Run, Kick, and (Im)passe: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment after Impasse in Brown v. Pro Football

Steven D. Buchholz

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Recommended Citation
https://scholarship.law.umn.edu/mlr/2379

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Comment

Run, Kick, and (Im)passe: Expanding Employers’ Ability to Unilaterally Impose Conditions of Employment After Impasse in Brown v. Pro Football

Steven D. Buchholz*

In 1987, the collective bargaining agreement between the National Football League (NFL)1 and the NFL Players’ Association2 expired.3 During negotiation of a new collective bargaining agreement, the NFL presented a “developmental squad” plan to the union.4 The plan proposed a developmental squad player salary of $1,000 per week, which the union promptly rejected, insisting that the developmental squad players remain free to negotiate salaries individually, as do regular professional players.5 Nonetheless, when negotiations

---

* J.D. Candidate 1998, University of Minnesota Law School; B.A. 1994, South Dakota State University. The author would like to thank Dean E. Thomas Sullivan for suggesting that Brown was ripe for commentary and John Bursch for his grueling brainstorming sessions. The author also wishes to dedicate this Comment to McMike, who never let him forget that life is more than a law review article.

4. Id. “Resolution G-2” provided that each club could have a “developmental squad” of up to six first-year players that had failed to secure positions on the regular roster. Id. Under the plan, the developmental players would function like minor league players, scrimmaging with regular players and sometimes appearing as substitutes in regular games. Id. All developmental players would receive identical weekly salaries. Id.
5. Id. The developmental squad provision had never been the subject of a collective bargaining agreement between the owners and the players. Brown, 782 F. Supp. at 138. In fact, the district court found that the developmental squads added a “novel category of players to each NFL club.” Id. Additionally, there was substantial disagreement at trial about whether the resolution had been the subject of “arm’s-length” negotiation. Brown, 116 S.
on this issue reached impasse, the NFL began paying practice squad players a fixed $1,000 salary without an agreement with the players' union.\textsuperscript{6} The developmental squad players responded with an antitrust suit against the NFL and its member clubs. They claimed that the agreement violated the Sherman Act\textsuperscript{7} by fixing salaries and eliminating competition for player services. The district court agreed with the players,\textsuperscript{8} but the Court of Appeals for the District of Columbia reversed.\textsuperscript{9} In \textit{Brown v. Pro Football Inc.},\textsuperscript{10} the United States Supreme Court affirmed the court of appeals, holding that "under the circumstances" the owners' conduct was exempt from the antitrust laws.\textsuperscript{11}

On its face, \textit{Brown} appeared to apply a test similar to the one lower courts follow\textsuperscript{12} and declared that antitrust laws do not apply to labor-management disputes except in extreme situations.\textsuperscript{13} The decision pleased professional sports owners as well as a multitude of joint employer groups across the country, who interpreted the decision as removing multiem-

\textsuperscript{6} Brown, 116 S. Ct. at 2119. After implementing Resolution G-2, the league informed the club owners that paying more or less than $1,000 per week would result in league disciplinary action. \textit{Id.}

\textsuperscript{7} See infra notes 15-21 and accompanying text (discussing the general interpretation of the Sherman Act).

\textsuperscript{8} The court refused to apply labor's "nonstatutory" antitrust exemption to the resolution, and a jury awarded the players more than $30 million in damages. \textit{Brown}, 116 S. Ct. at 2119. For a discussion of the development and application of the nonstatutory labor exemption, see \textit{infra} notes 36-42 and accompanying text.

\textsuperscript{9} The court of appeals concluded that the NFL action fell within the scope of the antitrust exemption. \textit{Brown v. Pro Football, Inc.}, 50 F.3d 1041, 1048 (D.C. Cir. 1995), \textit{rev'd}, 116 S. Ct. 2116 (1996). The court followed a three-pronged test similar to the one lower courts traditionally use to evaluate antitrust exemptions: (1) the owners imposed the fixed salary as part of the "collective bargaining process"; (2) the resolution did not violate the labor laws; and (3) the action affected a labor market rather than a product market. \textit{Id.}

\textsuperscript{10} \textit{Brown}, 116 S. Ct. at 2127.

\textsuperscript{11} \textit{Id.} The Court applied the exemption, but claimed not to interpret it as broadly as the D.C. Circuit. \textit{Id.} at 2119.

\textsuperscript{12} See \textit{id.} at 2127 (noting that the agreement arose from the collective bargaining process, did not violate the labor laws, and concerned a mandatory subject of bargaining).

\textsuperscript{13} \textit{Id.}
employer bargaining agreements from antitrust scrutiny.\textsuperscript{14} Such an interpretation is troubling, however, because it upsets the delicate balance of bargaining power under the federal labor laws in favor of employers, frustrates the goals of federal antitrust laws, and is inconsistent with Supreme Court precedent.

This Comment contends that \textit{Brown} drastically changed federal labor law. Part I discusses federal antitrust and labor laws and the evolution of the judicially-created “nonstatutory labor exemption.” It also introduces the lower court decisions that attempted to establish the scope of this exemption. Part II analyzes the reasoning of the \textit{Brown} decision. Part III posits that \textit{Brown} favors employers by recognizing that labor law policy no longer promotes a pro-employee collective bargaining platform and by requiring unions to exhaust labor law remedies before they attack employer actions under the more potent antitrust laws. Finally, Part III argues that, despite the interpretation favored by joint employer groups and professional sports owners, the \textit{Brown} Court actually applied a balancing test that differs from the three-pronged test lower courts have followed in applying nonstatutory antitrust exemptions. The traditional “balancing test” interpretation is critical because it preserves the application of antitrust law to joint employer acts and prevents employers from abusing the collective bargaining process by imposing terms of employment at will. This reading is also necessary to preserve federal antitrust policies and to maintain consistency with Supreme Court precedent.

\textsuperscript{14} See Patrick Graham, \textit{State and National Contractors Earn Blessing of High Court in Football Anti-Trust Suit}, MEMPHIS BUS. J., Aug. 5, 1996, at 18 (stating that \textit{Brown} was a “victory for contractors nationwide” and that contractor groups, which regularly negotiate employment contracts with subcontractors, could now remove multiemployer groups from the reach of the antitrust laws); Allan H. Weitzman & Kathleen M. McKenna, \textit{The Supreme Court Has Held That a Multiemployer Group May Impose Contract Terms Unilaterally After a Bargaining Impasse}, NAT'L L.J., July 29, 1996, at B4 (interpreting \textit{Brown} as establishing that multiemployer bargaining groups, which negotiate more than 40% of all collective bargaining agreements in the United States, may impose contract terms after impasse “without risk of antitrust liability”).
I. THE EVOLUTION OF THE LABOR EXEMPTION TO THE ANTITRUST LAWS

A. ANTITRUST LAW

The Sherman Act governs U.S. antitrust policy. The Act prohibits "[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." Despite this all-inclusive language, however, the Supreme Court has interpreted the Act to prohibit only unreasonable restraints of trade.

Congress designed the antitrust laws to protect consumers by preventing monopolistic behavior and encouraging the efficient use of resources through free competition for goods. Certain practices are per se violations of the antitrust laws, such as price fixing and output restrictions among competitors in an industry. Courts analyze other practices under the

---

15. See generally E. Thomas Sullivan & Herbert Hovenkamp, Antitrust Law, Policy, and Procedure 1-4 (3d ed. 1994) (explaining the broad provisions of the Sherman Act that courts and scholars have interpreted as targeting both monopolistic concentrations of industrial power and inefficient uses of economic resources).


17. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984) [hereinafter NCAA] (explaining that, because all contracts are restraints of trade in the sense that they limit contracting parties' freedom to negotiate and enter into other contracts, Congress must have intended the Sherman Act to prohibit only unreasonable restraints of trade); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (stating that the "dread of enhancement of prices and of other wrongs" thought to follow from contracts which restricted competition led to the prohibition of actions that were "unreasonably restrictive of competitive conditions").

18. See E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications § 1.02 (2d ed. 1994) (discussing the widely accepted policy reasons for the Sherman and Clayton Acts such as Jeffersonian/Hamiltonian "allocative efficiency," consumer welfare and the efficient use of resources). Congress attempted to deter anticompetitive conduct by allowing antitrust plaintiffs to sue for treble damages. Id. § 3.02. This policy stands today despite criticism that it encourages frivolous lawsuits and excessive litigation. Id.

19. See, e.g., Palmer v. BRG, Inc., 498 U.S. 46, 49-50 (1990) (holding that any attempt among competitors to divide and control markets or submarkets is per se illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (noting that any conspiracy to fix prices is a per se violation of the Sherman Act, even if the plaintiff cannot show that the defendants had enough market control to carry out the plan).

These types of restrictions are known as "horizontal" restraints because
"rule of reason," which allows a more complete inquiry into an agreement's economic consequences to balance the procompetitive effects of a restraint of trade against the injury it causes to the freely competitive market. The Supreme Court has applied the "rule of reason" in industries where competitors must use some restraints on competition to create a marketable product, such as organized league sports.

they involve competitors at the same level in an industry, rather than at different stages of the production process. See generally SULLIVAN & HOVENKAMP, supra note 15, at 183-85 (defining and listing examples of horizontal restraints).

20. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 27 (1976). Under the "rule of reason," a restraint will violate the antitrust laws only if its procompetitive efficiencies do not outweigh its negative impact on competition. NCAA, 468 U.S. at 103-04. In one case, the Court required a rule of reason analysis in a cooperative joint venture marketing a previously unavailable product because of the procompetitive effect. Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23-25 (1979). In that case, the Supreme Court held that blanket fees were not per se illegal because they substantially lowered costs for both sellers and buyers and essentially created a product that individual composers could not create alone. Id. at 21-24; see also Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977) (holding that a restraint in a limited aspect of a market is not per se illegal because it may enhance competition in the wider market). But cf. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 355-56 (1982) (discussing Broadcast Music but holding that an agreement among competing doctors to establish and maintain fixed prices for medical services did not create procompetitive efficiencies and was per se illegal).

Another factor that has reduced the number of successful antitrust claims is the concept of "antitrust injury." The notion arose from section four of the Clayton Act, which requires antitrust plaintiffs to suffer injury "by reason of" the antitrust violation to succeed on an antitrust claim. SULLIVAN & HARRISON, supra note 18, § 3.02[B]. In Brunswick Corp. v. Pueblo Bowl-O-Mat, the Court defined antitrust injury as harm caused by a reduction in competitive conditions in the relevant market directly because of the defendant's anticompetitive acts. 429 U.S. 477, 488-89 (1977).

