terms after impasse with immunity from the antitrust laws via a broad nonstatutory exemption.

*Brown* may not achieve this goal because employers, without fear of antitrust sanctions, may now implement any new or different term after impasse, provided that the term has been "reasonably comprehended"<sup>267</sup> in the employers' pre-impasse proposal.<sup>268</sup> In this

---

262. See *Jewel Tea*, 381 U.S. at 716 (separate opinion of Goldberg, J.).

263. See Roberts, *supra* note 170, at 97.

264. See *id.*

265. See *id.* at 83, 96-98.

266. By disallowing antitrust allegations in the courts, all complaints arising out of collective bargaining must be routed to the NLRB. While the NLRB was created to hear such complaints, the dissenting panel judge in *Powell* questioned its effectiveness:

The majority asserts that the players can seek a cease and desist order from the NLRB to prohibit conduct constituting an unfair labor practice. Implicit in this assumption is the idea that it may be an unfair labor practice for employers to insist on a package of player restraints which violate the antitrust laws. The problem is that the NLRB will not decide that question. The NLRB will say that it is for the courts to decide whether the antitrust laws are being violated.

*Powell v. National Football League*, 930 F.2d 1293, 1305 (8th Cir. 1989) (Heaney, J., dissenting).

One commentator suggests that the NFL is unfazed by reprimands from the NLRB, quoting one League official as saying that "I'm never surprised when the NLRB rules in favor of the union. You know what the penalty is, don't you? They tell you not to do it again." Lock, *supra* note 14, at 384-85 (quoting *NLRB Tackles the Cowboys*, USA TODAY, Mar. 16, 1988, at C3 (statement of Tex Schramm)).

267. *Brown*, 116 S. Ct. at 2121.

way, employers could propose a term favorable to themselves and not relent, because they would know that upon impasse they would be free to impose the term unilaterally.<sup>269</sup> As such, impasse would be “more likely and successful collective bargaining less likely.”<sup>270</sup>

The Court’s response to such an argument presumably would be that employers are not free to propose any terms; rather, their proposals must be made in good faith.<sup>271</sup> A bad-faith proposal would be prohibited as an unfair labor practice.<sup>272</sup> However, “it will often be difficult to distinguish bad faith from mere good-faith ‘adamant insistence’ on favorable terms,” which is allowed.<sup>273</sup> Thus, employers may escape sanctions under labor law, and antitrust law will be inapplicable when the employers eventually impose their proposed terms. This could lead to employers actually favoring impasse over a new agreement.<sup>274</sup>

Even if employers do not engage in bad-faith bargaining, they are apparently in a better position now to engage in “hard bargaining”—that is, “hang[ing] tough on their demands”<sup>275</sup> and being less willing to make concessions in the interest of reaching agreement.<sup>276</sup>

268. See Corcoran, *supra* note 195, at 1068. The author writes that if the exemption extends beyond impasse and covers the unilateral imposition of terms, “the employer has an incentive to generate and maintain impasse. The incentive is produced by the employer’s knowledge that, during impasse, it can enjoy immunity from antitrust liability while unilaterally imposing new player restraints.” *Id.*

269. Such a tactic may be referred to as “surface bargaining,” which is defined as “going through the motions of negotiating.” *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980); see also Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958) (discussing the impact on unions of “going through the motions of negotiating”).

270. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1064 (D.C. Cir. 1995) (Wald, J., dissenting), *aff’d*, 116 S. Ct. 2116 (1996); see also Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U. L.J. 123, 137 (1990) (maintaining that under such a system “employers have a strong incentive to generate impasse”).

271. See *Brown*, 116 S. Ct. at 2121. Another response that the Court would presumably make is that unions are still free to strike. For a discussion of the strike as an economic weapon, see *infra* notes 278-83 and accompanying text.

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

273. *Brown*, 50 F.3d at 1064 n.6 (Wald, J., dissenting).

274. See Goldman, *supra* note 170, at 658 (noting that employers would have “carte blanche to impose additional restraints with impunity, merely by bargaining to the point of impasse on the new restraint”); Corcoran, *supra* note 195, at 1068; see also Powell v. National Football League, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, C.J., dissenting from denial of rehearing en banc) (arguing that such a system “does not accommodate labor policy, [but] instead offers an employer’s Shangri-la of everlasting immunity from the antitrust laws”).

275. *Brown*, 50 F.3d at 1064 (Wald, J., dissenting).

276. For a discussion of the impact of *Brown* upon the “balance of powers” between

One judge contends that the position adopted in *Brown* "does not just *protect* hard bargaining; it positively *encourages* it."<sup>277</sup> Again, this would have the effect of generating fewer, rather than more, collective bargaining agreements with which both parties are satisfied.

Also, in taking away a union's ability to bring an antitrust suit, the *Brown* decision effectively leaves the strike as the employees' only economic weapon in the bargaining process. While courts that espouse the position adopted by *Brown* concede this,<sup>278</sup> it is a consequence with questionable benefits. First, a strike should be the proverbial "last step," because it is a drastic move which creates hardships on both sides of the bargaining table. Unlike an antitrust suit, a strike burdens the public by depriving it of a product or service which it ordinarily enjoys.<sup>279</sup> Yet if the strike is the union's only weapon, the union will be forced to use it, perhaps regularly.

Second, in regard to professional sports, and particularly to professional football, it has been suggested that the players may not have the ability to effectively strike.<sup>280</sup> One commentator argues that many players have short careers, and strikes "jeopardize a disproportionate percentage of [their] earning potential."<sup>281</sup> If this contention is correct, the players essentially are left without a bargaining weapon at all,<sup>282</sup> and consequently bring little leverage to the bargaining table.<sup>283</sup> Again, the suggestion is that this will have a detrimental, rather than a beneficial, effect on the collective bargaining system.

Another possible concern is that the position adopted in *Brown* either will discourage employees from organizing initially or will encourage existing unions to decertify themselves.<sup>284</sup> It is the status of

---

employers and employees, see *infra* notes 349-58 and accompanying text.

