ANTITRUST LAW—THE NONSTATUTORY LABOR EXEMPTION FROM ANTITRUST LIABILITY CONTINUES TO AFFORD PROTECTION TO A MULTIEMPLOYER BARGAINING UNIT EVEN AFTER A PAST AGREEMENT ENDS, AND THE ENTITY RETAINS THE DUTY TO BARGAIN ONCE A GOOD FAITH IMPASSE IS REACHED IN CONTRACT NEGOTIATIONS—*Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

The enigmatic relationship between federal antitrust and labor laws[1] has evolved to ensure that the two may co-exist and properly function despite their inherently inconsistent principles.[2] The Sherman Antitrust Act,[3] enacted in 1890, was designed to promote competition and regulate commercial activity.[4] To determine if an antitrust law has been violated,

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[1] *See* Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 604-05 (1976). *See generally* Martin I. Kaminsky, *The Antitrust Labor Exemption: An Employer Perspective*, 16 SETON HALL L. REV. 4 (1986) (discussing the problematic and unsettled relationship between the two distinct areas of law and concluding that while antitrust exemptions protect good faith employer conduct, the standards of liability are still confusing and hardly give adequate guidance to predict future action).

[2] *See* Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers, 769 F.2d 1381, 1386 (9th Cir. 1985) (stating that antitrust and labor laws "do not have identical objectives"); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 937 (3d ed. 1994); ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 871-72 (9th ed. 1981).

[3] *See* 15 U.S.C. §§ 1-7 (1992). The Sherman Act was the result of the tenuous socio-political and economic atmosphere between 1865 and 1890. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 15-18 (1965). The Act encouraged freedom of trade and was founded on English common law principles. *See id.* On its face, and in its application, there has been dispute over Congress's goals in enacting the Sherman Act. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 106 (1982). General agreement exists that Congress intended to encourage competition by regulating firms or industries with significant market power because they could artificially raise prices and restrict output. *See id.* Congress wanted an efficient and productive economy that would curtail the social and political power of large corporations and enable smaller entrepreneurs to enter new markets. *See id.*

[4] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985). See also Northern Pacific Railroad v. United States, which stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the

courts apply one of two distinct standards.[5] Certain business activities are labeled as either a per se restraint of trade[6] or the situation is ana-

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> lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

366 U.S. 1, 4 (1958).

Section one of the Sherman Act provides, in pertinent part, that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 1 (1992). Additionally, section two provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . ." *Id.* § 2.

When the Supreme Court first interpreted the Sherman Act, it condemned every restraint on trade or commerce, without exception, as unlawful. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897) (inquiring, the Court simply asked: "Does the agreement restrain trade or commerce in any way so as to be a violation of the [A]ct?"). Such a literal reading of this section would prohibit numerous necessary and valid business activities and objectives. *See* LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 63, at 165 (1977) (noting that every contract inevitably restrains trade to some extent).

One year after deciding *Trans-Missouri*, the Court reconsidered its strict reasoning and concluded that its initial interpretation of section one was too inclusive. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898). Justice Peckham held:

> [T]he statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements . . . would enlarge the application of the act far beyond the fair meaning of the language used . . . . An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may *indirectly and remotely* affect that commerce.

Id. (emphasis added).

The Supreme Court continued to interpret section one of the Sherman Act to forbid only unreasonable restraints of trade. *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918) (concluding that an imposed restraint is legal if it merely regulates and promotes competition as opposed to suppressing and possibly destroying competition); *see also* Standard Oil Co. v. United States, 221 U.S. 1, 65-66 (1911) (interpreting the congressional intent to pertain to unreasonable restraints). To determine the reasonableness of a particular restraint, courts must make an extensive inquiry into the nature, purpose, and effect of the restraint. *See Standard Oil*, 221 U.S. at 67. In *Board of Trade*, the Supreme Court considered several factors including "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Board of Trade*, 246 U.S. at 238. Additionally, courts should analyze the history of an industry, the rationale and reason for imposing a restraint, and the goal that is sought to be attained. *See id.*

[5] *See* SULLIVAN, *supra* note 4, § 63, at 166.

[6] *See id.* The Supreme Court stated that "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as

lyzed pursuant to the Rule of Reason.[7] The underlying policies of Labor Law, however, directly contrast with antitrust principles.[8] For this rea-

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to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.*, 365 U.S. at 5. As to specific price-fixing agreements, the Supreme Court summarily disregards any reasonableness arguments. *See* Addyston Pipe and Steel Co. v. United States, 175 U.S. 211, 237-38 (1899) (labeling the issue of reasonableness as unimportant because common law courts did not entertain any inquiries into the reasonableness of such contracts). In *United States v. Trenton Potteries Co.*, for example, a case involving a price-fixing agreement among 20 individuals and 23 corporations that manufactured and distributed bathroom accessories, the Court promulgated:

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition . . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry [into] whether a particular price is reasonable or unreasonable as fixed . . . .

273 U.S. 392, 397 (1927).

Other cases have also demonstrated specific practices that have been labeled per se violations of the Sherman Act. *See, e.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) (clarifying that past experience with a specific restraint enables the Court to presume that the restraint is unacceptable); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (reiterating that group boycotts are per se illegal); Paramount Famous Lansky Corp. v. United States, 282 U.S. 30, 43 (1930) (declaring a per se violation if parties maintain outright refusal to deal).

The per se rule, however, has been limited in its application because of the substantial risk that legitimate, pro-competitive activities will be declared illegal. *See* Bradley S. Albert & Brian K. Albert, *Fourth and Goal: It's Time for Congress to Tackle the Nonstatutory Labor Exemption*, 2 SPORTS LAW. J. 185, 193 (1995). For that reason, the per se rule is usually only invoked in limited circumstances. *See* Continental Tel., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (finding that conduct must be manifestly anticompetitive before the per se rule applies); White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (deeming certain business activities a naked restraint of trade).

[7] *See Standard Oil Co.*, 221 U.S. at 49-62. The Rule of Reason demands that a court analyze the reasonableness of a challenged restraint on trade. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 344 (1989). To determine unreasonableness, courts first look at the purpose and effect of the imposed restraint. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). Citing *Standard Oil*, the *National Society* Court viewed the nature, character, or circumstances of either a contract or an act to infer an intentional trade restraint. *See id.* at 690. In addition, the Court stated that:

> [T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. 'The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'

Id. at 691 (quoting *Board of Trade*, 246 U.S. at 238).

The Rule of Reason also requires a court to balance the pro-competitive and anticompetitive effects of a restraint. *See, e.g., Board of Trade*, 246 U.S. at 238. In *Appalachian Coals, Inc. v. United States*, the Supreme Court went as far as to uphold a price-fixing agreement under the Rule of Reason because of the deplorable economic conditions in the coal industry. *See* 288 U.S. 344, 361 (1933). In essence, the Rule of Reason grants broad discretion to courts for weighing various aspects of competitive markets be-

son, two separate labor exemptions—one statutorily imposed[9] and one judicially implied[10]—have been enacted and incorporated to protect labor

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fore deciding whether an agreement violates antitrust laws. *See* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 83-86 (2d ed. 1994).