21. NCAA, 468 U.S. at 101 (citing ROBERT H. BORK, THE ANTITRUST PARADOX 278-79 (1978)). Examples of restraints that competitors in the sports context must impose include rules affecting the size of the playing field, the number of players per team, and the extent of physical contact allowed. Id.

The Supreme Court's watershed decision in NCAA guides lower courts' application of the antitrust laws to organized league sports. In that case, two member schools of the NCAA, the national association that regulates amateur collegiate sports, brought an antitrust suit alleging that the association had violated the Sherman Act by fixing prices for the rights to televise college football games and by limiting the number of games that the networks could televise. Id. at 91-94. Despite its ultimate finding that the NCAA was restricting the number of televised games without any procompetitive justifications, the Court cited the myriad of horizontal restrictions that enhance competition in the league sports context and applied the "rule of reason" to determine the legality of the NCAA's plan. Id. at 103.
B. LABOR LAW

The National Labor Relations Act (NLRA)\textsuperscript{22} shapes federal labor policy.\textsuperscript{23} Congress passed the Act in 1935\textsuperscript{24} to protect “the right of employees to organize” and bargain collectively.\textsuperscript{25} The Act established an administrative body, the National Labor Relations Board (NLRB), to safeguard the public from interruptions in commerce that follow from industrial unrest, to encourage peaceful settlement of labor-management disputes over wages, hours, and other terms of employment, and, to restore equal bargaining power between employers and employees.\textsuperscript{26}

The NLRA prohibits an employer from interfering with the rights of employees to organize in unions, to bargain collectively, and to engage in concerted activities like strikes.\textsuperscript{27} If an employer interferes, the NLRB will find it guilty of committing an “unfair labor practice.”\textsuperscript{28} Upon such a determination, the


\textsuperscript{23} See DEVELOPING LABOR LAW, supra note 22, at 27-30.

\textsuperscript{24} Congress has substantially amended the Act on two occasions by passing, in 1947, the Taft-Hartley amendments and, in 1959, the Landrum-Griffin amendments. Id. at 35-60. The Act has remained largely unchanged since 1959. Id. at 61.

\textsuperscript{25} 29 U.S.C. § 151.

\textsuperscript{26} Id. Great Depression and economists’ suggestion that unionization would increase wages and economic productivity heightened interest in creating a federal labor statute. ARCHIBALD COX ET AL., LABOR LAW 76-77 (12th ed. 1996).

\textsuperscript{27} 29 U.S.C. § 157. These three rights are commonly referred to as employees “Section 7 rights.” COX ET AL., supra note 26, at 78. When Congress passed the Taft-Hartley amendments to the NLRA in 1947, the goal of the labor laws shifted from strict protection of employees to a “hands-off” policy encouraging vigorous collective bargaining. DEVELOPING LABOR LAW, supra note 22, at 35-45; see also infra notes 123-127 (discussing reasons for the shifting aims of labor law).

\textsuperscript{28} See 29 U.S.C. § 158(a) (stating inter alia that it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of their rights under section 157 of the NLRA, or to discriminate in hiring or firing based on union activity, or to refuse to bargain collectively with a union’s elected bargaining representative). With the Taft-Hartley amendments, Congress established that unions commit unfair labor practices by restraining employees in the exercise of their § 157 rights, causing or attempting to cause employers to discriminate in hiring or firing, refusing to bargain collectively with an employer, and engaging in certain types of picketing. Id. § 158(b).
NLRB may issue a cease and desist order or order the employer to reinstate wrongfully discharged employees, sometimes with back pay. Further, when the NLRB believes an employer is refusing to negotiate with a union, the NLRB will order the employer to bargain "in good faith." This duty applies to the "mandatory subjects" of bargaining such as wages, hours, and other conditions of employment and continues

29. Id. § 160(c). The NLRB occasionally seeks injunctions in federal district court to enjoin challenged labor or management practices pending final NLRB determination of whether the conduct is an unfair labor practice. Id. § 160(j).

30. Id. § 160(c). In Phelps Dodge Corp. v. NLRB, an employer refused to hire highly qualified job applicants because of their union involvement, and the Supreme Court held that the NLRB's power to reinstate workers could encompass the power to force employers to hire qualified applicants with union ties. 313 U.S. 177, 188-89 (1941). Despite this indication that the NLRB has an arsenal of effective weapons at its disposal to remedy labor law violations, in the 50 years since the Taft-Hartley amendments commentators have concluded that remedies under the NLRA do not deter powerful unions and employers who are determined to further their goals regardless of the law. See generally FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR §§ 7.04, 8.07(j) (2d ed. 1986) (discussing remedies available to the NLRB in the context of employer refusals to bargain in good faith and union misconduct in picketing, and noting that remedies are limited to injunctions and recovery of "damages sustained" rather than punitive damages) (citation omitted).

31. The NLRA provides that "good faith negotiation" consists of meeting at "reasonable times" and discussing wages, hours, and other conditions of employment. 29 U.S.C. § 158(d). The duty to bargain in good faith does not require either party to agree to a certain proposal or make any concessions. Id. Commentators have noted, however, that "going through the motions of negotiating" undermines collective bargaining just as much as "bluntly withholding recognition." Archibald Cox, The Duty to Bargain in Good Faith, 71 HARV. L. REV. 1401, 1413 (1958).

In NLRB v. A-1 King Size Sandwiches, Inc., the Eleventh Circuit reviewed substantive bargaining proposals to determine whether an employer entered into collective bargaining with genuine intentions to reach an agreement. 732 F.2d 872, 874 (11th Cir. 1984). The record showed that the employer insisted on exclusive control over discharge, management rights, and nearly all other conditions of employment. Id. at 877. Further, the employer responded to union suggestions for compromise with proposals more extreme than before. Id. The court held that the employer had indeed failed to bargain in good faith. Id.; see also NLRB v. Montgomery Ward & Co., 133 F.2d 676, 684 (9th Cir. 1943) (quoting NLRB v. Boss Mfg. Co., 118 F.2d 187, 189 (7th Cir. 1943)) (stating that the NLRA requires parties involved in collective bargaining to negotiate "with an open and fair mind" and to "sincerely endeavor to overcome obstacles or difficulties" in reaching a collective bargaining agreement).

32. 29 U.S.C. § 158(d). The good faith bargaining duty only extends to mandatory subjects because of their extreme importance to the employer/employee relationship. COX ET AL., supra note 26, at 408-09. The Supreme Court first inter-
even after collective bargaining negotiations break down.\textsuperscript{33} Thus, even if the parties reach impasse, the duty to bargain in good faith still requires "reasonable" comprehension of the employer's unilateral changes\textsuperscript{34} in employment terms within pre-impasse proposals.\textsuperscript{35}

\textsuperscript{33} The point at which collective bargaining has broken down, otherwise known as the point of impasse, depends on many factors. In Charles D. Bonanno Linen Service v. NLRB, the Court defined impasse as 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." 454 U.S. 404, 412 (1982) (citation omitted). The Court also explained that impasse is a recurring feature in collective bargaining, and that parties may bring about impasse intentionally as a means of furthering the collective bargaining process. \textit{Id.}

\textsuperscript{34} Implementing contract terms without a union-employer agreement is referred to as a "unilateral imposition" of contract terms. See DEVELOPING LABOR LAW, supra note 22, at 596-601 (discussing unilateral impositions of contract terms and when they support an inference of an employer's refusal to bargain in good faith); see also Archibald Cox & John T. Dunlop, \textit{Regulation of Collective Bargaining by the National Labor Relations Board}, 63 \textit{Harv. L. Rev.} 389, 391 (1950) (discussing the extent to which the NLRB has made traditionally "entrepreneurial" decisions subject to the joint control of employers and employees in the collective bargaining context).

For an example of conduct that courts have held properly within exclusive employer control, see American Ship Building Co. v. NLRB, 380 U.S. 300, 308-18 (1965). In that case, an employer had engaged in collective bargaining with a group of unions on five occasions, but all agreements were preceded by strikes. \textit{Id.} at 302. When the current negotiations reached impasse, the employer unilaterally laid off all employees in a "lock out" until resolution of the dispute so that the employees would not strategically strike to cause the employer irreparable financial injury. \textit{Id.} at 304. The Supreme Court, in reversing the NLRB, held that employers do not violate the NLRA when they shut down their enterprise temporarily, as long as the action is not directed to injuring the labor organization or evading the duty to bargain in good faith. \textit{Id.} at 307-08, 318. The Court also emphasized that the employer in \textit{American Ship Building} was not motivated by anti-union animus and had bargained to impasse in good faith. \textit{Id.} at 305-06. Similarly, in First National Maintenance Corp. v. NLRB, an employer unilaterally terminated an agreement to provide maintenance services less than two weeks after a union was certified and had informed the employer of its desire to begin collective bargaining, which re-
C. CREATION OF LABOR'S STATUTORY AND NONSTATUTORY ANTITRUST EXEMPTIONS

Even before Congress enacted the NLRA, it recognized that antitrust laws would apply to labor unions' concerted activities. 36 It also recognized, however, that this would stifle the

resulted in the employer's termination of all union members. 452 U.S. 666, 669-70 (1981). The NLRB found that the action constituted a refusal to negotiate, in violation of § 8(a)(5), and ordered the employer to reinstate the terminated employees to substantially equivalent positions, with backpay for the lost wages. Id. at 671-72. The Supreme Court reversed, holding that the decision to terminate the maintenance contract naturally had a significant impact on employees through the elimination of jobs, but dealt solely with the economic profitability of the maintenance contract. Id. at 688. The Court found this decision to be completely separate from the employment relationship, "akin to the decision whether to be in business at all." Id. at 677. Therefore, the Court held that the employer's interest in free management outweighed the employees' interest in collective bargaining over the decision to close the operation. Id. at 686.