277. *Brown*, 50 F.3d at 1064 (Wald, J., dissenting). *But see* Jacobs & Winter, *supra* note 64, at 27 (implying that it is not the role of antitrust law to check hard bargaining by employers).

278. *See Powell*, 930 F.2d at 1302.

279. *See* 29 U.S.C. § 151 (1994) (stating that strikes "impair the interest of the public in the free flow of . . . commerce").

280. *See Lock*, *supra* note 14, at 385, 403-04.

281. *Id.* at 403. The author further argues that because players have nowhere else to sell their services, the League is in a better position than the players to endure a strike. *See id.* This is especially true because the NFL appears to suffer no long-term detrimental effects of consumer ill-will after strikes. *See id.* at 403-04. *But cf.* Mike Weber, *Fans' Group Warns of Rising Wrath*, STAR-LEDGER (Newark, N.J.), Sept. 10, 1995 (discussing adverse impact of 1994 baseball strike on revenues).

282. *See infra* notes 349-58 and accompanying text.

283. *See Lock*, *supra* note 14, at 403.

284. *See Goldman*, *supra* note 170, at 658. Decertification of a union entails having union members sign a petition authorizing the decertification and the subsequent presentation of the petition to the NLRB. *See Nester*, *supra* note 270, at 138 & n.11.

the employees as a certified union that places them within the collective bargaining system.<sup>285</sup> Under *Brown*, it is the collective bargaining system that essentially removes the availability of an antitrust suit. Thus, employees may prefer not to be organized in a group so that they can regain the ability to threaten antitrust action.<sup>286</sup> If the system under *Brown* encourages labor groups to disband, it undermines the national labor policy favoring collective bargaining.

One commentator argues that a system which allows employers to unilaterally impose terms after impasse "sacrifices both labor and antitrust interests."<sup>287</sup> He explains that under such a system, decertification would be a "realistic response."<sup>288</sup> This would mean that "[e]ither employees would be left with no representation, or informal 'blackout' negotiations may take place. The latter forfeits labor law protections and the former completely undermines collective bargaining."<sup>289</sup>

One of the dissents in *Powell* criticized a rule allowing unilateral imposition of terms after impasse and stated that a union should not have to decertify "in order to invoke rights to which the players are clearly entitled under the antitrust laws. . . . Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws."<sup>290</sup> Although the possibility of such decertification may seem slight, the Players Association temporarily decertified its union

"Decertification places the parties to the collective bargaining negotiations at the *status quo ante*. The situation is the equivalent to having no union at all." *Id.* at 138 n.11. Because there is no collective bargaining relationship, the employers' restraints are no longer immunized from antitrust law. *See id.*

285. *See* 29 U.S.C. §§ 158-59 (1994).

286. *See* *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1059 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 116 S. Ct. 2116 (1996). If the collective bargaining system allows employers to unilaterally impose terms after impasse, then "[e]mployees in a weak bargaining position will likely opt in favor of clinging to antitrust protection as the less risky course of action; these employees will henceforth have powerful incentives *not* to engage in collective bargaining at all." *Id.* (Wald, J., dissenting).

287. Goldman, *supra* note 170, at 659. Antitrust interests would be sacrificed due to the nature of the restraints—to which the union never agreed—that such a system would allow employers to impose on unions after impasse. *See id.* at 658.

288. *Id.* at 658.

289. *Id.* at 658-59 (footnote omitted). The author defines a "blackout" agreement as "an agreement to bargain without official recognition of the meetings." *Id.* at 658 n.218. *See generally* Jeffrey D. Schneider, Note, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 846-49 (1991) (arguing that decertification would have harmful consequences for the group of players as a whole, such as the loss of protections and benefits for non-superstar players and increased transaction costs in separately negotiating every term in each individual player's contract).

290. *Powell v. National Football League*, 930 F.2d 1293, 1309-10 (8th Cir. 1989) (Lay, C.J., dissenting from denial of rehearing en banc).



and discontinued negotiations with the NFL after the Eighth Circuit's decision in *Powell*.<sup>291</sup>

The other dissenting opinion in *Powell* took issue with the rule prohibiting a union, either indefinitely or permanently, from bringing an antitrust suit against an employer for continuing to enforce a restraint in an expired agreement.<sup>292</sup> A similar argument is that such a standard, where the exemption extends beyond impasse, creates a "lifetime exemption" for employers.<sup>293</sup> That is, once employees have agreed to a certain restraint in a collective bargaining agreement, employers can continue to enforce the restraint beyond expiration of that agreement and beyond the time when the parties subsequently bargain to impasse over the disputed term, without fear of antitrust sanctions.

Some argue that permitting this lifetime exemption is unwise for several reasons. First, newly formed unions, which are often relatively weak, may agree to restraints in an initial agreement to which they would not be willing to agree in subsequent agreements when they become stronger.<sup>294</sup> An employer enjoying a lifetime exemption could continue to impose the restraints from the initial agreement after it expires, even though the union at that time would have sufficient bargaining power to resist the restraint if it were embodied in a new proposal.<sup>295</sup> Second, in accepting the restraint in the previous agreement, the employees presumably received something in return

---

291. See *Corcoran*, *supra* note 195, at 1064. After decertification, individual players brought several antitrust suits. See *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993); *Jackson v. National Football League*, 802 F. Supp. 226 (D. Minn. 1992); *Powell v. National Football League*, 764 F. Supp. 1351 (D. Minn. 1991). Ultimately, a Minnesota district court judge pressured the League and the players to enter into a new collective bargaining agreement. See *Corcoran*, *supra* note 195, at 1064-65.

One commentator has written that a union, if faced with unilateral imposition of restraints, could decertify, sue under antitrust laws, and then reunite in order to regain the advantages of the labor laws. See Note, *supra* note 240, at 883. If the employers again tried to impose unilateral restraints, "the whole process may repeat." *Id.* This "surely does not accommodate the national labor policy intended to secure economic stability." *Id.*

292. See *Powell*, 930 F.2d at 1307 (Heaney, J., dissenting).

293. Goldman, *supra* note 170, at 666.

294. See *id.*; see also Lock, *supra* note 14, at 350 (suggesting that players had success in earlier antitrust suits such as *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), because the courts recognized that the restraints had been imposed when the union was newly-formed and relatively weak); cf. Weistart, *supra* note 242, at 129 (arguing that consent to a restraint in an agreement should be presumed when parties have an established bargaining relationship, but that restraints in agreements from newly formed bargaining relationships should receive closer antitrust scrutiny).