[8] *See* Kieran M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1048 (1994). Specifically, unions, the threat of strikes, and the process of good faith collective bargaining over issues that may restrain an employee's mobility can effectively preclude an employer from productively bargaining with its employees. *See* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 528 (1979). In these types of circumstances, the enforcement of antitrust law would severely hinder the process of collective bargaining, which would effectively negate the original purpose of establishing such a principle. *See* Albert & Albert, *supra* note 6, at 195. Not surprisingly, initial joint activities by workers were prosecuted as conspiracies. *See* Kaminsky, *supra* note 1, at 7.

[9] *See* Kaminsky, *supra* note 1, at 8-15; *see also* LIBERTY AND JUSTICE: A HISTORICAL RECORD OF AMERICAN CONSTITUTIONAL DEVELOPMENT 314 (J. Smith & P. Murphy eds., 1958) (detailing historical review of the development of American labor law).

The statutory labor exemption originated with the Clayton Act. *See* Clayton Act, 15 U.S.C. §§ 12-27 (1994); 29 U.S.C. §§ 52-53 (1994). Section six of the Clayton Act states that labor is not an article or commodity of commerce and that antitrust laws do not prohibit labor unions or organizations. *See* 15 U.S.C. § 17 (1988). In addition, section 20 of the Clayton Act limits the power and discretion of courts to grant injunctions in labor disputes. *See* 29 U.S.C. § 52 (1988). The Supreme Court enunciated:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [section] 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

United States v. Hutcheson, 312 U.S. 219, 232 (1941). The application of the Clayton Act, however, was slow. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 477-78 (1921) (issuing broad injunctions against organized labor).

Accordingly, Congress then enacted the Norris-LaGuardia Act of 1932, which established a favorable policy for organized labor, collective bargaining, and expanded protection for union activities. *See* 29 U.S.C. §§ 101-15 (1988). The Clayton Act and Norris-LaGuardia Act jointly created the initial statutory exemption. *See* Corcoran, *supra* note 8, at 1049-50. Because unions assume the vital role of improving a worker's wages, working conditions, and hours by consolidating the supply of labor, their existence would be tenuous without such an antitrust exemption. *See* Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1400-02 (1988). Neither the Clayton Act nor the Norris-LaGuardia Act, however, explicitly guided courts on how to deal with complex collective bargaining problems. *See* SULLIVAN, *supra* note 4, § 237, at 723. To reinforce its commitment to the collective bargaining process, Congress enacted the National Labor Relations Act (NLRA) in 1947. *See* 29 U.S.C. §§ 151-69 (1988). In essence, this Act and its companion, the Labor Management Relations Act, *see* 29 U.S.C. §§ 141-97 (1988), promote the federal interest in collective bargaining by correcting the unequal bargaining power between employers and employees. *See* Corcoran, *supra* note 8, at 1050.

[10] *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 961. This is a limited, judicially-contrived antitrust exemption that specifically addresses employer-union agreements because the statutory exemption only applied to unilateral acts of unions. *See id.* The nonstatutory exemption is a safeguard for employers in their negotiations with unions concerning collective bargaining agreements. *See* Bradley Roscoe Cahoon, Note, Powell v.

policies from antitrust liability.[11] The professional sports industry poses an interesting dilemma to courts[12] because major league baseball has been deemed an express exception to antitrust laws,[13] while other specific bargaining processes enjoy the nonstatutory exemption.[14] The nonstatutory exemption's scope, however, is still somewhat ambiguous.[15] Specifically

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National Football League: *Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 381, 387 (1990). For a more detailed and historical analysis of the relevant case law pertaining to the nonstatutory labor exemption, see *infra* notes 39-59 and accompanying text.

[11] *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 960-63.

[12] *See* Albert & Albert, *supra* note 6, at 199. The industry as a whole is unique from other industries. *See id.* This can be attributed, but not limited to, the inherently unequal bargaining power between labor and management, the monopolization of the labor force and product market, the instability of union membership due to the extremely high turnover rate, and uncommon interests among players. *See id.*; *see also* Lock, *supra* note 7, at 354-59 (tracing the specific history of collective bargaining labor disputes in the National Football League). In addition, the individual teams that comprise a league are financially independent and do not necessarily compete economically with one another, which makes professional sports somewhat of an anomaly. *See* Shawn Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption from the Antitrust Laws, in the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955, 962 (1996) (citing United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953)).

[13] *See* Federal Baseball Club, Inc. v. National League, 259 U.S. 200, 209 (1922) (holding that professional baseball was not subject to the Sherman Act because the activity was not considered trade or commerce in the ordinary sense of the word). As a result, professional baseball, as opposed to other sports, was specifically exempted from antitrust liability. *See* Radovich v. National Football League, 352 U.S. 445, 449-52 (1957). Although this exemption was established on a tenuous foundation, *see* SULLIVAN & HOVENKAMP, *supra* note 2, at 969, the Supreme Court continues to honor its validity. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972) (recognizing baseball's antitrust exception as a judicial aberration which is not founded on labor law but, rather, stare decisis). Additionally, in 1961 Congress impliedly approved of the exemption by observing that nothing in a new sports-broadcasting law would affect the applicability or nonapplicability of antitrust laws to baseball, football, basketball, or hockey. *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 969. Other than baseball, though, no other sport receives this exemption on an industry-wide basis. *See Radovich*, 352 U.S. at 452. *See generally* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (upholding injunctions issued against that professional basketball league).

[14] *See* Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976) (discussing the nonstatutory exemption when an agreement was genuinely reached through good faith, arm's-length bargaining).

[15] *See* Albert & Albert, *supra* note 6, at 197-98. The nonstatutory exemption, or the circumstances for when it can be imposed, has not been clearly set forth by the Supreme Court. *See id.* at 198. The existing case law that has helped evolve the application is limited and ambiguous. *See id.* at 197 (citing United Mine Workers v. Pennington, 381 U.S. 657, 668 (1965)) (denying the exemption because a union-employer wage control conspiracy was not within the bargaining objectives); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965) (permitting the exemption because bona fide arm's-length bargaining was in furtherance of union policies)). The Supreme Court, however, has explicitly stated that a collective bargaining relationship must exist for the nonstatutory exemption to apply. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975).

at issue is the unanswered question of when, or if, the nonstatutory exemption terminates once a collective bargaining agreement expires.[16] Four separate theories have been established by various courts.[17]

Due to the uncertainty in this area, the United States Supreme Court recently examined the nonstatutory labor exemption's applicability as it relates to collective bargaining within the sports industry when it decided *Brown v. Pro Football, Inc.*[18] The Court considered whether a multi-employer bargaining unit's unilateral imposition of a fixed salary upon certain athletes violated antitrust or labor laws.[19] Considering several different factors, the Supreme Court held that the players' lawsuit was barred by the nonstatutory exemption even though a past agreement had ended.[20] Thus, the Supreme Court concluded that the owners were shielded from antitrust liability.[21]

In *Brown*, a labor dispute arose in 1989 between the National Football League Player's Association (NFLPA) and the National Football League (NFL).[22] The two entities previously had operated together pur-

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[16] *See* Treadwell, *supra* note 12, at 966; *see also* Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 888-94 (1991) (arguing that the union must consent for the exemption to continue to exist beyond an agreement's expiration).