The Supreme Court discussed the NLRB standard for good faith negotiation where employers unilaterally impose employment terms in NLRB v. Katz, 369 U.S. 736, 742-43 (1962). In that case, an employer unilaterally granted merit pay increases and instituted a change in sick-leave policy, issues upon which the union and the employer had negotiated but had not reached agreement. Id. at 740-41. The policies were implemented between October 1956 and April 1957, while negotiations continued from August 1956 to May 1957. Id. The Court held that the employer violated the NLRA despite the employer's subjective desire to reach an agreement, noting that "an employer's unilateral change in conditions of employment under negotiation... is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to negotiate]." Id. at 743; see also Bonanno Linen, 454 U.S. at 416 (stating that impasse in collective bargaining does not in any way release parties from the duty to bargain in good faith); Hinson v. NLRB, 428 F.2d 133, 137 (8th Cir. 1970) (holding that, even after expiration of a collective bargaining agreement, employers have an obligation to bargain in good faith before making unilateral changes "in those terms and conditions of employment comprising mandatory bargaining subjects within the meaning of § 8(d) of the Act") (citation omitted).

35. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543-44 n.5 (1988) (quoting Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967)). Similarly, in American Federation of Television & Radio Artists v. NLRB, the employer unilaterally imposed wage increases and fringe benefits after negotiating 27 times with the union and reaching impasse. 395 F.2d 622, 624 (D.C. Cir. 1968). The NLRB held that, despite containing one provision never before submitted to the union, the employer proposal was reasonably comprehended within the "ambit" of pre-impasse proposals. Id. at 629-30.

36. See, e.g., Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975) (explaining the union's need to have the ability to act concertedly and unilaterally, but noting that antitrust policy does not exempt labor unions); United States v. Hutcheson, 312 U.S. 219, 230-31 (1941) (describing the ways in which employers used the antitrust laws to prevent the formation of unions); see also COX ET AL. supra.
labor movement's goals. Therefore, Congress enacted an anti-trust exemption for certain labor-related activities in the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932. Both statutes prohibit employers from invoking the anti-trust laws to prevent labor organization and concerted activity.

Ironically, the statutory anti-trust exemption in the Clayton and Norris-LaGuardia Acts protected union activity but not labor-management agreements reached through successful collective bargaining. Consequently, the Supreme Court de-

37. See Felix Frankfurter & Nathan Greene, The Labor Injunction 24-27 (1930) (describing the obstacle to unionization that labor injunctions caused and arguing that the ends of unionization, namely improved working conditions, justified a certain degree of concerted activity).

38. See, e.g., Connell Construction Co., 421 U.S. at 622 (noting that there is a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions"); Hutcheson, 312 U.S. at 231 (explaining that the statutory exemptions "explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted") (footnote omitted).

39. 15 U.S.C. §§ 17, 20 (1994). The Clayton Act provides that "[n]othing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor ... organizations, instituted for the purposes of mutual help." Id. § 17. Furthermore, the Act prevents the courts from granting injunctions to prevent the formation of labor groups unless absolutely necessary to prevent injury to the property or property rights of an employer. 29 U.S.C. § 52 (1994).

40. 29 U.S.C. §§ 101-15. Courts interpreted the Clayton Act's labor exemption narrowly, causing Congress to enact a clearer exemption in the Norris-LaGuardia Act. See, e.g., Hutcheson, 312 U.S. at 231 (stating that the Act was needed to remove the restrictions on union activities that judicial interpretation of § 20 of the Clayton Act had preserved, by limiting the circumstances in which courts could grant injunctions to prevent union organization); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469-72 (1921) (holding that the Clayton Act's exemption only extended to acts between the two disputing parties, but that labor organizations were subject to antitrust liability and court injunctions as soon as they involved a third party in the dispute through activities such as pickets or boycotts). The Norris-LaGuardia Act provides:

[I]t is necessary that [workers] have full freedom of association, self-organization, and designation of representatives of [their] own choosing, to negotiate the terms and conditions of [their] employment, and that [they] shall be free from the interference, restraint, or coercion of employers of labor ... in the designation of such representatives or in self-organization or in other concerted activities ....


41. See C. Douglas Floyd & E. Thomas Sullivan, Private Antitrust Actions § 3.13, at 144 (1996) (declaring that there is "universal recognition
cided that some union-employer agreements should be exempt from the antitrust laws to balance the congressional policies that favor collective bargaining under the NLRA and free and open commercial competition under the Sherman Act. This led to the judicially-constructed "nonstatutory antitrust exemption" that covered agreements between unions and other groups, such as employers.

The Supreme Court first directly discussed the criteria for applying a nonstatutory antitrust exemption in United Mine Workers of America v. Pennington43 and Amalgamated Meat Cutters v. Jewel Tea Co.44 In Pennington, a coal miners' union negotiated a collective bargaining agreement that established minimum wages that eventually forced small coal mining companies from the market.45 The Court held that national labor policy does not protect union-employer agreements that help employers drive competitors from an industry.46 Such agreements blatantly violate the Sherman Act by attempting to decrease competition in an industry without promoting "the peaceful settlement of industrial disputes."47 Thus, even

that it would be senseless to immunize strikes, picketing, and other concerted activities by a union designed to win favorable terms of employment from an employer, but to condemn the collective bargaining agreement that embodies those terms if the union succeeds"; see also Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (explaining that restraints imposed by an employer and a union are not automatically exempt from the antitrust laws); United Mine Workers of America v. Pennington, 381 U.S. 657, 662 (1965) (stating that the Clayton and Norris-LaGuardia Acts did not address labor-management agreements).

42. Connell Construction Co., 421 U.S. at 622. For a discussion of Connell Construction Co., see infra notes 52-55. See also FLOYD & SULLIVAN, supra note 41, § 3.13, at 145-46 (stating that the Supreme Court was sensitive to the central purposes of the federal antitrust and labor laws in creating a nonstatutory exemption, and that any decision to extend the exemption must consider the purpose and effect of the activities and agreements in light of antitrust and labor policies).

43. 381 U.S. 657 (1965).
44. 381 U.S. 676 (1965).
45. Pennington, 381 U.S. at 660. The union obtained the minimum wage provision by agreeing not to oppose mechanization of the mines and not to abandon its efforts to control the working time of the miners. Id. In addition to increased wages, the mining companies gave the union increased welfare fund payments and control over the management of the fund. Id. Competing coal mines not party to the agreement were affected when the union and the companies convinced Congress to establish industry-wide minimum wages in the Walsh-Healey Act. Id.
46. Id. at 663.
47. Id. at 665-66. The Court acknowledged that the union-employer agreement affected the product market for coal only indirectly, but did not
though the agreement dealt with wages, a mandatory subject of bargaining, it did not qualify for the nonstatutory exemption.\textsuperscript{48}

In \textit{Jewel Tea}, meat cutters' unions negotiated with grocery store owners for shorter operating hours in grocery store meat departments to limit their working hours.\textsuperscript{49} The plurality held that national labor policy protected the union-employer restriction on operating hours from the antitrust laws because the agreement dealt with a mandatory subject of bargaining,\textsuperscript{50} and the unions had a compelling interest in controlling working hours.\textsuperscript{51}

Ten years after \textit{Pennington} and \textit{Jewel Tea}, the Court revisited the nonstatutory exemption in \textit{Connell Construction Co., Inc. v. Plumbers \& Steamfitters Local Union No. 100}.\textsuperscript{52} In \textit{Connell Construction Co.}, a construction union negotiated a collective bargaining agreement that forced a contractor to subcontract with only union members.\textsuperscript{53} The Court held that union agreements with nonlabor groups to eliminate non-union workers from the labor market will not qualify for the nonstatutory antitrust exemption because they afford unions control over the entire market, adversely affecting consumers by raising prices.\textsuperscript{54} It also stressed that unions may not use an agreement with an employer to control working conditions of employees not party to that agreement.\textsuperscript{55}

\begin{itemize}
\item Consider this determinative. \textit{Id.} at 664-65. The Court held instead that the purpose and effect of the agreement to eliminate competitors outweighed the arrangement's benefits to the union. \textit{Id.}

\item \textit{Id.} at 665.

\item \textit{Jewel Tea}, 381 U.S. at 679-80. The meat cutters unions represented virtually all butchers in the city of Chicago. \textit{Id.} at 680. After \textit{Jewel Tea}, the operator of a chain of retail grocery stores refused to agree to the operating hours restriction and the unions authorized a strike. \textit{Id.} at 681. Under the threat of a strike, Jewel agreed to the restriction. \textit{Id.}

\item \textit{Id.} at 689-91; \textit{see supra} note 32 and accompanying text (discussing § 158(d) of the NLRA and the scope of the term "mandatory subjects of bargaining").

\item \textit{Id.} at 691. The Court described the unions' interest in working hours as "immediate and direct." \textit{Id.}

\item 421 U.S. 616 (1975).

\item \textit{Id.} at 619-20. The union was already party to a contract with a group of mechanical contractors that provided for exclusive contracting to union members. \textit{Id.} at 619. When Connell, a general building contractor, refused to sign the agreement, the union picketed at Connell's construction site and approximately 150 workers walked off the job. \textit{Id.} at 620. Connell signed the agreement under protest and brought an antitrust suit against the union. \textit{Id.}

\item \textit{Id.} at 624-25.

\item \textit{Id.} The Supreme Court had used similar reasoning to invalidate an
In addition to case-specific analysis of whether to apply the exemption in Pennington, Jewel Tea, and Connell Construction Co., the Supreme Court has discussed general guidelines for applying the nonstatutory antitrust exemption. When groups other than unions are acting, the Court has repeatedly warned that the nonstatutory exemption only applies to restraints that further federal labor and antitrust policies. In Connell Construction Co., for example, the Court declared that the agreement to exclude all non-union subcontractors “contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.”

In addition to the balancing requirement, the Court also mentioned general factors that support application of the exemption. A reduction of competition confined to a labor market, rather than a product market, is one such factor. In agreement among electrical subcontractors and manufacturers of electrical equipment that excluded all non-union subcontractors from the market in Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 799 (1945). The Court held that such agreements became industry-wide understandings, foreclosing the opportunity for independent collective bargaining for other manufacturers and subcontractors. Id. at 799-800. Thus, the agreements had the effect of establishing a monopoly for electrical equipment, causing increases in price to consumers in direct violation of the Sherman Act. Id. at 800-01. For further analysis of the Court's reasoning in Allen Bradley, see infra note 71.