295. See Goldman, *supra* note 170, at 666-67.

that they valued equally.<sup>296</sup> If the union becomes stronger and no longer values as highly what it received in return for agreeing to the restraint, it would be “inequitable” to allow the employer to continue to apply the restraint.<sup>297</sup>

The Court in *Brown* implicitly denied that it was granting the equivalent of a lifetime exemption because employers would not necessarily be exempt from antitrust law if their actions were “sufficiently distant in time and in circumstances from the collective-bargaining process.”<sup>298</sup> However, the Court declined to “draw the line”<sup>299</sup> where employers’ actions may lose their exemption, leaving that line somewhere beyond impasse and beyond the unilateral imposition of terms by employers.<sup>300</sup> As such, the system that *Brown* established may suffer many of the same drawbacks discussed in regard to a true lifetime exemption. Further, the above critique of the lifetime exemption focused on the situation in which employers continued to enforce a term that *at one time had been a part of an agreement*. That is, it contemplated a situation in which employees agree to a restraint which the employers continue to enforce after the agreement expires. *Brown* presented a still more controversial situation—the unilateral imposition of a restraint to which the union *never previously agreed*.<sup>301</sup>

The Court did offer justifications for allowing employers to unilaterally impose terms—even new or different ones—after impasse. The Court noted that labor law allows employers to impose new or different terms after impasse, provided those terms were “reasonably

---

296. *See id.*

297. *Id.* This is effectively an issue of “quid pro quo.” *See infra* notes 315-19 and accompanying text; *see also* Lock, *supra* note 14, at 392-94 (arguing that even the status quo doctrine—under which an employer remains exempt from antitrust liability so long as the employer retains the terms of the expired agreement—“gives management a benefit for which there was no bargained-for exchange”).

298. *Brown*, 116 S. Ct. at 2127; *see supra* notes 66-67 and accompanying text.

299. *Brown*, 116 S. Ct. at 2127.

300. *See id.* (“We need not decide in this case whether, or where, . . . to draw [the] line.”).

301. *See id.* at 2119; *id.* at 2129 (Stevens, J., dissenting). The *Brown* Court’s ruling goes beyond other decisions that had bestowed a liberal scope on the exemption. For example, the Eighth Circuit in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), fashioned a broad exemption, *see supra* notes 234-39 and accompanying text, but it was addressing a situation in which the “restraints imposed by management [were] derived from an expired collective bargaining agreement.” *Powell*, 930 F.2d at 1301 (emphasis added). Similarly, in *National Basketball Ass’n v. Williams*, 45 F.3d 684 (2d Cir. 1995), the court held that the employers’ actions were exempt because they were merely continuing to enforce terms that had been in a previous agreement that had since expired. *See id.* at 688.

comprehended" in prior proposals and were made in good faith.<sup>302</sup> From this it concluded that impasse and the subsequent unilateral imposition of terms "constitute an integral part of the bargaining process."<sup>303</sup> Because it was the expansive bargaining "process" that the Court sought to protect with the exemption, these "stages" of the process had to be included.

However, while post-impasse unilateral imposition of terms had been accepted in labor law, the Court had not previously held that this imposition of terms was likewise exempt from antitrust laws.<sup>304</sup> Indeed, it is possible that the threat of antitrust law functioned as a check against employers who would attempt to impose post-impasse terms unilaterally.<sup>305</sup> That is, although the NLRB allowed these employers to impose new or different terms unilaterally, the fear of antitrust sanctions made them prefer to reach agreement or, if agreement could not be reached, made them cautious in applying oppressive terms.<sup>306</sup>

Also, it is arguable whether impasse and the subsequent unilateral imposition of terms constitute part of the "bargaining process." By conventional definition, "impasse" denotes the final termination of a bargaining process.<sup>307</sup> The Court explained, however, that labor law's definition of "impasse" describes what is often a "temporary" situation.<sup>308</sup> As far as labor law is concerned, "impasse" is "a recur-

---

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

303. *Id.*

304. See *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 130 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996); see also *Nester*, *supra* note 270, at 143 (arguing that while post-impasse unilateral imposition of terms is allowed by labor law, the practice "should not receive immunity from the federal antitrust laws [because the] implementations have received no bargained-for exchange, they were not mandated by labor law policy, and [they] have no implied union consent" (footnotes omitted)). *But cf.* *Roberts*, *supra* note 170, at 96 (arguing that the view that antitrust law should apply to actions that labor law allows is "extraordinary" and "based on the erroneous assumption that union consent is required to exempt a restraint").

305. *Cf.* *Goldman*, *supra* note 170, at 661 (discussing how judicial involvement via the application of antitrust law affects the balance of power at the bargaining table). The author states that if the exemption is not clearly defined, then "labor and management bargain knowing that judicial intervention may be possible if employers impose intolerable labor market restraints." *Id.*

306. *Cf.* *Lock*, *supra* note 14, at 374 (arguing that an employer has an incentive to bargain to an agreement because that is the only way to immunize an otherwise-illegal restraint from antitrust law).

307. One dictionary defines "impasse" as "a blind alley; an impassable road; by extension, a situation that has no solution or affords no escape." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 911 (2d ed. 1983).

308. See *Brown*, 116 S. Ct. at 2124; see also *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 966 (D.N.J. 1987) (stating that "impasse is not equivalent to the end of

ring 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.”<sup>309</sup> Yet even if one accepts that impasse is part of the bargaining process,<sup>310</sup> it is more difficult to accept the notion that one party’s unilateral imposition of new or different terms over the objection of the other party constitutes “bargaining” toward an agreement. As one judge stated, “[u]nilaterally-imposed terms are a *substitute* for an agreement, not a means of reaching one.”<sup>311</sup>

Professor Goldman argues that for antitrust purposes, “union-employer agreements [should be treated] differently from restraints imposed unilaterally by employer[s].”<sup>312</sup> The reason for this is that stability in the collective bargaining system can be reached only through agreements, and “[u]nilateral imposition of terms can breed resentment that may explode at any time.”<sup>313</sup> As such, the unilateral imposition of terms after impasse should not be seen as part of a bargaining “process” that is completely exempt from antitrust

negotiations”).