[17] *See* National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1074-76 (S.D.N.Y. 1994). The first theory is a reasonable expectation standard, which allows the exemption to survive if the employer imposes a past restraint upon impasse founded on the reasonable belief it will similarly be included in the next agreement. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 967 (D.N.J. 1987). A second theory is that the exemption lasts only until an impasse in negotiations is reached. *See* Powell v. National Football League, 678 F. Supp. 777, 788 (D. Minn. 1988). A third possibility, enunciated by the Eighth Circuit upon *Powell*'s appeal, extended the exemption to last beyond impasse, so long as the bargaining relationship continued to exist and each side was capable of reaching an accord before and after the impasse. *See* Powell v. National Football League, 888 F.2d 559, 568 (8th Cir. 1989). The fourth theory held that the labor exemption expired simultaneously with the end of any collective bargaining agreement. *See* Brown v. Pro Football, Inc., 782 F. Supp. 125, 132 (D.D.C. 1991), *rev'd* 50 F.3d 1041, 1058 (D.C. Cir. 1995).

[18] 116 S. Ct. 2116 (1996).

[19] *See id.* at 2119.

[20] *See id.* at 2127. The Court focused its analysis on four primary factors to determine if the exemption still existed: (1) the employer conduct occurred during and immediately after collective bargaining; (2) the exemption arose from and was related to lawful bargaining; (3) the two sides were obligated to negotiate collectively; and (4) the matter only concerned the parties involved in the collective bargaining. *See id.*

[21] *See id.*

[22] *See Brown*, 782 F. Supp. at 127. The NFLPA is a recognized labor organization pursuant to 29 U.S.C. § 152(5) (1994) and retains exclusive bargaining power for every National Football League player. *See Brown*, 782 F. Supp. at 129 (citing 29 U.S.C. § 159(a) (1994)). At the time of this labor dispute, Eugene Upshaw was the acting representative of the NFLPA. *See id.* at 127. Additionally, when this suit commenced, the

suant to a collective bargaining agreement, but that contract had expired.[23] Contention between the two parties developed when the NFL attempted to establish fixed salaries of one thousand dollars per week for developmental squad players.[24] The NFLPA rejected the NFL's resolution as a restraint of trade and demanded that all players retain the right to negotiate their individual salaries.[25] Notwithstanding the union's opposition,[26] the NFL's Commissioner sent a memorandum to each NFL team that commanded teams to adhere to the aforementioned salary and warned of possible repercussions for noncompliance.[27] After the teams instituted the required compensation, developmental player Antony Brown[28] challenged the NFL's attempted "salary cap," arguing that it encompassed an illegal price-fixing scheme that violated section one of

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NFL consisted of 28 teams, and the Executive Director of the NFL Management Council was Jack Donlan. *See id.*

[23] *See id.* at 129. The NFL and NFLPA originally entered into a collective bargaining agreement in 1977. *See id.* That agreement expired in 1982 and the parties subsequently agreed to a new one, which terminated in 1987. *See id.* While a new accord was not consummated when the current dispute arose in 1989, the parties still retained the duty to bargain. *See id.* (citing U.S.C. § 158(a)(5) & (b)(4)(ii)(D) (1982)).

[24] *See id.* at 127. The League's Long Range Planning/Finance Committee adopted Resolution G-2, which allowed each franchise to maintain a developmental squad of players for the 1989 season. *See id.* In addition to its active player roster, each team was permitted to retain an additional six rookies or first year free agents for the pending year. *See id.*

[25] *See id.* at 128 (citing Letter from Eugene Upshaw, Representative, NFLPA, to Jack M. Donlan, Executive Director, NFL Management Council (May 30, 1989)) (stating unequivocally that the NFLPA's position is that any football player has the right to negotiate his individual salary). Upshaw's letter was in response to Donlan's salary proposal, which modified the 1982 collective bargaining agreement by implementing the following provision: "Article XXII, *Salaries*, shall not apply, In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis." *Id.* at 127-28. In response to Upshaw's letter, Donlan subsequently notified the NFL that the issue of developmental squad salaries had reached an impasse. *See id.* at 128.

[26] *See id.* Beginning in February 1989, Upshaw and Donlan frequently communicated with each other regarding a new collective bargaining agreement and, specifically, the issue of developmental squad salaries. *See id.* at 127-28. Between June and July 1989 it became clear that neither side was wavering on this issue. *See id.* at 128. In August, after the NFL sent a final, unchanged letter to the NFLPA, Upshaw notified the league that its salary cap was illegal and would not be tolerated. *See id.* (citing Letter from Eugene Upshaw, Representative, NFLPA, to Jack M. Donlan, Executive Director, NFL Management Council (Oct. 17, 1989)).

[27] *See Brown*, 782 F. Supp. at 128. The memorandum stated that weekly compensation for developmental players was $1000 and did not permit the negotiation of other terms. *See id.* The memorandum also forbade teams from giving any other form of compensation, such as per diem wages or housing accommodations. *See id.* Threatened punishment included fines and/or the loss of future college draft picks. *See id.*

[28] *See id.* at 127 n.1. The lawsuit commenced on May 9, 1990, as a class action suit filed by Antony Brown of the Buffalo Bills Football Club. *See id.* at 127 & n.1. The other named plaintiffs included James Bishop, John Buddenberg, Gary Couch, Graig Davis, Matthew J. Jaworski, Ricky Andrews, and Wesley Pritchert. *See id.* at 127 n.1.

the Sherman Act.[29] The NFL defended itself against these allegations by claiming antitrust immunity pursuant to the nonstatutory labor exemption.[30] After a federal jury heard the case, the players were victorious and awarded damages in excess of thirty million dollars.[31]

The *Brown* litigation commenced in the United States District Court for the District of Columbia.[32] Following their victory at the trial level,

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[29] *See* Treadwell, *supra* note 12, at 974 (citing Linda Greenhouse, *Justices to Hear Players' Case Against NFL*, N.Y. TIMES, Dec. 9, 1995, at 9). Other non-developmental players who individually negotiated their contracts earned approximately $4000 a week as opposed to the mandated $1000. *See id.*

[30] *See Brown*, 782 F. Supp. at 128.

[31] *See* Brown v. Pro Football, Inc., 839 F. Supp. 905, 908 (1993). The exact amount of the jury award was $30,349,642. *See id*; *see also* Greenhouse, *supra* note 29, at 9 (calculating actual damages at $10 million, representing the difference between the players' possible earning potential as opposed to what they were paid under the fixed system). The $10 million award was subsequently tripled pursuant to section four of the Clayton Act, which allows for payment of treble damages to a successful antitrust plaintiff:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[e] in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1996). The adherence to treble damages dates back to the English Statute of Monopolies and is presently justified under economic and deterrence theories. *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 166-68.