A union acting alone qualifies for the statutory exemption even when a court disagrees with the wisdom or appropriateness of the union's conduct. United States v. Hutcheson, 312 U.S. 219, 232 (1941); see supra notes 36-40 and accompanying text (describing the purpose and scope of the statutory exemption as provided in the Clayton and Norris-LaGuardia Acts).

For a discussion of the distinction between courts' level of scrutiny where nonlabor, as opposed to solely labor, parties are involved, see FLOYD & SULLIVAN, supra note 41, § 3.13, at 145 (noting that conduct falling within the provisions of the Clayton or Norris-LaGuardia Acts is exempt from antitrust liability regardless of the actor's purpose or the agreement's effect, but that courts take into account both purpose and effect when deciding whether to extend the nonstatutory exemption).


United Mine Workers of America v. Pennington, 381 U.S. 657, 662-63 (1965); see also Connell Construction Co., Inc., v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 623 (1975) (stating that "curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect"); Kieran M. Corcoran, Note, When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports, 94 COLUM. L. REV. 1045, 1052 (1994) (stating that direct restraints on product markets will only qualify for the nonstatutory exemption when courts find it “necessary to pro-
Pennington, for example, the Court held that the agreement between the union and the mining company fixing prices at which the employer could sell coal would not qualify for an exemption because it directly and immediately affected the product market. This principle is merely a presumption, however, not a hard and fast rule. Agreements that predominantly concern a labor market will not qualify for an antitrust exemption if they allow a party to gain control of an entire product market, indirectly increasing consumer prices. Furthermore, significant anticompetitive effects on a product market do not automatically subject an agreement to the antitrust laws. In Jewel Tea, for example, the Court acknowledged that the restraint on operating hours directly affected the product market by reducing the hours during which consumers could purchase meat. The Court extended the nonstatutory exemption to the union, however, because of employee concerns about working hours.

A second factor the Court considers is whether the agreement concerns “mandatory subjects” of bargaining. If it does, it

tect fundamental employee interests”) (citing Connell Construction Co., 421 U.S. at 623).
60. 381 U.S. at 663.
61. Connell Construction Co., 421 U.S. at 624-25. A plaintiff must show effects of some kind on a product market because pursuant to the Clayton Act, the labor of human beings cannot be considered a “commodity.” 15 U.S.C. § 6 (1994). Thus, a restraint on the labor market, without more, does not reduce competition in a product market and is not the type of restraint Congress intended the antitrust laws to prohibit. Pennington, 381 U.S. at 664; see, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-04 (1940) (distinquishing between employer restrictions on wages designed to effect increased market prices and an injury to consumers, which are subject to the antitrust laws, and restraints on competition among employees in the sale of their services, which are not condemned by the antitrust laws). But cf. Radovich v. National Football League, 352 U.S. 445, 451-52 (1957) (refusing to extend antitrust exemption to professional football because of the effects of the labor market upon consumers); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-38 (1948) (holding that the Sherman Act “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers”); Cordova v. Bache & Co., Inc., 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (stating that Congress, when passing the statutory exemption, was concerned with employees’ rights rather than the right of employers to fix wages paid to employees, making the employer subject to antitrust liability); BERNARD D. MELTZER, LABOR LAW 515 (2d ed. 1977) (stating that while agreements that only affect a product market indirectly have a greater chance of qualifying for the nonstatutory exemption, the line between labor and product markets is often unclear because wage costs often directly affect product prices and employers’ ability to secure supply).
63. Id.
is more likely to qualify for an antitrust exemption than an agreement involving only "permissive subjects." Indeed, using the antitrust laws to attack agreements related to mandatory subjects would severely frustrate the goals of the labor laws. Again, however, a finding that an agreement deals with a mandatory subject of bargaining is not conclusive. The Supreme Court has cautioned that restraints involving mandatory subjects will not qualify for the exemption if they violate other laws.

Finally, the Supreme Court emphasized that it will more readily apply the nonstatutory exemption when the defendant in an antitrust action first engaged in "bona fide, arm's-length bargaining" on the issue. Although the Court did not define "bona fide, arm's-length" negotiation, lower courts eventually incorporated this criterion into a three-pronged test to determine whether to apply the exemption. When deciding

64. In *Jewel Tea* the Court stated that because the NLRA mandates that parties in a collective bargaining relationship bargain about wages, hours of employment, and other working conditions, labor law policy "weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689; *see also* Corcoran, *supra* note 59, at 1051 (stating that agreements concerning mandatory subjects are shielded by the antitrust exemption provided they are of "immediate and direct concern" to union members, and that such an exemption will apply even if the restraint has significant effects on competition in a product market).

65. *See supra* note 32 and accompanying text (discussing *Borg-Warner* and courts' interpretation of "mandatory" and "permissive" bargaining subjects).

66. *See, e.g.,* Pennin, *381 U.S.* at 664-65 (acknowledging that the decision by Congress and the National Labor Relations Board to place some issues within the realm of "compulsory subject[s] of bargaining" has great relevance to the application of the nonstatutory exemption).

67. *Id.* The Court cautioned that "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 685.

68. *Jewel Tea*, *381 U.S.* at 689-90. The Court also stated that finding that a union acted pursuant to its own interests as they related to a mandatory subject of bargaining was relevant to the application of the nonstatutory exemption. *Id.; see supra* notes 49-51 and accompanying text (providing a more detailed discussion of the facts and holding of *Jewel Tea*).

69. *Jewel Tea*, *381 U.S.* at 690. In affirming the district court's finding that the parties indeed engaged in genuine bargaining over the restricted working hours, the Court merely noted that the parties had participated in several collective bargaining sessions. *Id.* at 680. In fact, the employers had made numerous requests that the parties lift the restriction on operating hours, all of which the unions rejected. *Id.*

70. *See* Shawn Treadwell, *An Examination of the Nonstatutory Labor Ex-
whether to extend the nonstatutory exemption, therefore, courts may look to certain plus-factors but must balance the interests of employees and employers in establishing working conditions through collective bargaining with the interests of consumers in maintaining a competitive business economy.\textsuperscript{71}

D. APPLICATION OF THE NONSTATUTORY EXEMPTION TO POST-IMPASSIE EMPLOYER ACTIONS

Supreme Court cases that discuss the scope of the nonstatutory exemption involved agreements with unions that employers challenged on antitrust grounds.\textsuperscript{72} Before \textit{Brown}, the Court did not expressly address whether it would apply a different level of scrutiny to strictly non-union actions, such as lockouts and unilateral changes in working conditions.\textsuperscript{73} Several circuit courts have addressed the issue of applying the nonstatutory exemption to unilateral employer conduct, however.\textsuperscript{74} In \textit{Mackey v. National Football League},\textsuperscript{75} the Court of

\textit{emtion from the Antitrust Laws, in the Context of Professional Sports, 23 Fordham Urb. L.J. 955, 963 (1996) (stating that agreements will not qualify for the nonstatutory labor exemption if they are not the product of "good faith arm's-length negotiation" between the parties to the labor dispute).}

\textsuperscript{71}. Allen Bradley Co. v. Local Union No. 3, International Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945). The Court followed this approach in \textit{Jewel Tea}, exempting a restriction of operating hours from the antitrust laws despite adverse effects on the product market. 381 U.S. at 691. The Court characterized its holding as a balancing of the restraint's "relative impact on the product market and the interests of union members." \textit{Id.} at 690 n.5; see also \textit{Pennington}, 381 U.S. at 665 (stating that courts are charged with "harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediating influence of negotiation'") (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964)); \textit{Corcoran}, supra note 59, at 1052 (describing the task of applying the nonstatutory exemption as "accommodat[ing] the competing congressional policies favoring collective bargaining and free competition").

\textsuperscript{72}. See, e.g., \textit{Connell Construction Co.}, 421 U.S. at 622 (stating that employees have a strong interest in uniting to eliminate competition related to wages and working conditions); \textit{Jewel Tea}, 381 U.S. at 689-90 (holding that the nonstatutory exemption will apply to restraints imposed as part of a union's attempt to obtain employment provisions as long as the union engages in "bona fide, arm's-length bargaining").

\textsuperscript{73}. See \textit{Corcoran}, supra note 59, at 1052 (remarking that Supreme Court precedent on applying the nonstatutory exemption primarily discusses union interests and activities).

\textsuperscript{74}. See, e.g., \textit{Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters}, 676 F.2d 881, 893 (7th Cir. 1982) (holding that an employer agreement implemented after expiration of the collective bargaining agreement was protected by the nonstatutory labor exemption); Amalgamated Meat Cutters v. Wetterau Foods, 597 F.2d 133, 135-36 (8th Cir. 1979) (holding that employer
Appeals for the Eighth Circuit formulated a three-pronged test to determine whether an employer's interest in engaging in certain conduct to reach a collective bargaining agreement outweighed the antitrust laws' preference for free and open competition in the market. First, the restraint must "primarily affect" only the parties to the collective bargaining relationship. Second, the restraint must concern a mandatory subject of collective bargaining. Third, the restraint must be the product of "bona fide arm's-length bargaining." Applying this test to the NFL's unilaterally imposed regulation of player compensation, the court held that, while the players and owners included the rule in previous agreements, they had never negotiated the rule at length. Hence, the court concluded that the antitrust exemption did not apply.

agreements adopted following a strike were exempt from antitrust laws despite the resultant denial of employment to some employees.

75. 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). In Mackey, professional football players brought an antitrust suit against club owners after reaching an impasse in collective bargaining because the owners had unilaterally imposed a rule regulating player compensation without approval from the players' union. Id. at 612. The rule, commonly known as the Rozelle Rule, provided that upon expiration of a player contract, a player may sign with a different team only if the new team provides mutually satisfactory compensation to the former team, subject to review by the then-League Commissioner, Pete Rozelle. Id. at 612 n.1.

The owners conceded that they introduced the Rozelle Rule unilaterally in 1963. Id. at 610. They contended, however, that the players accepted the rule by agreeing to the 1968 collective bargaining agreement, which incorporated by reference the NFL Constitution and Bylaws, which contained the Rozelle Rule. Id. at 612-13.

76. Id. at 613-14. The Eighth Circuit stressed that the application of the nonstatutory exemption turned on "whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." Id. at 613.

77. Id. at 614.

78. Id.

79. Id. For a different wording of the third requirement, see Amalgamated Meat Cutters v. Wetterau Foods, 597 F.2d 133, 135-36 (inquiring whether unilateral employer conduct complied with the provisions of the NLRA, including the duty to bargain in good faith, before extending the nonstatutory exemption).