309. *Brown*, 116 S. Ct. at 2124-25 (quoting *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982)). The definition that the Court adopted in *Bonanno* was promulgated by the NLRB. See *Bonanno*, 454 U.S. at 412 (citing *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093-94 (1979), *aff'd*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982)). Justice O’Connor, dissenting from *Bonanno*, argued that the NLRB’s application of the “impasse” label may not be appropriate in all situations in which the parties cannot reach agreement: “The problem with the Board’s approach is that it reasons by definition. That is, while an impasse may be a temporary deadlock, a deadlock cannot be made temporary simply by calling it an impasse.” *Bonanno*, 454 U.S. at 428 (O’Connor, J., dissenting).

310. This interpretation is not universally accepted. See, e.g., *Powell v. National Football League*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, C.J., dissenting from denial of rehearing en banc) (“Once impasse has been reached, after termination of an agreement, it is a complete nonsequitur to hold that continued restraints are protected as an accommodation of the good faith bargaining of the parties.”).

Justice Burger, joined by Justice Rehnquist, wrote a dissenting opinion in *Bonanno* in which he argued that “impasse” should have a connotation of more permanence: One should not “ignore[] a basic element of impasse: impasse is reached only when a stalemate—a breakdown in bargaining—occurs after good-faith negotiations. Intentionally refusing to agree in order to create an impasse . . . is hardly good-faith bargaining.” *Bonanno*, 454 U.S. at 426-27 (Burger, J., dissenting) (citations omitted).

311. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1068 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 116 S. Ct. 2116 (1996); see also *Bridgeman*, 675 F. Supp. at 967 (stating that “[w]hen the employer no longer has [a reasonable belief that the restraint being imposed will be included in the next agreement], it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm’s-length negotiation”).

312. Goldman, *supra* note 170, at 659.

313. *Id.*

repercussions.<sup>314</sup>

Further, the unilateral imposition of terms would seem not to be part of the *bargaining* process because it lacks the elements of consent and a *quid pro quo* relationship.<sup>315</sup> Under this theory, a union will consent to a certain restraint because it receives something it values in return.<sup>316</sup> Thus, although there is a restraint, labor policy immunizes it from antitrust law.<sup>317</sup> However, when a restraint is unilaterally imposed, the union no longer consents; it is not receiving something of equal value in return for enduring the restraint.<sup>318</sup> Thus, the governing conditions are not the result of bargaining and should not be exempt from the antitrust laws.<sup>319</sup>

However, the majority in *Brown* found the "consent" argument unpersuasive. It noted that "consent" could not apply solely to the agreement, because it was already settled that the exemption applied to the bargaining process and not merely to the agreement itself.<sup>320</sup> As for post-agreement bargaining, the Court held that the consent principle could not apply in that context either because there were

---

314. *See id.*

315. *See id.* at 671-72. *But cf.* Roberts, *supra* note 170, at 94-95 (arguing that it is impracticable or impossible to establish criteria for determining what is "adequate union consent").

316. *See* Goldman, *supra* note 170, at 671-72.

317. *See id.*

318. Presumably, if the union felt that it was still receiving something of value in return for agreeing to the restraint, impasse would have never been reached and the term would not have been unilaterally imposed. In arguing that the exemption should expire at impasse, one commentator states that it is proper to allow the exemption to endure past expiration of the agreement because it is reasonable to assume that terms to which a union has agreed in the past will be acceptable to them in a future agreement. *See* Nester, *supra* note 270, at 138. However, "[t]his assumption of union consent is undermined when impasse exists because impasse implies the union does not want the terms in the next agreement." *Id.* The author further argues that "when *unilateral* changes have been implemented, no reasonable basis exists for assuming the union will incorporate these new terms into the next agreement because it has never previously consented to such terms." *Id.*

319. *See* Goldman, *supra* note 170, at 672. The dissenting judge in *Powell* asserted that "[t]he labor exemption will not immunize restraints which are unilaterally continued after impasse because such restraints are not agreed to during good faith bargaining. Similarly, new restraints, unilaterally implemented, are not protected by the labor exemption. Union approval is a prerequisite [for] . . . the exemption." *Powell v. National Football League*, 930 F.2d 1293, 1305 (8th Cir. 1989) (Heaney, J., dissenting). The court in *Bridgeman* maintained that the exemption protects the products of bargaining and "guards against unilateral imposition of terms as to which there is no agreement." *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 965 (D.N.J. 1987) (emphasis added). *See generally* Note, *supra* note 240, at 888-94 (discussing the need for consent to support the exemption).

320. *See Brown*, 116 S. Ct. at 2123.

many things that a union would not and should not consent to—such as a certain bargaining position adopted by employers, or a lockout—that were nevertheless legitimate actions that employers are free to take.<sup>321</sup>

The Court similarly dismissed related arguments in creating what Justice Stevens referred to as “a newly-minted exemption [that is crafted] only by ignoring the reasoning of one of our prior decisions in favor of the views of the dissenting Justice in that case.”<sup>322</sup> The prior decision to which Justice Stevens referred was *Pennington*,<sup>323</sup> and the “dissenting Justice” in that case was Justice Goldberg.<sup>324</sup> Justice Stevens’ charge has merit.<sup>325</sup> The *Brown* Court arguably abandoned the principles of—or at least the philosophy behind—the *Pennington-Jewel Tea-Connell* line of cases. Those three cases reflected a Court that was quite willing to intervene in labor issues and apply antitrust law,<sup>326</sup> despite the protestations of Justice Goldberg urging the “antitrust courts” to stay out of such issues.<sup>327</sup> In *Brown*, it was the Court itself that decried the intervention of “antitrust courts” in labor relations<sup>328</sup> in the process of creating an antitrust exemption broad enough to insulate the courts from hearing