[32] *See Brown*, 782 F. Supp. at 125. In a memorandum opinion, Judge Lamberth granted the players' motion to strike and denied the league's motion for summary judgment. *See id.* at 127. The district court explained that the nonstatutory exemption is a limited exception to antitrust law and concluded that it terminated simultaneously with the collective bargaining agreement. *See id.* at 132. In its opinion, the court was forced to distinguish *Powell v. National Football League*, 930 F.2d 1293, 1298-99 (8th Cir. 1989), which extended the exemption beyond the expiration of a past agreement. *See id.* at 131; *see also infra* notes 78-89 and accompanying text (discussing *Powell* in detail). Judge Lamberth explained that without union consent or the threat of antitrust liability, the league would not have any incentive to bargain towards a new collective bargaining agreement. *See id.* at 131-32. The court stated:

> Without an endpoint at expiration, the terms of a collective bargaining agreement and the applicability of the nonstatutory labor exemption remain in perpetual limbo. Even if a court were to set expiration at impasse, this would not foster execution of a new collective bargaining agreement or remove any uncertainty because courts would still have to determine the existence of 'impasse' and whether court intervention at that point would be appropriate— determinations as to which different courts will likely differ.

Id. at 132. The court felt that this bright-line standard would provide guidance and certainty to parties in negotiations as opposed to an extension of the exemption that would "hinder[ ] rather than facilitate[ ] the execution of new collective bargaining agreements." *Id.* at 131. The court noted that four years had passed since the old agreement ended and the parties still showed no indication of reaching an accord. *See id.*

the players were also granted injunctive relief[33] and awarded attorneys' fees.[34] The NFL then appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court and held that the nonstatutory exemption barred the players' action.[35] The players appealed the court of appeals decision to the United States Supreme Court, which granted a writ of certiorari.[36] Upon review, the United States Supreme Court affirmed the appellate court's decision.[37] The Supreme Court, per Justice Stevens, held that the nonstatutory ex-

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[33] *See* Brown v. Pro Football, Inc., 821 F. Supp. 20, 25 (D.D.C. 1993). First, Judge Lamberth denied five motions by the NFL, which included motions for a new trial, deferral of attorneys' fees, and oral argument. *See id.* The court ordered a permanent injunction against the NFL and enjoined it from conspiring to establish uniform salaries for any contingency of players. *See id.* at 25-26.

[34] *See* Brown v. Pro Football, Inc., 846 F. Supp. 108, 112 (D.D.C. 1994). As a matter of antitrust policy, successful plaintiffs are entitled to receive reasonable attorneys' fees pursuant to section four of the Clayton Act. *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 168-70. Prior to this final determination of attorneys' fees, the players previously requested that the amount be awarded according to the current market rate. *See Brown*, 839 F. Supp. at 908. At that hearing, the players claimed $1,594,367.50 in attorney's fees, $142,397.51 for litigation costs, and approximately $21,762 to litigate the issue of fees. *See id.* Judge Lamberth, however, ruled that further discovery was necessary to establish reasonable hourly rates. *See id.* Subsequently, the Judge heard the plaintiffs' reconsideration motion and granted them $1,744,578.41, which included attorneys' fees and costs of litigation. *See Brown*, 846 F. Supp. at 112.

[35] *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1058 (D.C. Cir.), *cert. granted*, 116 S. Ct. 593 (1995). Chief Judge Edwards held that the exemption applied because the NFL's actions were legal under the labor laws and predominately affected parties organized in a collective bargaining relationship. *See id.* at 1048. The court also dismissed the players' attempt to distinguish between bargaining with a single employer as opposed to a multiemployer unit. *See id.* at 1050. The court articulated that because antitrust law is not intended to prohibit the unilateral action of a single employer, the argument proscribing the same conduct of a multiemployer bargaining unit cannot be sustained. *See id.* at 1055. Judge Edwards maintained that Congress intended antitrust laws to apply to multiemployer bargaining units because of their necessity in the formation of unions. *See id.* at 1056. Additionally, the court determined that the exemption applies to the collective bargaining *process*, not necessarily the ultimate *product*. *See id.* at 1050 (citing Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616, 622 (1975)); *see also infra* notes 54-59 and accompanying text (discussing *Connell* in detail). Lastly, the court discounted other theories, noting that none of them agree on a specific point in time at which the exemption expires and each conflicts with basic principles of labor law. *See id.* at 1052-53, 1053 n.6. Judge Edwards concluded by enumerating the required criteria for the exemption to apply: (1) the restraint was imposed through collective bargaining; (2) only the bargaining parties are affected; and (3) the product market is not impacted. *See id.* at 1058. Judge Wald filed a dissenting opinion. *See id.* at 1058 (Wald, J., dissenting).

[36] *See* 116 S. Ct. 593 (1995). The issue before the Supreme Court was whether federal labor laws protected the owners' self-contained agreement, which unilaterally implemented the same terms of their last best bargaining proposal. *See* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2119 (1996).

[37] *See Brown*, 116 S. Ct. at 2127.

emption applied because it was invoked through collective bargaining negotiation, directly related to the lawful bargaining process, and only concerned the involved parties pursuant to a matter that they were required to negotiate jointly.[38]

The historical development of the nonstatutory exemption can be understood only by first examining the scope of the statutory exemption.[39] In *United States v. Hutcheson*,[40] the Court definitively explained the implications of the statutory exemption and held that union activity generally will be immune from antitrust challenges.[41] Justice Frankfurter, while criticizing prior restrictive judicial interpretations, bestowed new meaning upon the three interlacing statutes[42] and interpreted the broad statutory exemption.[43] Although this framework originally only concerned strife arising between labor groups, the Court established a foundation and expanded the exemption to include conflicts of labor and non-labor organizations.[44]

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[38] *See id.*

[39] *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 960. While the Norris-LaGuardia Act was unrelated to antitrust law, its enactment forced the Supreme Court to explain the relationship between labor law and antitrust law, which ultimately created the statutory exemption. *See id.*

[40] 312 U.S. 219 (1941).

[41] *See id.* at 236-37. *Hutcheson* involved two labor groups—the United Brotherhood of Carpenters and the International Association of Machinists—fighting over construction jobs to build a new facility for Anheuser-Busch. *See id.* at 228. After the carpenters initiated a strike, they were charged with forming a criminal conspiracy. *See id.*

[42] *See id.* at 229-31. The Court considered the relationship of the Sherman Act, the Clayton Act, and the Norris-LaGuardia Act. *See id.*

[43] *See id.* at 236. Justice Frankfurter articulated that one of Congress's intentions when it passed the Norris-LaGuardia Act was to reinforce the general purpose of the Clayton Act, which had been frustrated by courts. *See id.* The Court emphasized:

> If the facts . . . come within the conduct enumerated in [section] 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law . . . . So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [section] 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232. *Hutcheson* embodies the foundation for the present statutory exemption. *See* Kaminsky, *supra* note 1, at 13-14.

[44] *See* Kaminsky, *supra* note 1, at 14. Four years after *Hutcheson*, the Court held that the labor exemption would protect union-employer agreements from antitrust liability unless other parties were involved who had neither control nor an interest in the pending employment relationship. *See* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809-10 (1945) (denying antitrust exemption to an agreement between electrical contractors to purchase solely equipment from union manufacturers and retain exclusive contractual rights upon the union's promise to boycott competitors).