80. Mackey, 543 F.2d 615-16.

81. Id. at 616. The court proceeded to analyze the Rozelle Rule in light of the Sherman Act, stating that courts have often applied the Sherman Act to employer-imposed restraints on player-services markets. Id. at 617. The court affirmed the district court's findings that the restraint violated the antitrust laws under the rule of reason because it prevented players from selling their services in a freely competitive market. Id. at 620. The Supreme Court chose not to review the case. Mackey v. NFL, 434 U.S. 801 (1977).
The Mackey test has served as the foundation for subsequent decisions applying the exemption to unilateral employer conduct. Indeed, although the Mackey court stated that the test merely facilitated weighing labor and antitrust policies, courts have treated it like a “checklist,” applying the exemp-

82. See Corcoran, supra note 59, at 1058 & n.96 (stating “[t]he Mackey test has become the standard used to decide labor exemption issues in player restraint cases” and listing cases in which courts have followed the Mackey test).

83. The term “checklist” refers to a test that considers only certain factors without undertaking a balancing of relevant antitrust and labor policies. The Eighth Circuit purported to follow Mackey in Powell v. National Football League, 930 F.2d 1293, 1299 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991). In that case, professional football players brought an antitrust suit against club owners for unilaterally imposing the Free Agency Rule, under which a team could prevent a player from contracting with another team by exercising a right of first refusal and matching the competing club’s offer. Id. at 1295. The rule is also known as the Right of First Refusal/Compensation Rule. Id. The players and owners first incorporated the rule into a collective bargaining agreement in 1977. In 1982, after a 57-day strike, the parties again included a modified version of the rule in a collective bargaining agreement. Id. at 1296. Applying the Mackey test, the court found that the agreement affected only the parties to the collective bargaining relationship, concerned a mandatory subject of bargaining, and was the product of bona fide, arm’s-length bargaining. Id. at 1298-99. Thus, the court applied the exemption and held the restraint on competition in the player services market to be immune from antitrust challenge even though the employers instituted it after the bargaining impasse. Id. at 1304.

Under Powell, employers may unilaterally implement terms of employment after impasse if the provisions pass the Mackey test and are “reasonably comprehended” within pre-impasse proposals. Id. at 1302-03 (citing Laborers Health & Welfare Tr. Fund v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 544 n.5 (1988)). The court in Powell essentially revised the third Mackey prong to require that parties comply with the NLRA’s “good faith bargaining” requirement, instead of Mackey’s “bona fide arm’s-length bargaining” standard. The Supreme Court denied certiorari to review the Powell decision. Powell v. NFL, 498 U.S. 1040 (1991). For a more detailed discussion of permissive employer actions after impasse, see supra note 35 and accompanying text (describing the Laborers Health “reasonably comprehended within pre-impasse proposals” standard in relation to the general labor law duty on all collective bargaining parties to bargain in good faith).

The Second Circuit also followed the Mackey test in National Basketball Ass’n v. Williams. 45 F.3d 684, 693 (2d Cir. 1995). In Williams, professional basketball players brought an antitrust suit against club owners for unilaterally imposing three provisions, including a right of first refusal similar to the provision in Powell, after a collective bargaining agreement had expired. Id. at 686. The court cited Powell in holding that the nonstatutory exemption continued to apply to unilateral employer conduct after impasse because all three elements of the Mackey test were met and the restraints otherwise complied with the labor laws. Id. at 692-93. The court held that the provisions were “reasonably comprehended within pre-impasse proposals” because
tion without mentioning antitrust considerations if the three
criteria are satisfied. The Supreme Court has neither
adopted nor rejected the Mackey test as it applies to employer
conduct after impasse. Thus, before Brown, Mackey still
provided lower courts with the clearest method for determining
whether to apply the nonstatutory exemption.

The District Court for the District of New Jersey applied the Mackey
test in Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J.
1987). In Bridgeman, the National Basketball Association (NBA) owners im-
plemented a post-impasse maximum club salary provision (a "salary cap"),
which had been part of collective bargaining agreements from 1983 until the
expiration of the agreement in 1987. Id. at 962-63. The court found that the
NBA owners' agreement implementing a salary cap met all three Mackey ele-
ments, concluding that an employer may satisfy the "bona fide, arm's-length
bargaining" prong by maintaining a reasonable belief that the provision, or a
"close variant" of it, will be adopted in the next collective bargaining agree-
ment. Id. at 967. The Bridgeman court also stated in dicta that its applica-
tion of the Mackey test did not stand for the proposition that employers could
claim the exemption indefinitely simply by maintaining the status quo provi-
sions. Id. at 966. Rather, employers must continue to bargain about the con-
tested terms in good faith; otherwise, unions would refuse to enter into any
collective bargaining agreements for fear that they would be forever bound by
them. Id.

The Powell court failed to recite the operative language in Mackey
that the "test" was actually a means of balancing labor and antitrust issues in
a particular case. Rather, it stated that the antitrust laws had no application
whatevsoever under the circumstances. 930 F.2d at 1304. In dissent, two
judges argued that the majority in Powell implicitly overruled Mackey because
it refused to consider the antitrust policies at stake. Id. at 1305 (Heaney, J.,
dissenting); id. at 1309 (Lay, J., dissenting in denial of rehearing en banc).

The Court has simply indicated the extremes of parties' rights during
the collective bargaining process. "[B]oth employer and union may bargain to
impasse over [terms and conditions of employment] and use the economic
weapons at their disposal to attempt to secure their respective aims." First
Natl Maintenance Corp. v. NLRB, 452 U.S. 666, 675 (1981). On the other
hand, some provisions are so inherently prejudicial to unions and so devoid of
economic justification that no showing of antiuunion animus is required to
subject the provision to the antitrust laws. American Ship Bldg. Co. v. NLRB,
380 U.S. 300, 311 (1965). The Court described the process of determining
whether employer action promotes the federal labor policies as the "far more
delicate task . . . of weighing the interests of employees in concerted activity
against the interest of the employer in operating [his or her] business in a
particular manner." Id. at 312 (citing NLRB v. Erie Resistor Corp., 373 U.S.
221, 229 (1963)).
II. BROWN V. PRO FOOTBALL

In Brown v. Pro Football, the Supreme Court did not expressly establish an approach for lower courts to follow in applying the nonstatutory exemption. It implicitly adopted the first two prongs of the Mackey test, but refused to apply the third and inquire whether employers had bargained in good faith. Instead, the Court presumed that the owners' resolution did not violate labor law or policy.

A. THE BROWN COURT APPLIED THE FIRST TWO PRONGS OF THE MACKEY TEST

The Court's holding that the owner resolution fixing developmental squad salaries fell within the protections of the nonstatutory exemption briefly addressed the first two elements of Mackey. Without discussing specific facts, the Court stated that the employer conduct "concerned only the parties to the collective-bargaining relationship" and "involved a matter that the parties were required to negotiate collectively." Thus, the Court acknowledged Mackey's first two prongs.

B. THE SUPREME COURT DID NOT IMPLEMENT MACKEY'S THIRD PRONG

Despite its adoption of the first two prongs, the Court did not implement Mackey's third prong. Specifically, the Court refused to examine whether the owners' developmental squad resolution was the subject of bona fide, arm's-length bargaining. Instead, the Court inquired whether the employers' agreement violated labor law or policy. The Court abbreviated this inquiry by assuming that, under the facts of the case,

86. 116 S. Ct. 2116 (1996). In Brown, NFL owners unilaterally imposed a resolution fixing scrimmage squad player salaries at $1,000 per week. Id. at 2119. The players claimed that the owners violated the antitrust laws, and the owners claimed that they qualified for the nonstatutory exemption. Id.; see supra notes 1-11 and accompanying text (stating the facts and procedural posture of Brown).

87. See supra notes 75-79 and accompanying text (laying out the elements of the Mackey test).


89. Id. at 2127.

90. Id.

91. See supra notes 75-79 and accompanying text (describing the elements of the Mackey test).

92. See supra notes 75-79 (describing the elements of the Mackey test).

the employers' conduct was "unobjectionable as a matter of labor law and policy." The first portion of the Court's opinion identified factors that gave rise to that assumption.

The Supreme Court first emphasized that the NLRA already regulates post-impasse unilateral employer action involving a mandatory subject of bargaining. Such conduct constitutes an unfair labor practice if the implemented provisions are not "reasonably comprehended" within pre-impasse proposals or if the employer failed to bargain on the issue in good faith. The Court explained, however, that the NLRB has explicitly condoned several forms of unilateral employer action. Furthermore, it noted that the NLRB extensively regulated unilateral, post-impasse conduct. The Court concluded that such extensive coverage signified that impasse and unilateral action after impasse are "integral part[s] of the bargaining process." Thus, it rejected the players' contention that even if the nonstatutory exemption applied, it expired at impasse. According to the Court, the bargaining process continues during and after one impasse is reached because impasse is often a temporary deadlock that may recur throughout collective bargaining. The NLRA, therefore, al-

94. Id. The Court's presumption that the owners' agreement did not violate the labor laws also shaped its framing of the issue presented in the case: "Does [the exemption] apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer?" Id. (emphasis added).

95. Id.

96. The Court noted that the phrase "reasonably comprehended' within the employer's preimpasse proposals" generally means "the last rejected proposals." Id.

97. Id.

98. Id. at 2123-24; see also PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 278 (Supp. 1996) (discussing bargaining practices exempt from antitrust restrictions). The Court pointed out that unit-wide lockouts, the use of replacement workers, and joint employer preparation and bargaining in a multiemployer bargaining unit are not unfair labor practices. 116 S. Ct. at 2124.