321. *See id.* at 2123-24. The Court’s logic is not wholly convincing. Unions could very well consent to enduring unfavorable employer bargaining positions and lockouts as a price for entering a collective bargaining relationship and working toward an agreement. Presumably, they would expect the employers to “consent” in the same way to their striking, even though the employers would obviously not desire a strike. Thus, certain unpleasanties in the bargaining process can be consented to in the interest of reaching an agreement. When the bargaining process ends, however—that is, when impasse occurs and terms are unilaterally imposed—then this is beyond the scope of what the union consented to and could subject the employer to antitrust liability. *Cf. Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520-21 (10th Cir. 1979) (holding that although a football player consents to being subject to certain violent acts as a consequence of playing the game, the consent does not necessarily extend to intentional, illegal blows inflicted by an opposing player that are outside the scope of the “general customs” of the game).

322. *Brown*, 116 S. Ct. at 2131 (Stevens, J., dissenting).

323. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). For a discussion of *Pennington*, see *supra* notes 161-65 and accompanying text.

324. *See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 697 (1965) (separate opinion of Goldberg, J.). Justice Goldberg wrote a single separate opinion regarding both *Pennington* and *Jewel Tea*. *See id.* at 697 (separate opinion of Goldberg, J.). He concurred in the judgment in *Jewel Tea* and dissented from the opinion in *Pennington*; he disagreed with the reasoning in both cases. *See id.* (separate opinion of Goldberg, J.); *supra* notes 171-77 and accompanying text.

325. Justice Stevens noted that “[a]t five critical junctures in its opinion” the Court relied on Justice Goldberg’s separate opinion. *Brown*, 116 S. Ct. at 2132 (Stevens, J., dissenting).

326. *See supra* notes 160-89 and accompanying text.

327. *See supra* notes 171-77 and accompanying text.

328. *See Brown*, 116 S. Ct. at 2123.

labor disputes in the guise of antitrust claims.

Although the Court adopted Justice Goldberg's stance<sup>329</sup> over its previous position, this may well have been justified as a corrective move. *Pennington*, *Jewel Tea*, and *Connell* may be viewed as a departure from the correct course, adding nothing but confusion to the relatively sound framework established by the *Apex-Hutcheson-Allen Bradley* trilogy.<sup>330</sup> Viewed in this light, the position of Justice Goldberg and his two fellow dissenters may have reflected the better viewpoint. Thus, the *Brown* Court used Justice Goldberg's separate opinion in *Jewel Tea* and *Pennington* as a connecting bridge across the Court's arguably erroneous position of the 1960s and 1970s in order to retrieve and re-adopt the more balanced and less criticized position it had assumed in the 1950s.

However, while the *Brown* Court apparently abandoned the mindset behind the *Pennington* line of cases, it neither expressly nor implicitly overruled them. Those cases dealt with situations in which third-party competitors were affected by an agreement made between a union and employers.<sup>331</sup> In *Brown*, the Court limited its holding to cases where "only the parties to the collective-bargaining relationship" are affected.<sup>332</sup> Thus, the courts theoretically are still open to third parties who allege antitrust injury caused by a labor agreement between other parties. *Brown* merely closes the courts to the disgruntled party in a bargaining relationship who wants to bring an antitrust suit against the party with whom it is bargaining. Yet, in

---

329. According to the reasoning of one lower court, *Brown* goes beyond even Justice Goldberg's approach insofar as it exempts from antitrust scrutiny terms that were never contained in an agreement. See *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1172 (D.C. Cir. 1978). In *Smith*, the district court stated that "Justice Goldberg's concurring opinion in *Jewel Tea* . . . makes clear that his arguments all assume the existence of a collective bargaining agreement, and cannot be read in any reasonable fashion" to support the argument that mandatory subjects of bargaining automatically fall within the exemption regardless of whether they are embodied in an agreement. *Id.* (emphasis added).

330. See *Handler & Zifchak*, *supra* note 110, at 500 (stating that "the trilogy of *Pennington*, *Jewel Tea*, and *Connell* is on a collision course with the developing law on the scope of the duty to bargain"); *Leslie*, *supra* note 1, at 1218 ("*Jewel Tea* diverged from the relatively clear line of demarcation [between antitrust immunity and liability] that had been drawn by prior decisions [in *Hutcheson* and *Apex*].").

331. See *supra* notes 160-89 and accompanying text.

332. *Brown*, 116 S. Ct. at 2127. In partial support of the Court's position, one commentator has written that "labor contract terms which have purely intra-unit effects appear to present the most compelling case for foreclosing antitrust review." Weistart, *supra* note 242, at 112. This commentator goes on to say, however, that the analysis cannot stop at that point: "Another critical issue concerns the degree of employee consent that will be required before the employer can claim the protection of the exemption." *Id.*; see *supra* notes 315-19 and accompanying text.

the Court's determination to fashion a broad rule that would unequivocally exclude bargaining parties from the courts, it may have failed to take account of the "special nature" of the case. Justice Stevens asserted in his dissent that there were "three unique features of the case" which were critical in determining whether the nonstatutory exemption should apply.<sup>333</sup>

First, Justice Stevens noted that the policy behind encouraging labor to organize is to prevent competition between workers and a consequent depression of wages.<sup>334</sup> Labor statutes serve to allow "collective action by union members to achieve wage levels that are higher than would be available in a free market."<sup>335</sup> In contrast, while professional football players *want* their salaries determined by the free market, the League's resolution mandated paying the players wages below the market level.<sup>336</sup> Second, Justice Stevens noted that the League's implementation of the resolution was not done as a bargaining tactic, but was merely a means of forcing the team owners to comply with roster limits.<sup>337</sup> As such, the League was "forbidding players from individually competing in the labor market," primarily as a result of its refusal to directly confront the team owners and diligently enforce the roster limits.<sup>338</sup> Third, Justice Stevens argued that the League's proposal of the resolution and its subsequent implementation over the protests of the players could hardly be characterized as bargaining to impasse; it was more accurately characterized as "notice to the union" that the League would soon unilaterally implement the resolution.<sup>339</sup>

The majority stated that nothing sufficiently distinguished professional sports to make the case particularly unique.<sup>340</sup> As to Justice

---

333. *Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting).