Because the statutory exemption did not apply to agreements between unions and non-labor groups,[45] the Supreme Court, in *United Mine Workers of America v. Pennington*,[46] declined to expand the statutory exemption's scope and hinted at the possible existence of a nonstatutory labor exemption to the Sherman Act.[47] The Court found that the agreement between the union and large coal companies violated antitrust laws because the exemption applied to the union's unilateral acts, rather than to their agreements with employers.[48]

In an effort to resolve the inherent conflict described in *Pennington*, the Supreme Court simultaneously decided a companion case, *Local Union No. 89, Amalgamated Meat Cutters v. Jewel Tea Co.*.[49] In *Jewel*

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[45] *See Hutcheson*, 312 U.S. at 232. In 1981, the Supreme Court restated the test for the statutory exemption. *See* H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 714-16 (1981). In *H.A. Artists*, an actors' union developed a licensing system in which union actors were to be represented only by agents who had a franchise agreement with the union. *See id.* at 709. To obtain such a license, an agent not only had to pay a franchise fee, but was also required to comply with union restrictions pertaining to the amount of commission that the agent could charge. *See id.* at 710. The Supreme Court did not object to the licensing aspect of the scheme, reasoning that it was designed to promote the union's self-interest and was necessary to uphold the wage structure. *See id.* at 719-22. The Supreme Court declared that it was illegal to charge an agent money for inclusion on the licensed list and declared that the fee was unnecessary for the administration of the regulatory system. *See id.* at 722. For the statutory exemption to apply, the Supreme Court held that the initial inquiry is: (1) whether a union is acting in its self-interest; and (2) whether a combination exists with a non-labor group. *See id.* at 714. For a union to act in its self-interest, ordinarily a labor dispute needs to exist "concerning terms or conditions of employment." *See id.* n.14. Additionally, to satisfy the second requirement, unions must act "independently." *See id.* at 716. For a detailed analysis of these two elements, see Kaminsky, *supra* note 1, at 25-30.

[46] 381 U.S. 657 (1965) (three Justice plurality).

[47] *See id.* at 664-66. Pennington addressed an antitrust challenge against a union after it contracted with large coal mining companies, whereby the union agreed to impose new and higher wages on small coal companys' employees in an effort to eliminate the competition. *See id.* at 660. The wage clause of the agreement, entitled the National Bituminous Coal Wage Agreement, was not immune from antitrust laws. *See id.* at 669. Justice White, writing for the plurality, noted that unions do not violate antitrust provisions when they either jointly conclude a wage agreement with a multiemployer negotiating unit or merely seek similar wages from another employer. *See id.* at 664. The Justice concluded, however, that a union loses its antitrust exemption if it is established that the union has colluded with one group of employers to implement a wage scale on another bargaining unit. *See id.* at 665.

[48] *See id.* at 662. The Court found that union-employer arrangements or agreements were neither explicitly permitted nor proscribed by the Clayton or Norris-LaGuardia Acts. *See id.* One implicit problem, however, rests with the fact that labor law encourages collective bargaining contracts, which often include certain agreements with non-labor organizations. *See* SULLIVAN & HOVENKAMP, *supra* note 2, at 961; *see also* Kaminsky, *supra* note 1, at 19 (observing the ambiguity surrounding the exemption's boundaries and its applicability between unions and multiemployer units).

[49] 381 U.S. 676 (1965) (plurality opinion).

Tea, the Supreme Court for the first time formally recognized the existence of the nonstatutory labor exemption when it analyzed an employment clause restricting the working hours of Chicago butchers.[50] After balancing the union workers' interests against the impact on the product market, Justice White announced the basic test to determine whether to utilize the nonstatutory exemption: A restriction must be "intimately related" to one's working conditions, hours and wages, and obtained through good faith, arm's-length bargaining.[51] In a concurring opinion, Justice Goldberg emphasized that antitrust laws do not apply to any mandatory subjects of negotiation pursuant to the collective bargaining agreement.[52]

Although *Jewel Tea* set forth the framework to determine whether the nonstatutory exemption can be utilized as a defense, the Supreme Court hardly evinced clear guidelines to be followed.[53] Therefore, ten years after *Jewel Tea*, the Court again addressed the scope of the nonstatutory exemption in *Connell Construction Co. v. Plumbers Local Union No. 100.*[54] After considering a contract between a union and an em-

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[50] *See id.* at 688-91. *Jewel Tea* involved a multiunion-multiemployer agreement to close Chicago butcheries between six o'clock p.m. and nine o'clock a.m. in an attempt to protect butchers from either unskilled laborers or self-service markets. *See id.* at 680. The employers argued working hour restrictions attained through collective bargaining was illegal. *See id.* at 688. The Court, however, was more concerned with the labor union's "immediate and direct" interests and, after weighing the minimal interests of the employees, concluded that the "National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work." *Id.* at 691.

[51] *See id.* at 689-90. Justice White further articulated:

> Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject . . . . Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, *is so intimately related* to wages, hours and working conditions that the unions' successful attempt to obtain that provision *through bona fide, arm's-length bargaining* in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.

Id. at 689-90 (citation omitted) (emphases added).

[52] *See id.* at 710 (Goldberg, J., concurring). Justice Goldberg emphasized that if labor law policy mandated that a particular concern be subject to collective bargaining, then antitrust law cannot apply. *See id.* at 710-12 (Goldberg, J., concurring).

[53] *See* Kaminsky, *supra* note 1, at 21.

[54] 421 U.S. 616 (1975).

ployer with whom the union had no relationship,[55] the Supreme Court limited the exemption's applicability to parties directly involved in the bargaining relationship as well as to fundamental issues of employee interest.[56] Although the Court acknowledged that the union's conduct was legal, it declined to afford nonstatutory protection because the chosen methods contravened basic antitrust policy.[57] Thus, the Court professed that the nonstatutory exemption should be invoked only when necessary to protect restraints promoting labor policy[58] and to protect union-employer agreements that establish wage and working conditions.[59]

The first time the nonstatutory labor exemption was applied to professional sports by a federal appellate court occurred in *Mackey v. National Football League.*[60] In *Mackey*, several professional football play-

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[55] *See id.* at 623. In *Connell*, a construction union forced a multiemployer bargaining association to sign a clause that required the general contractors to subcontract work only to firms that maintained collective bargaining agreements with the union. *See id.* at 625-26. Local 100, the bargaining representative for the plumbers and mechanical workers, already had an agreement with Mechanical Contractors Association of Dallas, which comprised a most favored nation clause. *See id.* at 619. Thus, any favorable contract offered to another employer had to also be offered to the union with the same terms. *See id.* Local 100 then approached Connell to subcontract mechanical work but placed the following limitation upon Connell: "[I]f the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 . . . ." *Id.* at 620. Connell originally refused to approve this clause, but after the union staged a strike, it agreed and subsequently brought an action under sections one and two of the Sherman Act. *See id.* at 620-21.