100. Id.

101. Id. at 2124.

102. Id. at 2125.

103. Id. at 2124-25 (citing Charles D. Bonanno Linen Serv. v. NLRB, 454 U.S. 404, 412 (1982)). Furthermore, the Court noted that impasse often differs from actual bargaining only in degree and that parties sometimes manipulate impasse as part of their bargaining strategy. Id. at 2125.
ready regulated the employers' fixed-salary provision because it was part of the broad collective bargaining process.\textsuperscript{104}

Finally, the Court stated that the nonstatutory exemption derives from the federal labor statutes, which delegate the power to make and interpret rules to the NLRB.\textsuperscript{105} The exemption's purpose is to promote a congressional preference that the NLRB, rather than "antitrust courts,"\textsuperscript{106} define the acceptable parameters of industrial conflict resolution.\textsuperscript{107} The Court noted that Congress has established "free and private collective bargaining" as the best method of resolving labor-management disputes.\textsuperscript{108} The Court concluded, therefore, that the antitrust laws should have limited application in the collective bargaining context because Congress, through the labor laws, authorized the NLRB to determine desirable collective bargaining policy.\textsuperscript{109}

Considering these factors, the Court indicated that, if it subjected the owners' conduct in the present case to antitrust scrutiny, the "antitrust courts" would dictate how collective bargaining should proceed.\textsuperscript{110} The Court considered this unacceptable because these courts sometimes find antitrust liability based on "little more than uniform behavior among competitors."\textsuperscript{111} Furthermore, if players could avail themselves of anti-

\textsuperscript{104} Id. at 2127. The Court stated that the employer conduct "grew out of, and was directly related to, the lawful operation of the [collective] bargaining process." Id.

\textsuperscript{105} Id. at 2120.

\textsuperscript{106} For a discussion of the artificial term "antitrust courts" and the Supreme Court's use of it, see infra note 172 stating that there is no regulatory agency charged with ruling on questions of antitrust law, but that all federal courts have jurisdiction to rule on antitrust questions because the Sherman and Clayton Acts are federal statutes. The Court described the NLRB as a "single expert administrative body," compared to "nonexpert antitrust judges and juries" that would create a "web of detailed rules" to govern the collective bargaining process. 116 S. Ct. at 2123.

\textsuperscript{107} Id. at 2120-21.

\textsuperscript{108} Id. at 2120.

\textsuperscript{109} Id. The Court stated that Congress designed the labor laws to encourage genuine collective bargaining and to subject industrial conflicts to the "mediatory influence of negotiation." Id. at 2120-21 (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964)).

\textsuperscript{110} Id. at 2122.

\textsuperscript{111} Id. The Court cited antitrust cases condemning uniform employer conduct as violative of the Sherman Act. Id. These cases are all distinguishable from Brown, however, because they involved agreements aiming to fix artificially high prices or control output in a product market or both. For cases holding that cooperation of some kind among sellers in a product market violated the Sherman Act, see United States v. General Motors Corp., 384
trust remedies, the Court believed that owners could not act after impasse without violating either a labor or antitrust provision. Therefore, the Court assumed that agreements do not violate labor law or policy if the NLRB has not found them to constitute unfair labor practices.

The Supreme Court acknowledged that professional athletes have special individual talents and more bargaining power than most unionized employees. Nonetheless, the Court held that those differences do not entitle athletes to additional legal advantages or give them an enhanced ability to invoke the antitrust laws in negotiating with employers. The Court concluded that the fixed-salary agreements concerned only the parties to the collective bargaining, involved mandatory subjects of bargaining, and did not violate labor law or policy. Thus, the Court held that the NFL owners qualified for the nonstatutory antitrust exemption.

III. BROWN REJECTS A PRO-EMPLOYEE UNDERSTANDING OF LABOR LAW BUT DOES NOT GRANT EMPLOYERS ABSOLUTE ANTITRUST EXEMPTION

At first glance, the Supreme Court in Brown appeared to adopt an approach similar to the three-pronged Mackey test, extending the nonstatutory antitrust exemption to all employer


112. Brown, 116 S. Ct. at 2122-23. The Court analogized a discussion among NFL owners about setting a low wage level for scrimmage players to discussions among theater owners about fixing artificially high admission prices. Id. at 2123 (comparing Interstate Circuit, 306 U.S. at 222-23). The Court stated that owners would automatically violate either the labor laws for implementing a provision that was different than those of other employers, or the antitrust laws, by cooperating with other employers in determining which provision to implement. Id. at 2122-23.

113. Id. at 2121. The Court assumed that post-impasse conduct based on a good faith offer by a multiemployer bargaining unit does not violate labor law or policy. On this assumption, the Court concluded that the exemption applies to this conduct.

114. Id. at 2126. The Court named transport workers, coal miners, and meat packers as examples of unionized workers that might not enjoy the kind of "superior bargaining power" held by athletes. Id. The Court remarked that professional athletes' increased bargaining power is evidenced by the fact that athletes have "special individual talents" and often negotiate contracts individually with employers. Id.

115. Id.

116. Id. at 2127.

117. Id.
conduct that addresses mandatory subjects of bargaining, relates only to the parties to the collective bargaining, and does not violate labor law or policy. Upon closer scrutiny, however, the Court's opinion differed significantly from lower court opinions applying the Mackey test. The Court incorporated a new understanding of labor policy and followed the traditional balancing test established in Jewel Tea, Pennington, and Connell Construction Co. As a result of these key differences from Mackey, Brown indeed forces employees to seek redress first through the NLRB, rather than the antitrust laws. It also shows, however, that when employers have not violated the labor laws, they are still subject to the antitrust laws. Thus, although Brown tips the collective bargaining scales toward employers, it does not allow them to abuse the collective bargaining process by negotiating superficially and reaching impasse in order to unilaterally implement new terms of employment.

A. THE COURT'S PRESUMPTION THAT AGREEMENTS FURTHER LABOR LAW POLICY PRESUMES CONGRESS DID NOT PASS THE LABOR LAWS SOLELY TO PROTECT EMPLOYEES

In enacting the National Labor Relations Act, Congress intended to promote industrial peace, specifically by restoring equality of bargaining power between employees and employers. Senator Wagner, a dedicated proponent of the NLRA, believed that the greatest problems facing workers before the Act were depressed wages and the widening gap between employee wages and employer profits. Therefore, in earlier

118. See supra note 71 and accompanying text (describing the balancing test followed in Jewel Tea and Pennington); see also supra note 58 and accompanying text (describing the balancing test followed in Connell Construction Co.).

119. See supra note 26 and accompanying text (reciting Congress's goals in passing the NLRA).

120. See, e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985) (finding that "[t]he NLRA's declared purpose is to remedy [t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association") (quoting 29 U.S.C. § 151 (1994)); see also United States v. Hutcheson, 312 U.S. 219, 231 & n.2 (1941) (describing the goals of the labor laws as protecting workers who are helpless to exercise their liberty of contract and to obtain acceptable terms of employment by guaranteeing them the right to bargain through a representative of their own choosing).

121. See National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong. 34-35 (1935) (statement of
nonstatutory exemption cases, the Supreme Court analyzed whether a proposed provision "furthered labor policy" by asking whether it helped to balance the bargaining power of employees and employers or to distribute wealth more evenly between employees and employers.\textsuperscript{122}

In \textit{Brown}, however, the Court focused on a fundamentally different view of labor policy. The predominant understanding of the labor laws today is that they do not establish a pro-employee framework for industrial relations.\textsuperscript{123} Indeed, since Congress passed the Taft-Hartley amendments in 1947, the NLRB and courts consider the labor laws to be essentially neutral and encourage vigorous collective bargaining as the most effective means of resolving labor-management disputes.\textsuperscript{124} The \textit{Brown} Court supported this view, describing modern labor policy as encouraging resolution of industrial conflict through "free and private collective bargaining."\textsuperscript{125} Therefore, the Court

\textsuperscript{122} See supra note 69 and accompanying text (citing the Supreme Court's explanation of what constituted "furthering the goals of the labor laws" in its original nonstatutory exemption jurisprudence).

\textsuperscript{123} See \textit{Cox ET AL.}, supra note 26, at 87 (describing the common understanding of the goals of the labor laws after the amendments to the NLRA as placing the government "in the center" rather than on the side of employees and stating that the amendments symbolize "an abandonment of the policy of affirmatively encouraging the spread of union organization"); \textit{see also Daniel R. Ernst, Lawyers Against Labor}, 234-35 (1995) (discussing Walter Gordon Merritt's fight against legislation encouraging unionization).

\textsuperscript{124} See \textit{supra} note 27 (stating that the NLRB has emphasized that the best way to effect industrial peace is through vigorous collective bargaining). The view that the labor laws should not tip the bargaining scales in favor of unions is influenced by the significant gains made by unions through both collective bargaining and successful lobbying for workplace legislation, in addition to the well-publicized violence and corruption within the union structure. \textit{See DEVELOPING LABOR LAW}, \textit{supra} note 22, at 35-40 (analyzing reasons for the decreasing protections the labor laws offer unions and noting that, from 1935 to 1947, unions became extremely powerful economic organizations, causing widespread public fear of powerful union bosses); Craig Becker, \textit{Labor Law Outside the Employment Relation}, 74 \textit{Tex. L. Rev.} 1527, 1528-39 (1996) (discussing the shrinking categories of workers covered under the NLRA because of the Taft-Hartley amendments and employment trends such as "outsourcing" and "subcontracting"); David Charny, \textit{The Employee Welfare State in Transition}, 74 \textit{Tex. L. Rev.} 1601, 1611-12 (1996) (positing that workers have few workplace protections that are immune from employer abuse despite the general belief that employees have gained extensive employment security).

did not require that the employers' resolution improve employees' ability to secure favorable working conditions, as it had in earlier cases.\textsuperscript{126} Instead, it merely asked whether the agreement was related to the broad collective bargaining process.\textsuperscript{127} This inquiry favors employers because, under the old standard, employers could not show they were "furthering labor policy" unless they acted specifically to benefit employees' interests during collective bargaining, something employers rarely do.

The Court also assisted employers by creating a presumption that agreements further labor policy as long as they are reached in connection with the "collective bargaining process," including impasse and the unilateral implementation of employment terms after impasse.\textsuperscript{128} Thus, even though the employers in \textit{Brown} acted unilaterally, the resolution "furthered federal labor policy"\textsuperscript{129} because the parties were still negotiating a new collective bargaining agreement and the owners were merely attempting to force the players back to the bargaining table.\textsuperscript{130} This recognition of the substantial shift in labor law policy favors joint employer groups by establishing that they may act in their own interest and still "further labor law policy," thereby falling within the nonstatutory exemption to the antitrust laws.