334. *See id.* at 2128-29 (Stevens, J., dissenting).

335. *Id.* at 2129 (Stevens, J., dissenting).

336. *See id.* at 2129-30 (Stevens, J., dissenting). *But cf.* Roberts, *supra* note 170, at 27 (arguing that if one challenges a restraint based on the fact that it limits competition among players, then "the challenge is necessarily founded on the claim that antitrust law proscribes restraints on competition for the labor of human beings . . . . That, however, is precisely what section 6 [of the Clayton Act] expressly and unambiguously declares to be outside the ambit of the antitrust laws."). For the relevant text of section 6 of the Clayton Act, see *supra* text accompanying notes 96-97.

337. *See Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting).

338. *Id.* (Stevens, J., dissenting).

339. *Id.* (Stevens, J., dissenting); *cf.* *Zimmerman v. National Football League*, 632 F. Supp. 398, 408 (D.D.C. 1986) (examining an agreement and noting that "[t]he important question is whether *bona fide* bargaining took place such that the policies in favor of such bargaining should take precedence over antitrust concerns").

340. *See Brown*, 116 S. Ct. at 2126 (noting that professional sports might be "special")



Stevens' first point about football players' desire to negotiate their salaries individually, the majority vaguely responded that "this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table."<sup>341</sup> As to the dissent's second point, the majority noted that it would require a subjective inquiry into the League's purpose or motivation, an inquiry which it refused to make.<sup>342</sup> Concerning Justice Stevens' third point, the majority noted that both parties were treating the case as if an impasse had been reached and thus there was no basis for contending otherwise.<sup>343</sup> Hence, the majority stated that there was no reason for "distinguishing football players from other organized workers. We therefore conclude that all must abide by the same legal rules."<sup>344</sup>

If Justice Stevens was correct in his contention that the facts of *Brown* made it an atypical case, it may appear that the Court fashioned its new, broad exemption *in spite of* this particular case. That is, in its desire to resolve the controversy over the scope of the exemption and the proper role of the courts in labor disputes, the Court neglected to properly consider the "case or controversy" before it on its individual facts. Thus, a larger problem was resolved at the expense of one class of plaintiffs or perhaps one industry.

An alternative interpretation, however, is that the Court fashioned its broad rule precisely *because of* the type of case it had before

---

with regard to interest, excitement, talent, or concern, but not with respect to labor law's antitrust exemption or the framework within which bargaining is to take place).

341. *Id.*

342. *See id.* The Court's refusal to consider motivation is not without support in scholarly literature. *See, e.g.,* Meltzer, *supra* note 1, at 722 ("Violations that turn on the existence of particular 'purposes' or 'motives' in collective bargaining confront triers of fact with slippery evidentiary issues and, as a corollary, place collective bargaining under a Damoclean sword.").

343. *See Brown*, 116 S. Ct. at 2126 ("Insofar as they suggest that there was not a genuine impasse, they fight the basic assumption upon which the District Court, the Court of Appeals, the petitioners, and this Court rest the case.").

344. *Id.* In opposition to this viewpoint, one commentator has written that "[s]everal factors distinguish the market for professional football from other markets . . . [These factors] have created an inherently unequal bargaining relationship between players and owners quite unlike the relationship between industrial employees and employers." Lock, *supra* note 14, at 354. The author further argues that the "NLRA was designed for industrial employees. It was not designed for professional employees with a wide range of skills, short careers, and seasonal employment." *Id.* at 418; *see also* Berry & Gould, *supra* note 207, at 706-10 (discussing several ways in which a union of professional athletes differs from ordinary trade unions); Nester, *supra* note 270, at 128-29 (same).

it. Antitrust cases involving professional sports are perennially before the courts; the players and unions of the various professional sports leagues have brought numerous suits in the last two decades, each time alleging antitrust violations by team owners and league management.<sup>345</sup> Yet the *Brown* Court utilized only non-sports cases in its reasoning; conspicuous by their absence were the many sports cases that much more closely addressed the precise issue before the Court and which had been discussed openly in the lower courts' decisions in *Brown*.<sup>346</sup>

If the Court was indeed targeting professional sports with its broad exemption, it may have grave implications for other labor fields. One commentator has warned that "[i]n their haste to exempt employers' restraints on labor, particularly in sports markets, commentators would permit the exercise of collective monopsony power against less powerful or unorganized workers, misallocate resources to the detriment of public welfare, . . . and possibly permit collusion by service or professional workers."<sup>347</sup>

Regardless of whether the Court aimed the new rule at any particular industry, the inescapable fact remains that the Court was forced to make a decision about the scope of the exemption. It seems equally clear that "no decision concerning the scope of the labor exemption [could] be considered neutral."<sup>348</sup> In other words, the question of when employee unions may bring an antitrust suit, or

---

345. See *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Smith v. Pro-Football*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987); *Zimmerman v. National Football League*, 632 F. Supp. 398 (D.D.C. 1986); *Wood v. National Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974).

346. The absence of reliance on sports cases is puzzling in light of the fact that the exemption historically has played a different role in sports cases than in non-sports cases. See *supra* note 213. One commentator has argued that *because* the exemption plays a different role in sports cases, the "proper analysis of the exemption issue in player cases should be quite different from the narrowly focused analysis of *Jewel Tea* and *Pennington*." Roberts, *supra* note 170, at 62. This would apparently explain the *Brown* Court's result, but not necessarily its methodology in reaching that result.

347. Goldman, *supra* note 170, at 685. Commentators are split as to whether professional sports should receive special treatment under the antitrust laws. Compare *id.* at 626 n.36 (arguing that "[t]reating sports cases as sui generis" may have detrimental effects on salary and benefit levels), and *Jacobs & Winter*, *supra* note 64, at 9 (arguing that unions of professional athletes should not receive special treatment under antitrust laws), with *Lock*, *supra* note 14, at 409 (suggesting amendment to the National Labor Relations Act as it applies to professional sports).