[56] *See id.* at 623. Justice Powell recognized that certain union-employer agreements should be shielded from antitrust attack in an effort to accommodate Congress's dual objectives of collective bargaining pursuant to the NLRA and the promotion of free competition. *See id.* at 622 (citing *Jewel Tea*, 381 U.S. at 690). The Court, however, nullified the agreement between the union and the contractors, determining that it unnecessarily limited entry into the market and restrained competition. *See id.* at 625. The Court explained that while the statutory exemption may, under appropriate circumstances, permit unions to unilaterally impose restraints, the nonstatutory exemption does not offer similar protection when the conduct involves a union and non-labor group in a competitive business environment. *See id.* at 622-23.

[57] *See id.* at 625. The Court found that the agreement discriminated against and purposely excluded the non-union subcontractors from the market. *See id.* at 624. Further, the Court concluded that simply because the union's goal was legal, its chosen methods of implementation would not prevent antitrust scrutiny. *See id.* at 625. The Court noted the overwhelming anti-competitive effects of eliminating competition and found the restraint unjustifiable under any congressional labor policy. *See id.*

[58] *See id.* at 622-23.

[59] *See Connell Constr. Co.*, 421 U.S. at 622. If, however, an agreement solely restrains competition for the employer's product, the Court noted that traditional antitrust analysis should determine whether the activity is legal. *See id.* at 623.

[60] 543 F.2d 606 (8th Cir. 1976).

ers brought an action against the NFL in response to the Rozelle Rule.[61] The players considered this new rule to be a refusal to deal and a restraint of trade because it hindered player mobility between teams by requiring the new team to compensate the old one.[62] Although the league's defense asserted that the nonstatutory exemption should protect the newly implemented rule, the district court disagreed and declared the restriction per se illegal[63] and "clearly contrary to public policy."[64]

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[61] *See* Mackey v. National Football League, 407 F. Supp. 1000, 1002 (D. Minn. 1975), *aff'd*, 543 F.2d 606, 623 (8th Cir. 1976). The Rozelle Rule was instituted by Commissioner Peter Rozelle in an attempt to create a reserve system, which would allow a player to become a free agent after his contract expired with his current team. *See id.* at 1003. Any club that signed this player to a new contract, however, was obligated to compensate the old team. *See id.* at 1003-04. If the two NFL teams could not agree on the amount of compensation, Rozelle would make the final determination and award the former team either current players or future college draft picks from the new team. *See id.* at 1004. The rule, Article 12.1(H), was an amendment to the NFL Constitution and Bylaws and stipulated:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

Id. See also *Mackey*, 543 F.2d at 609 n.1, discussing the discretion afforded the Commissioner. Every NFL team adopted the Rozelle Rule in 1963. *See Mackey*, 407 F. Supp. at 1003. In addition, any player was ineligible to participate in any NFL game unless they signed a Standard Player Contract, which included the NFL's constitution and bylaws. *See Mackey*, 543 F.2d at 610.

[62] *See Mackey*, 407 F. Supp. at 1002. The players brought suit under section one of the Sherman Act and sections 4 and 16 of the Clayton Act. *See Mackey*, 543 F.2d at 609. Originally, 36 players initiated a class action suit, which was withdrawn before the case went to trial. *See id.* At trial, only 15 players remained; six sought only injunctive relief while the others also asked for damages. *See id.* n.2.

[63] *See Mackey*, 407 F. Supp. at 1007. The district court, per Judge Larson, determined that the Rozelle Rule constituted a group boycott without undertaking any antitrust or economic analysis. *See id.* The trial lasted for 55 days and one commentator found it interesting that the court needed that amount of time to invoke the per se rule, which is ordinarily used to eliminate "prolonged, complicated, and costly inquiries into the history of the industry and the history and impact of the practice." Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 384 n.185 (1986).

[64] *See Mackey*, 407 F. Supp. at 1007. The court not only considered this a per se violation, but also indicated that it would violate the Rule of Reason because players' salaries would be lessened and their freedom for employment restricted. *See id.* at 1007-08.

On appeal to the Eighth Circuit, the district court's holding, declaring the Rozelle Rule illegal, was upheld but on a different rationale.[65] Building on the precedent of *Jewel Tea*, *Connell*, and *Pennington*, the court established the following three-prong test to determine if the nonstatutory exemption applied: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[66] While the court held that the NFL's imposed restraint on player movement satisfied the first two prongs,[67] it failed the third prong[68] and was therefore still subject to

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[65] *See Mackey*, 543 F.2d at 619-20. Judge Lay first declared that the professional football industry is unique, which makes it inappropriate to apply to it the per se rule. *See id.* at 619. The court acknowledged the league's important desire to maintain competitive balance, however, Judge Lay invalidated the Rozelle Rule pursuant to the Rule of Reason because it was "significantly more restrictive than necessary." *See id.* at 622. Furthermore, the court emphasized that the restriction was unlimited in duration and without procedural safeguards. *See id.*

[66] *Id.* at 614 (citations omitted). The court explained that before this analysis commences, a court must first conclude that an agreement was actually reached by the parties. *See id.* at 612. After finding that such an agreement was in place concerning the Rozelle Rule, the court observed that these three criteria would sufficiently accommodate both the labor and antitrust concerns. *See id.* at 615.

One commentator has suggested that the first, or "affects only," prong ensures that collective bargaining is promoted. *See* Kaminsky, *supra* note 1, at 40 (citing William C. Zifchak, *Labor-Antitrust Principles Applicable to Joint Labor-Management Conduct*, 21 DUQ. L. REV. 365, 366 (1983)). Furthermore, the second, or "mandatory subject of collective bargaining" prong, is equivalent to the "intimately related" requirement set forth in *Jewel Tea*. *See id.* at 35-38. Consequently, the collective bargaining must relate to salaries, hours, and work conditions. *See id.* at 35.

[67] *See Mackey*, 543 F.2d at 615. The court held that the Rozelle Rule only affected the parties to the agreement. *See id.* To clarify this prong of nonstatutory protection, the court in *Zimmerman v. National Football League* recently clarified that the exemption must be withheld if the agreement primarily affects competitors or third parties outside of the bargaining relationship. *See* 632 F. Supp. 398, 405 (D.D.C. 1986).