\textbf{B. THE COURT ASSISTED EMPLOYERS BY PLACING UNFAIR LABOR PRACTICE ISSUES SOLELY WITHIN THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD}

Under Mackey's third prong, courts evaluated whether parties to collective bargaining had negotiated at arm's length before implementing an agreement.\textsuperscript{131} In \textit{Brown}, however, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{126} \textit{Id.} at 2120; see also supra note 72 and accompanying text (discussing the traditional Supreme Court requirement that agreements further unions' cause before applying the nonstatutory exemption).
\item \textsuperscript{127} See supra note 104 and accompanying text (describing the \textit{Brown} Court's abbreviated inquiry and extremely broad definition of the "collective-bargaining process").
\item \textsuperscript{128} See supra notes 100-104 and accompanying text (discussing the concept of "impasse" and its relevance in the collective bargaining process).
\item \textsuperscript{129} \textit{Brown}, 116 S. Ct. at 2127.
\item \textsuperscript{130} In dicta, the Court suggested that the "collective bargaining process" continues until the bargaining relationship collapses, either through union decertification or "defunctness" of the multiemployer bargaining unit. \textit{Id.}
\item \textsuperscript{131} See supra notes 75-79 and accompanying text (articulating the elements of Mackey).
\end{itemize}
\end{footnotesize}
Court stressed the NLRB's responsibility for determining acceptable bargaining behavior. The Court thereby established a presumption that the party imposing an agreement does not violate labor laws as long as that party has not committed an unfair labor practice. By creating this presumption, the Court refused to ask whether a given agreement is the subject of bona fide arm’s-length negotiation, thereby respecting the NLRB's authority to determine whether labor law violations have occurred.

The Supreme Court therefore favored employers by requiring that employees seek labor law sanctions, which have severely limited remedies, before attempting to use the antitrust laws with their more effective treble damages. The NFL owners in Brown may not have negotiated in good faith, but as long as the players did not invoke the protections of the labor laws to challenge the employers’ resolution, the Court presumed that they had. Despite the presumption in favor of

---

132. See supra note 109 and accompanying text (discussing Congress's intention, when passing the NLRA, to encourage genuine collective bargaining); see also DEVELOPING LABOR LAW, supra note 22, at 1576-79 (stating that the provisions of the NLRA are administered by the NLRB and noting that courts may review NLRB decisions not to issue complaints pursuant to unfair labor practice charges only in extreme cases).

133. The Brown Court does not expressly state that the players did not bring unfair labor practice charges, but the record in the case does not mention such proceedings.

134. Whether an agreement resulted from arm’s-length bargaining depends on whether a party bargained for an issue in good faith. Congress placed determination of that particular issue within the NLRB’s jurisdiction under § 8(a)(5) of the NLRA, 29 U.S.C. § 158 (1994). The Eighth Circuit in Powell reached a similar conclusion, asking first whether the agreement was the subject of arm’s-length bargaining, and then inquiring whether the agreement had violated any labor laws. See Powell v. National Football League, 930 F.2d 1293, 1298-99 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).

135. See supra notes 29-31 and accompanying text (discussing the remedies available to the NLRB and many commentators' beliefs that these remedies are impotent against employers with bargaining power greater than their opposing unions, and vice versa).

136. See supra note 18 (discussing the treble damages provision of the Clayton Act to deter business owners from violating the antitrust laws).

137. See supra note 5 and accompanying text (describing the negotiation process followed by the owners before implementing the fixed-salary resolution); see also Cox, supra note 31, at 1412-13 and accompanying text (stating that going through the motions of bargaining, otherwise referred to as "surface bargaining," undermines the collective bargaining process as much as outright refusals to negotiate).

employers, the Court did not explicitly note its departure from the Mackey test. To respect the NLRB's jurisdiction, however, lower courts should acknowledge Brown by refraining from analyzing substantive labor law questions in the future.

C. BROWN FOLLOWED A BALANCING TEST THAT DOES NOT EXEMPT ALL UNILATERAL EMPLOYER CONDUCT

In applying the nonstatutory exemption to the owners' agreement, the Brown Court does not explicitly acknowledge that it is adopting either the Mackey approach or its own "checklist" approach. It also fails to mention the traditional approach it established in Jewel Tea, Pennington, and Connell Construction Co. Courts should interpret Brown as following the traditional balancing test because any approach that does not balance labor with antitrust policy will (1) implicitly overrule Supreme Court precedent, (2) encourage employers to abuse the collective bargaining process, and (3) frustrate federal antitrust policies.

When it created the nonstatutory antitrust exemption for nonlabor groups, the Supreme Court expressly discussed activities that did and did not qualify. None of those cases resemble Brown, however, because in those cases the players' association did not enter into an agreement to obtain better working conditions, the parties did not try to drive competitors from the industry, and the union did not try to force the owners to hire only union labor. Nonetheless, the Court also discussed factors that weigh in favor of extending the exemption in its early nonstatutory exemption decisions. Applying

---

139. Id. 2127.
140. See supra note 83 (describing the term "checklist approach").
141. See supra notes 43-71 and accompanying text (describing the holdings of Jewel Tea, Pennington, and Connell Construction Co.).
142. See supra note 49 and accompanying text (observing that the unions in Jewel Tea insisted on restricted operating hours of meat departments to improve their working conditions).
143. See supra note 45 and accompanying text (stating that the union in Pennington agreed to allow the owner to increase mechanization of the mines to drive competitors from the market and to increase wages).
144. See supra note 53 and accompanying text (noting that the union in Connell Construction Co. used its industry-wide agreement to prevent the owner from hiring any non-union workers).
145. See supra notes 56-71 and accompanying text (acknowledging that the Court will more readily apply the nonstatutory exemption to agreements affecting labor markets than it will to agreements affecting product markets,
those factors to Brown, the resolution fixing developmental squad salaries concerned a mandatory subject of bargaining, primarily involved a labor rather than a product market, and had been negotiated to some extent by the parties.\(^{146}\) Thus, in Brown, these factors created a strong presumption for applying the nonstatutory exemption.

If the Brown Court was applying the traditional balancing test, it would note this presumption and proceed to balance labor with antitrust concerns.\(^{147}\) The owners’ action promoted labor law policy because it attempted to force the players to continue collective bargaining, the NLRB’s preferred method of resolving labor disputes.\(^{148}\) Therefore, at this stage in the traditional approach, the players would have the burden of showing compelling antitrust policies that override the labor policy of encouraging vigorous collective bargaining.\(^{149}\) Analyzing the antitrust interest in Brown, there were three ways in which the owners could have used the resolution. The owners could have passed the proceeds on to consumers by reducing ticket prices, retained the funds as additional profits, or used them to cover skyrocketing salaries of “franchise players.”\(^{150}\)

None of these scenarios would cause actual “antitrust injury,” a decrease in output, an increase in price to consumers, agreements involving mandatory subjects of bargaining, or agreements reached after genuine, good-faith bargaining).

\(^{146}\) See supra notes 89-94 and accompanying text (articulating the holding of Brown and noting that the union had not brought unfair labor practice charges, leading the Court to the conclusion that the players could not resort to the antitrust remedies, despite the lack of significant bargaining on the developmental squad salaries).

\(^{147}\) See supra notes 74-80 and accompanying text (describing the elements of the traditional nonstatutory exemption analysis and courts’ inquiry into the interests of both labor and antitrust law).

\(^{148}\) See supra note 104 and accompanying text (analyzing the Court’s reasons for holding that the owners’ action furthered labor law policy).

\(^{149}\) See supra note 56-57 and accompanying text (describing the process the Supreme Court followed in applying the traditional balancing test).

\(^{150}\) Franchise players have enough fan recognition and talent to single-handedly boost spectator interest, event attendance, and owner revenues. See, e.g., Paul D. Staudohar, The Sports Industry and Collective Bargaining 7 (2d ed. 1989) (stating that professional sports are subject to the “star system,” where exceptionally talented superstars “command vastly disproportionate influence on their professions” and “derive exceptional incomes”); Mitch Truelock, Free Agency in the NFL: Evolution or Revolution?, 47 SMU L. REV. 1917, 1946 (1994) (describing the NFL’s definition of “franchise players” as veterans among the five highest paid at each position in the league).
or a general lessening of competition in a product market. In the first scenario, the owners' agreement would directly benefit consumers. In the second, all NFL owners would stand to gain profits, and competitors would not be eliminated from the industry, so there would be no effect on consumers. In the final scenario, investing the funds in the salary of a franchise player would potentially make one team more competitive against others in the league but would not negatively affect the product of NFL football to consumers. Therefore, the owners' use of the resolution would not have caused compelling antitrust problems.

Other unique circumstances in Brown made the players' interest in bringing an antitrust claim even less compelling. Because professional athletes have bargaining power far greater than most workers, their employers are less likely to engage in oppressive conduct. Furthermore, professional sports involve benefits that accrue to developmental squad, or

151. See supra note 20 and accompanying text (defining the concept of antitrust injury and its limiting effect on the ability of plaintiffs to bring antitrust causes of action).

152. The antitrust laws prohibit unreasonable restraints of trade that suppress competition in product markets and result in increased prices and decreased purchasing power for consumers. See supra note 20. Courts generally uphold restraints that result in reduced costs to owners and lower prices for consumers because they increase economic efficiency, at least in the sense that they help the general public and do not give owners monopoly profits. See supra note 20 and accompanying text (describing the rule of reason and the factors that courts consider to determine whether a restraint is "procompetitive"); see also Warren Freedman, Professional Sports and Antitrust 4-12 (1987) (describing antitrust principles in the context of professional sports and remarking that those principles aim to protect the spectators' interests).

153. See generally Staudohar, supra note 150, at 64-67 (discussing professional football leagues that have challenged the NFL and arguing that potential competitors have little chance of taking away NFL owners' profits or spectator loyalty).

154. That professional athletes usually negotiate contracts individually and have salaries that greatly exceed the average American worker demonstrates their superior bargaining power. See Staudohar, supra note 150, at 12-13 (discussing professional athletes' bargaining power); see also Robert C. Berry et al., Labor Relations in Professional Sports 10 (1986) (arguing that professional sports differ from other industries in that athletes become folk heroes and demigods while regular employees do not); see supra note 114 and accompanying text (citing the Supreme Court's admission that professional athletes are different from most workers because of their enhanced bargaining power).
minor league players,\textsuperscript{155} outside of traditional wages;\textsuperscript{156} therefore, a fixed-salary provision is not as damaging in professional football as it might be in a more traditional industry. Perhaps most importantly, the players in \textit{Brown} refused to exhaust all available labor law channels against the owners' actions before resorting to the antitrust laws.\textsuperscript{157} The developmental squad players chose to attack immediately the agreement on antitrust grounds, preferring the treble damages of the antitrust laws\textsuperscript{158} to meager labor law sanctions.\textsuperscript{159} Consequently, the

\textsuperscript{155} See supra note 4 (describing the role of the NFL's developmental players).