348. Goldman, *supra* note 170, at 661.

whether they may bring one at all, may well reduce to a question of balancing bargaining powers between labor and management.

One position is that if the unions do not have the ability to bring an antitrust suit, "the balance of power dramatically shifts toward employers."<sup>349</sup> Subscribers to this position argue that the exemption must be tailored to allow unions to threaten an antitrust suit after the expiration of agreement<sup>350</sup> or after bargaining has reached impasse.<sup>351</sup> That is, the employees must have this antitrust weapon in their arsenal in order to escape having terms unilaterally imposed on them at impasse.<sup>352</sup> In this view, granting the employees such a weapon is the only way they can match the bargaining power of the stronger employers and play on a level field.<sup>353</sup>

---

349. *Id.*

350. *See, e.g.*, Note, *supra* note 240, at 888 (arguing that employers should no longer be exempt from antitrust sanctions after the expiration of the agreement).

351. *See, e.g.*, Nester, *supra* note 270, at 125-26 (arguing for expiration of the exemption at impasse).

352. *See* Goldman, *supra* note 170, at 673. The author notes that "[o]nce the rights of the parties at impasse are defined, however, the threat of an antitrust suit already should be a part of the union's arsenal that the parties must incorporate into their bargaining stance." *Id.* Goldman argues that subjecting employers to antitrust liability after impasse would not encourage bad faith bargaining by unions because the union would rather reach an agreement than initiate a long and expensive lawsuit. *See id.*

353. *See* Lock, *supra* note 14, at 399. Regarding the NFL, the author argues that if the League's actions after expiration of a collective bargaining agreement are exempt from antitrust liability, "it will eliminate the one remaining weapon that the [Players Association] has at its disposal to counteract the League's ability to dictate and employ anticompetitive restraints, thereby further emasculating the union's leverage at the bargaining table." *Id.*; *see also* Corcoran, *supra* note 195, at 1068 ("The most significant economic weapon the union can use to break this impasse [and the subsequent imposition of unfavorable terms] is the antitrust laws.").

The district court in *Brown* asserted that "[t]he threat of treble damages under the antitrust laws is one of [the] union's economic weapons in its collective bargaining arsenal. Exempting employers from application of the antitrust laws in the absence of a collective bargaining agreement deprives unions of a statutorily created bargaining chip in the negotiating process." *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 133 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996). The dissent in the D.C. Circuit's *Brown* decision agreed with the district court, noting that "denying employers antitrust exemption for unilaterally-imposed terms does not place any new offensive plays in the employees' playbook. Rather, it affords them a defense against unilateral employer actions that offend antitrust principles." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1070 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 116 S. Ct. 2116 (1996).

One commentator, although criticizing the court in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), for failing to find that the exemption applied, noted that the decision allowed the union to return to the bargaining table with its "negotiating leverage substantially enhanced"; subsequently, "impasse was broken, and a new collective bargaining agreement was reached within a few months." Roberts, *supra* note 170, at 74; *see Mackey*, 543 F.2d at 616; *supra* notes 214-20. However, this commentator disagreed with the court's interference in the bargaining process, noting that the benefits it

The other position is that the field is level only when employees do not have the weapon of an antitrust suit.<sup>354</sup> This argument appeals to, or derives from, the idea that the collective bargaining system is sealed and self-contained, governed by labor law, and impervious to the intrusion of antitrust law or other governmental interference.<sup>355</sup> Under this theory, each side's "weapons" are provided solely by labor law: employers may lock out, employees may strike, or either side may appeal to the NLRB.<sup>356</sup>

The Court in *Brown* embraced the latter view, or at least the result proposed by such a view. The Court indeed may have recognized the interest of retaining the employees' ability to bring antitrust suits as a "balancing" weapon against the greater power of employers.<sup>357</sup> Nevertheless, this interest lost out in a broader "balancing" test to the interest of ridding labor law of the difficulties and complexities of antitrust law. In other words, to maintain that power in employees meant the continued intervention of courts in labor law, and thus that power had to be sacrificed to achieve a broader and purportedly more important objective.<sup>358</sup>

The Court may have taken too large a step in removing this threat of antitrust suit and consequently immunizing a wide range of

---

produced were short-lived because at the expiration of the new agreement "the parties were again at loggerheads in the courts." Roberts, *supra* note 170, at 74-75.

354. See, e.g., *Powell v. National Football League*, 930 F.2d 1293, 1302 (8th Cir. 1989) (arguing that to allow players to bring an antitrust suit would "upset the careful balance established by Congress through the labor law"); Lock, *supra* note 14, at 383 (noting that the NFL team owners argue that the availability of an antitrust suit "distorts the bargaining process by artificially inflating the union's bargaining leverage").

355. See, e.g., *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487-90 (1960) (discussing governmental non-interference with collective bargaining and considering limiting interference to good/bad faith determination); Roberts, *supra* note 170, at 82-83 (arguing that aside from sanctioning violations of unfair trade practices listed in the NLRA, "the government may not interfere in the substance of the negotiations or in writing contract terms").

356. See *Powell*, 930 F.2d at 1302.

357. After discussing the difficult position employers would suffer at impasse if they were subject to the antitrust laws, see *supra* notes 47-51 and accompanying text, the Court conceded that "[w]e do not see any obvious answer to this problem." *Brown*, 116 S. Ct. at 2123. This suggests that the Court felt there were some legitimate purposes behind allowing unions to bring antitrust suits; otherwise, the answer would have been obvious.

358. Cf. Roberts, *supra* note 170, at 91 (asserting that there is a "requirement of substantive noninterference [by courts] in collective bargaining mandated by Norris-LaGuardia and the NLRA"). But cf. Lock, *supra* note 14, at 386 (arguing that the type of judicial involvement that the labor statutes seek to prohibit does not necessarily include determination of rights under the antitrust laws); Meltzer, *supra* note 1, at 701 ("There is nothing in the legislative history to suggest that [the purpose of the labor statutes] was to liberate collective bargaining from restrictions imposed by the Sherman Act.").

employer activity against antitrust law.<sup>359</sup> The express “statutory” antitrust exemptions apply almost exclusively to unilateral union activity.<sup>360</sup> The judicially created “nonstatutory” exemption, at least as it was originally defined, appeared to apply only to agreements reached through the collective bargaining process.<sup>361</sup> That these agreements should be exempt was obvious and noncontroversial, because they were encouraged by labor policy and required by labor law.