The second prong, or "mandatory subject of bargaining" prong, requires that an agreement relate to "'wages, hours, and other terms and conditions of employment.'" *Mackey*, 543 F.2d at 615 (quoting NLRB v. Borg-Warner Corp., 356 U.S. 342, 348-49 (1958)). In addition, this determination should be based upon the practical effect of an agreement, not the specific form. *See id.* (citing American Fed'n of Musicians v. Carroll, 391 U.S. 99, 113-14 (1968)). The Eighth Circuit submitted that the restriction did not facially relate to a mandatory subject of bargaining. *See id.* The court, however, upheld the district court's determination that the rule restricted a player's ability to switch teams and also depressed salaries. *See id.* From that standpoint, Judge Lay equated the rule to a mandatory subject of bargaining. *See id.*

[68] *See id.* at 616. Looking at the history of negotiations between the NFL and the NFLPA, the court recognized that the Rozelle Rule, in form, was part of past agreements only because the NFLPA had been in a weak bargaining position after its initial creation.

antitrust scrutiny.[69] Although the Eighth Circuit established that the nonstatutory exemption could be invoked under more appropriate circumstances, the court declined to address the exemption's scope beyond the expiration of a past collective bargaining agreement.[70]

The first time a court specifically addressed when the nonstatutory exemption terminates occurred in *Bridgeman v. National Basketball Ass'n*.[71] In *Bridgeman*, after the union and owners' agreement had expired, allegations arose that the college draft, salary cap, and right of first refusal violated the Sherman Act.[72] The players contended that the exemption should expire simultaneously with the end of a prior collective bargaining agreement.[73] Judge Debevoise of the district court of New Jersey discarded that alternative.[74] The district court also rejected a proposed "impasse" theory, which would end immunity once the two sides reach an impasse in negotiations,[75] and fulfilled the owners' desire to al-

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See id. at 615-16. The court concluded that the rule was originally imposed unilaterally and continues to restrain the players. *See id.* at 616. Judge Lay stated:

> [W]e find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963 . . . . The union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining . . . cannot serve to immunize [it] from the scrutiny of the Sherman Act.

Id.

The third prong of the *Mackey* test was designed to require good faith bargaining as opposed to extensive negotiations over every clause of a new collective agreement. *See* Kaminsky, *supra* note 1, at 50-51.

[69] *See Mackey*, 543 F.2d at 616.

[70] *See id.* n.18. The court chose not to analyze the possible effects after an agreement terminated and, consequently, did not hypothetically explain any effect of the nonstatutory exemption. *See id.*

[71] 675 F. Supp. 960 (D.N.J. 1987). Prior to *Bridgeman*, *Mackey* remained the established framework. *See* McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979); *Zimmerman*, 632 F. Supp. at 403; Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd on other grounds*, 809 F.2d 954, 962-63 (2d Cir. 1987).

[72] *See Bridgeman*, 675 F. Supp. at 961-62. To explain how these obstacles restrained trade, the union asserted that the college draft did not allow a player to choose his team; the salary cap limited the amount of money a player can earn; and the right of first refusal prohibited players from switching teams. *See id.*

[73] *See id.* at 965.

[74] *See id.* Judge Debevoise reasoned that if the exemption ended the moment the agreement expired, the owners' responsibilities under the NLRA would be placed in jeopardy because, in such a case, the status quo must be maintained until impasse. *See id.*; *see also* Corcoran, *supra* note 8, at 1060-61.

[75] *See Bridgeman*, 675 F. Supp. at 967. In rejecting this theory, the judge noted that a deadlock at an impasse hardly signifies the end of negotiations. *See id.* at 965-66. The court reiterated that the purpose of the nonstatutory exemption is to promote collective

low the exemption to continue indefinitely.[76] The court concluded that immunity should continue so long as an employer imposes a restraint unchanged and reasonably believes that the next agreement would also include a similar practice.[77]

The next pronouncement concerning the nonstatutory labor exemption's duration after a collective bargaining agreement expires occurred in *Powell v. National Football League*.[78] In *Powell*, the 1987 collective bargaining agreement between the NFL and its players had expired,[79] and the players challenged the Right of First Refusal/Compensation System.[80]

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bargaining and that to determine whether an impasse has been reached is difficult. *See id.* at 966. Specifically, the court quoted that:

> 'Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.'

Id. n.5 (quoting Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967)).

[76] *See id.* at 966. The judge contended that to allow immunity indefinitely would discourage collective bargaining because a union would be at the will of an employer and forced to bind itself to agreements that could not be challenged in court. *See id.* The court indicated, however, that "[a]lthough . . . the rules embodied in the collective bargaining agreement are not automatically disregarded the instant the clock runs out on the agreement, the game cannot last forever." *Id.*

[77] *See id.* at 967.

[78] 678 F. Supp. 777, 789 (D. Minn. 1988), *rev'd*, 930 F.2d 1293, 1304 (8th Cir. 1989).

[79] *See* Lock, *supra* note 7, at 346-51, 359-69 (giving historical overview of the labor strife in professional football). In 1977, the NFL and NFLPA consummated a five-year collective bargaining agreement, which included a Right of First Refusal/Compensation System. *See Powell*, 678 F. Supp. at 779. When that agreement ended in 1982, the players attempted to eliminate this provision. *See* Lock, *supra* note 7, at 361. The NFL refused, and the players subsequently went on strike for 57 days. *See Powell*, 678 F. Supp. at 780. A new five-year agreement was executed in December 1982, that modified the First Refusal System. *See id.* Upon expiration of that agreement in 1987, the players again attempted to eliminate that provision and, after being rejected, went on another 24-day strike. *See id.* at 781. On the last day of the strike, a lawsuit was commenced that alleged that the Right of First Refusal/Compensation System violated the Sherman Act. *See id.*

[80] *See Powell*, 678 F. Supp. at 779. This alleged restraint of trade originated through the evolution of the Rozelle Rule. *See id.* After the Eighth Circuit held that the Rozelle Rule violated the Sherman Act, the primary change incorporated into the Right of First Refusal/Compensation System was the elimination of the Commissioner's discretion. *See* Lock, *supra* note 7, at 361. Section 17 of the 1977 agreement, however, allowed teams to retain a player's rights after his contract expired if that player was given a new salary that was 110% of his old one. *See id.* n.121. Similarly, if a new team offered that same player a contract, his former team could simply match the offer to retain the player. *See Powell*, 678 F. Supp. at 779.

Although this restricted the players' ability tc switch teams,[81] the NFL maintained the rule after an impasse in negotiations was reached.[82]

After considering the league's two theories that claimed immunity from antitrust laws,[83] the district court of Minnesota determined that the nonstatutory exemption will extend only beyond a past agreement's expiration until the parties reach an impasse in negotiations.[84] The district court reasoned that this termination point would promote labor policy and allow for protection so long as good faith negotiating occurred.[85]

Upon appeal to the Eighth Circuit, however, the "impasse" standard was rejected and reversed.[86] The court held that the nonstatutory exemption extends indefinitely beyond impasse and it will preserve agreements that arise out of an ongoing collective bargaining relation-

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[81] *See Powell*, 678 F. Supp. at 781 n.6. During the agreement existing between 1982 and 1987, no veteran player moved to a new team under the Right of First Refusal/Compensation System. *See id.* Furthermore, only one out of 1415 eligible players even received an offer. *See id.*

[82] *See id.* at 778. During the players' 24-day strike, the owners hired replacements from the United States Football League to ensure that some sort of competition occurred. *See* Neil K. Roman, *Illegal Procedure: The National Football Leagues Players Union's Improper Use of Antitrust Litigation for Purposes of Collective Bargaining*, 67 DENV. U. L. REV. 111, 120 (1990). On the last day of their strike, the players commenced this suit to enjoin the league from imposing the then current system of free agency. *See Powell*, 678 F. Supp. at 781.