\textsuperscript{156} The greatest benefit offered any developmental player in sports is the opportunity eventually to play for the team, which means greatly increased pay and, in most sports, the right to negotiate contracts individually. In reducing each scrimmage squad player's salary, owners actually created more developmental squad positions, arguably increasing the future opportunities for more first-year players. See generally BERRY ET AL., supra note 154, at 4 (discussing the extremely small number of players that make the "major leagues," creating the real economic value of an opportunity to play professional sports); STAUDOHAR, supra note 150, at 79-80 (discussing the effects of the 1987 NFL players strike).

\textsuperscript{157} See supra note 133 and accompanying text (stating that the record in \textit{Brown} makes no mention of the players instituting unfair labor practice charges). The Court may have implicitly considered that, in \textit{Brown}, the owners first notified the players of the new fixed salary proposal on May 18, 1989. \textit{Brown v. Pro Football}, 782 F. Supp. 125, 129 (D.D.C. 1991). On May 30, 1989, the players' bargaining representative notified the owners that the players wished to discuss the resolution and would not concede the status quo right to individual salary negotiation. \textit{Id.} Without further discussion, the owners' representative concluded in a letter to the owners, dated June 16, 1989, that, "for implementation purposes, the [developmental squad] issue is clearly at an impasse." \textit{Id.} (citing Plaintiffs' Statement of Material Facts Not in Genuine Dispute, at 4) (internal citations omitted). These undisputed facts raise serious doubt about whether the owners bargained in good faith for the developmental squad resolution, making NLRA unfair labor practice charges the players' most natural channel of recourse.

Another factor that may have influenced the Court in its statement about the non-applicability of the antitrust laws is the previous resolution of NFL labor disputes and strikes. In 1982 and 1987, the players led strikes that proved largely ineffectual in forcing the owners to agree to more generous terms of employment. STAUDOHAR, supra note 150, at 75-83. In \textit{Brown}, the developmental squad players knew that a successful labor law charge against the owners would only result in more collective bargaining. They had little bargaining power alone, however, because the "varsity squad" players would never agree to a strike, given that they stood only to gain lower salaries from the developmental players' demands. See \textit{id.} at 74-75 (discussing the balance of power within professional sports unions and the questionable effectiveness of such unions in fairly and equally representing all members).

\textsuperscript{158} See supra note 18 (noting that the antitrust laws provide for treble damages).
antitrust interests in Brown were not compelling enough to outweigh the owners' labor interest in forcing the players back to the collective bargaining table. Therefore, considering the factors that created a presumption in favor of applying the nonstatutory exemption and the lack of a compelling antitrust interest, the resolution in Brown deserved the protection of the nonstatutory exemption under the Supreme Court's traditional balancing test.

The most important reason for interpreting Brown as applying a balancing test is that a simple checklist approach like the one lower courts have been using since Mackey is inconsistent with Supreme Court precedent. In Radovich, the Court held that agreements involving only a labor market will not qualify for the nonstatutory exemption if they blatantly violate the antitrust laws, because those laws "protect the victims of the forbidden practices as well as the public." Therefore, under Radovich, an agreement strictly between an employer and an employee that involved a mandatory subject of bargaining and did not violate labor law or policy could still be subject to antitrust attack. Under a strict application of a four-pronged test based on Brown, however, such an agreement would be exempt automatically from the antitrust laws because it did not violate labor law or policy, it involved a mandatory subject of bargaining, and it concerned only the parties to the collective bargaining.

This simple checklist approach based on Brown would also be inconsistent with the interpretation of Supreme Court deci-

159. See Bartosic & Hartley, supra note 30, §§ 7.04, 8.07 and accompanying text (stating that NLRA remedies are usually limited to injunctions and bargaining orders).

160. The doctrine of stare decisis requires that, for a judicial system to maintain continuity over time, prior decisions must be followed unless their "principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).


162. Id. at 454; see supra note 61 and accompanying text (describing the Radovich holding and other cases in which the Court has not required a direct restraint on a product market to subject agreements to antitrust scrutiny).

163. Radovich, 352 U.S. at 448-49. The agreement at issue in the case took the form of a standard player contract, under which a player could not sign with another team without employer consent. Id. at 449. Therefore, the agreement dealt with a condition of employment considered mandatory under NLRA § 8(d). 29 U.S.C. § 158(d) (1994); see also supra note 32 and accompanying text (discussing courts' interpretation of the term "mandatory subjects of bargaining").
sions that first established the nonstatutory exemption. In Jewel Tea, the agreement among unions to limit operating hours concerned a mandatory subject of bargaining and did not violate labor law or policy, but it directly affected a product market. Thus, a court interpreting Brown as a checklist would not apply the nonstatutory exemption under the facts of Jewel Tea. In reality, the Supreme Court applied the exemption to the operating hours restriction. In Pennington, the agreement to establish higher wages involved only the parties to the collective bargaining and dealt with mandatory subjects of bargaining. The parties reached the agreement through collective bargaining, and they did not violate the labor laws. Thus, in Pennington, a court applying a strict four-factor test based on Brown would have extended the nonstatutory exemption. The Supreme Court struck down the agreement, however, because the antitrust violation outweighed the labor interests in the case.

These three illustrations demonstrate that interpreting Brown as following a test that does not balance labor with antitrust interests conflicts with Supreme Court precedent. Lower courts should, therefore, interpret Brown as following a balancing test that considers the facts and special circumstances of each case as well as the four factors discussed in the opinion. This balancing test requires that parties invoking the exemption show how their actions benefit the peaceful resolution of an industrial dispute to an extent greater than they injure federal antitrust policy. Indeed, the Court declared in Pennington that agreements involving nonlabor groups qualify for the exemption only if they promote the national labor policy of encouraging peaceful resolution of industrial disputes and do not

165. See supra note 62-63 and accompanying text (discussing the working hours restriction and the Supreme Court's acknowledgment that the agreement worked directly on the product market for meat).
166. See supra notes 50-51 and accompanying text (articulating the holding and reasoning of Jewel Tea).
168. See supra note 45 and accompanying text (describing the agreement in Pennington).
169. See supra note 46-48 and accompanying text (articulating the holding of Pennington).
170. See supra notes 74-80 and accompanying text (describing the factors the Court required for extension of the exemption).
disregard the antitrust laws in the process.\textsuperscript{171} Courts must, therefore, evaluate the extent to which a party's actions further or frustrate antitrust policy every time they apply the non-statutory antitrust exemption.

In \textit{Brown}, the Supreme Court applied the nonstatutory exemption without expressly engaging in any antitrust analysis.\textsuperscript{172} It is critical that lower courts interpret \textit{Brown} as preserving the antitrust inquiry, especially in light of recent commentaries noting that some employers have read \textit{Brown} as removing unilateral multiemployer bargaining actions from antitrust scrutiny altogether.\textsuperscript{173} If all such actions were indeed exempt, employers would be encouraged to simply negotiate until impasse without compromising, when they could unilaterally implement their own working conditions. Such a reading of \textit{Brown} would undermine the federal labor policy of resolving industrial disputes through collective bargaining. Courts must interpret \textit{Brown} as following a balancing test in deciding whether to extend the "nonstatutory exemption."\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{171} \textit{Pennington}, 381 U.S. at 664-65; \textit{see also} Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (discussing the federal labor policy as encouraging collective bargaining and the association of employees to eliminate competition over wages, but not permitting parties to unilaterally restrain competition in product markets); Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (stating that the Court must analyze the subject matter of the provision in light of the national labor policies before applying the exemption).
\item \textsuperscript{172} \textit{See supra} note 109 and accompanying text (discussing the Court's comments about the application of the antitrust laws to the questions in \textit{Brown}). The Court seems concerned about exposing labor issues to nonexpert antitrust judges and juries, a fear that is grounded on questionable logic. There is no administrative body comparable to the NLRB responsible for enforcing the federal antitrust laws; the Federal Trade Commission (FTC) may conduct administrative hearings only on claims under the narrow Federal Trade Commission Act, not the broader Sherman and Clayton Acts. \textit{See SULLIVAN \& HOVENKAMP, supra} note 15, at 75-76 (describing the limited jurisdiction of the FTC). Because the antitrust laws are federal laws, \textit{all} federal courts are charged with enforcing the policies of the antitrust laws and may properly rule on antitrust questions. \textit{See id.} at 81 (explaining the Clayton Act's jurisdiction and venue provisions).
\item \textsuperscript{173} \textit{The Court may in fact have been considering the unique circumstances in \textit{Brown} that made the players' antitrust interest less than compelling. \textit{See supra}} notes 154-157 and accompanying text (discussing factors unique to professional sports that made the players' interest in bringing antitrust charges less than compelling in \textit{Brown}).
\item \textsuperscript{174} \textit{See Weitzman \& McKenna, supra} note 14, at B4 (stating that employers and industrial relations experts interpreted \textit{Brown} as essentially freeing multiemployer bargaining activities from antitrust scrutiny).
\end{itemize}
because a checklist approach would conflict with Supreme Court precedent, frustrate federal antitrust policies, and encourage employers to abuse the collective bargaining process.

CONCLUSION

_Brown_ has severely confused lower courts and employers. The case appears to affirm the lower courts' _Mackey_ approach, suggesting that all unilateral employer conduct after impasse is exempt from the antitrust laws. As a result, _Brown_ threatens to tip the collective bargaining scales in favor of employers, encouraging them to pretend to engage in "negotiation" and then, upon impasse, to implement the terms of employment they desire. This Comment proposes that, while _Brown_ recognizes that labor laws no longer aim to protect employees and force workers to seek weaker labor law remedies before attempting to invoke the more potent antitrust laws, lower courts must interpret _Brown_ to apply a balancing approach and thereby extend the nonstatutory exemption only after weighing conflicting antitrust and labor policies in each case. This reading maintains consistency with Supreme Court precedent, respects antitrust policies, and does not give employers incentive to abuse the collective bargaining process.