That the scope of the exemption should be broadened to now include unilateral activity by employers is not nearly so obvious, and in fact is highly debatable. One reason is that the labor laws have traditionally operated to favor employees in an effort to put them on equal bargaining ground with employers.<sup>362</sup> If the courts now effectively remove that advantage by granting employers additional power in the form of antitrust immunity,<sup>363</sup> this would seem to run counter to the congressional intent upon which the Court relied so heavily in *Brown*.<sup>364</sup>

---

359. See, e.g., Weistart, *supra* note 242, at 146 (arguing that while labor policy favors limited judicial interference, “blind adherence to [a policy of complete judicial nonintervention] would protect wholly unilateral employer action and subvert the goal of the labor exemption”); Corcoran, *supra* note 195, at 1074 (“[U]nilaterally imposed restraints (implemented after impasse) should never receive the shield of exemption.”).

360. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975); Lock, *supra* note 14, at 351.

361. See *supra* notes 197-201 and accompanying text.

362. See *Robertson v. National Basketball Ass’n*, 389 F. Supp. 867, 884-86 (S.D.N.Y. 1975) (discussing history of labor statutes and noting that prior decisions found them to be for the benefit of employees); Lock, *supra* note 14, at 353 (arguing that the “original purpose” of the statutory labor exemption was to “protect unions . . . from antitrust attack”); Meltzer, *supra* note 1, at 667 (“[O]ne of the declared objectives of the labor statutes was the protection of labor organization in order to balance the power of large business combinations.”); Weistart, *supra* note 242, at 114 (“[T]he ultimate objective of the [statutory and nonstatutory] labor exemption[s] was the same—the furtherance of employees’ goals through collective action.”).

363. See *Brown*, 116 S. Ct. at 2129 (Stevens, J., dissenting). Justice Stevens argued that “[i]n light of the accommodation that has been struck between antitrust and labor law policy, it would be ironic to extend an exemption crafted to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually.” *Id.* (Stevens, J., dissenting). *But cf.* Roberts, *supra* note 170, at 35-45, 96-97 (arguing that “the text and legislative history of the [Clayton Act] compel the conclusion that [it] applies equally to employer and union conduct”).

364. See *Brown*, 116 S. Ct. at 2120, 2123, 2127. Justice Goldberg, upon whose views the *Brown* Court relied for support, also emphasized congressional intent. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 702-10 (1965) (separate opinion of Goldberg, J.). One commentator has criticized Justice Goldberg’s approach because its “reliance on that plastic perennial, the intent of Congress, is not even supported by a single reference to a statutory provision or to the legislative history of the NLRA, as amended.” Meltzer, *supra* note 1, at 731.

On the other hand, if it is the intent of Congress to remove the courts from labor disputes,<sup>365</sup> then perhaps the *Brown* Court saw the broad construction of this exemption as the only way to make an effective exit. It may further have been the result of some degree of frustration, as Congress has not drawn clear lines delineating the realm of antitrust law and that of labor law. Rather, it has written statutes in two areas of the law that have relatively large areas of overlap and which conflict with each other to a significant degree.<sup>366</sup> Offering little if any guidance, Congress has watched the courts struggle for years over the boundary between labor law and antitrust law.<sup>367</sup>

Perhaps feeling left in the crossfire, the Court may simply have determined that if Congress would not draw the line between the two areas of the law, then the Court would do so itself. The most effective way to do this was to throw a broad blanket of antitrust immunity over virtually everything relating to the labor field. Viewed in this way, increasing the power of employers was merely a by-product of a larger policy decision.<sup>368</sup> It remains to be seen

---

365. See Roberts, *supra* note 170, at 93.

366. Referring to labor and antitrust law, the Court in *Allen Bradley Co. v. Local 3*, 325 U.S. 797, 806 (1945), observed that the "result of all this is that we have two congressional policies which it is our responsibility to try to reconcile. . . . We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." Commenting on *Allen Bradley*, one writer noted that the Court was left to its own devices because "Congress had failed to indicate how the prohibition of commercial restraints and the purposes underlying that prohibition were to be integrated with the purpose of fostering unionization and collective bargaining." Meltzer, *supra* note 1, at 675; see also *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987) ("The interaction of the Sherman Act and the federal labor legislation is an area marked more by controversy than by clarity."); Leslie, *supra* note 1, at 1184 ("The legislature has chosen to follow both [antitrust and labor] policies, and the courts must determine the proper scope of each.").

367. One commentator, writing immediately after the *Pennington* and *Jewel Tea* decisions in 1965, opined that there would be "a substantial consensus that Congress should attempt to draw clearer lines and that its continued abdication will confront the Court with intractable problems." Meltzer, *supra* note 1, at 734.

368. The view that the Court took is not a new one. Justice Brandeis, writing in dissent in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), suggested that labor and management should perhaps be left alone to settle their disputes. See *id.* at 486 (Brandeis, J., dissenting). Congress, he said, had "declared that the relations between employers of labor and workmen were competitive relations, that organized competition was not harmful, and that it justified injuries inflicted in its course." *Id.* (Brandeis, J., dissenting). He offered the following quote from a committee report for comparison:

There are apparently, only two lines of action possible: First to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade unions, and second, to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retain-

whether the collective bargaining system will be able to withstand the effects of this decision, or whether such an oppressive regime will develop that "antitrust courts" will yet again have to return to the game and apply antitrust law in the labor arena.

JONATHAN P. HEYL

---

ing only the ordinary civil and criminal restraints for the preservation of life, property and the public peace. The first method has been tried and failed absolutely. . . . The only method therefore seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strike-breakers, and peaceful picketing.

*Id.* at 486-87 n.2 (Brandeis, J., dissenting) (citation omitted).