[83] *See Powell*, 678 F. Supp. at 782. The first theory, "absolute immunity," asserted that the restraints were a mandatory subject of bargaining and only affected the present parties. *See id.* at 783. The second theory, "survival doctrine," requested indefinite protection after an agreement ended. *See id.* Although the court acknowledged that the exemption does not instantly dissolve upon expiration, the court asserted that it cannot last indefinitely because allowing the standards of the previous agreement to continue would permit illegal provisions to last longer than those that were permissible. *See id.* at 788. Similarly, the court discarded the players' desire to allow the exemption to continue only until they clearly assented to the imposed terms or practices. *See id.* at 786.

[84] *See id.* at 788. Judge Doty gave three justifications for establishing impasse as the time when the exemption should expire: (1) the obligation under labor law to engage in good faith negotiations relating to mandatory subjects of bargaining; (2) promoting collective bargaining and enhancing the possibility to reach a compromise; and (3) antitrust laws are not avoided but merely delayed to encourage settlement. *See id.* at 789. The court equated impasse with deadlock, and concluded that one is achieved when neither party is willing to alter its position despite each side's best efforts during the negotiation. *See id.* at 788. Furthermore, the court asserted that the impasse test is satisfied once the parties exhaust the prospects of settlement. *See id.*

[85] *See id.* at 786-87. In reaching its conclusion, the court rejected the *Bridgeman* theory, which allowed the exemption to survive if a restriction was imposed unchanged and the employer reasonably believed that the practice would be incorporated into the following agreement. *See id.* at 787 (citing Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 967 (D.N.J. 1987)). The court stated that it did not feel that the *Bridgeman* standard advanced the basic principles of labor law. *See id.*

[86] *See* Powell v. National Football League, 930 F.2d 1293, 1304 (8th Cir. 1989).

ship.[87] The court supported its decision by proclaiming that the exemption was created to promote labor policy and by stating any other remedies should be fully pursued in a labor law context.[88] To extend the exemption beyond an impasse would, according to the court, force players and owners to continue negotiating until they reached a fair compromise.[89] Ultimately, however, this decision increased the NFL's bargaining power and created unforeseen problems.[90]

From the aforementioned base of judicial precedent emerged the United States Supreme Court's recent decision in *Brown v. Pro Football, Inc.*[91] The issue before the Court was whether the nonstatutory exemption barred the NFLPA's antitrust action, considering that the past agreement expired and current negotiations reached an impasse.[92] Justice Breyer, writing for the majority,[93] affirmed the decision of the court of appeals and determined that the exemption extends to post-impasse

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[87] *See id.* at 1303-04. Judge Gibson held that while labor policy may sometimes supplant antitrust policy, the holding should not be interpreted to allow management a permanent exemption from antitrust law. *See id.* (quoting Continental Maritime v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987)).

[88] *See id.* at 1300-01. First, the court reiterated that an obligation to bargain continues to exist between the parties. *See id.* at 1300. Furthermore, before and after an impasse is reached, a maintenance of the status quo is obligated and authorized, respectively. *See id.* Lastly, the court stressed that upon impasse, employers could institute new or different terms if they were reasonably contemplated and articulated prior to impasse. *See id.*

In terms of alternate remedies, the court felt that the parties could (1) continue to bargain; (2) resort to economic force; and/or (3) file a claim with the NLRB. *See id.* at 1303. Emphatically, the court stated that until the NLRB asserted its involvement, the exemption would continue to apply. *See id.* at 1303-04.

[89] *See id.* at 1303. The court reasoned that each side had available methods of resolving the dispute; players had the ability to initiate a strike and owners were permitted to lock-out their employees. *See id.* at 1302. Therefore, the court stressed that any action under the Sherman Act would frustrate the balance previously established through labor law policy. *See id.*

[90] *See* Corcoran, *supra* note 8, at 1064-65. Because the players could not bring an antitrust claim, they subsequently decertified the union so that the owners could not indefinitely shield themselves behind the nonstatutory exemption. *See id.* (discussing the resulting player suits after decertification in *White v. National Football League*, 822 F. Supp. 1389, 1394 (D. Minn. 1993); *Jackson v. National Football League*, 802 F. Supp. 226, 228 (D. Minn. 1992); and *McNeil v. National Football League*, 764 F. Supp. 1351, 1353 (D. Minn. 1991)). Corcoran poignantly observed that such a result—decertification of a union—completely contravenes the intended effect of creating the nonstatutory exemption. *See id.*

[91] 116 S. Ct. 2116 (1996).

[92] *See id.* at 2119.

[93] *See id.* at 2118. The decision was eight to one; Justice Breyer, writing for the majority, was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg. *See id.* Justice Stevens authored a dissenting opinion. *See id.*

agreements amongst employers, which insulated the NFL from any antitrust liability.[94]

Justice Breyer began the Court's analysis with a historical explanation of the nonstatutory exemption's origin, purpose, and development through federal labor policy.[95] While discussing the intertwined relationship between antitrust and labor law, the Court stressed that past congressional acts were intended to "prevent judicial use of antitrust law to resolve labor disputes . . . ."[96] Justice Breyer also explained that the nonstatutory exemption was judicially created to strike and ensure a necessary balance between labor and antitrust law.[97]

Although the Court recognized that the exemption applies to employee-employer relationships and fosters collective bargaining, it did not elaborate on that issue.[98] Rather, the majority analyzed the exemption's parameters and concluded that, upon impasse, it extends to employer agreements that implement "their last best good-faith wage offer."[99] The Court reasoned that unilateral employer acts, while subject to restrictions, are tolerated under labor policy.[100] Furthermore, the Court expanded the exemption's scope while concluding that no difference exists between the unilateral act of a single employer and the unilateral act of a multiemployer bargaining unit.[101]

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[94] *See id.* at 2127.

[95] *See id.* at 2120. Justice Breyer stated that labor policy is designed to further three primary goals: (1) uninhibited collective bargaining (citing 29 U.S.C. § 151); (2) "good-faith bargaining over wages, hours and working conditions," (citing 29 U.S.C. §§ 158(a)(5), (d)); and (3) reinforcing the NLRB's authority to arbitrate alleged labor misconduct (citing 29 U.S.C. § 153). *See id.*

[96] *Brown*, 116 S. Ct. at 2120 (citing Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 709 (1965)). Justice Breyer asserted that the nonstatutory exemption supplements the statutory exemption, which allows Congress—not the judiciary—to determine what constitutes reasonable practices relating to industrial strife. *See id.*

[97] *See id.* The Court articulated that the nonstatutory exemption necessarily effectuates the objectives of federal labor law even though some restraints on competition may escape antitrust liability. *See id.*

[98] *See id.* at 2121. The majority observed that the petitioners and the dissenting Justice both conceded these points. *See id.*

[99] *See id.* Justice Breyer again harkened that basic labor principles apply to the imposition of post-impasse terms if they are required subjects of bargaining. *See id.*

[100] *See id.* The Court declared that unless the new terms were "'reasonably comprehended'" from the pre-impasse proposals, an employer would be considered to be acting in bad faith. *See id.*

[101] *See Brown*, 116 S. Ct. at 2121-22. Justice Breyer noted the common practice of multiemployer units implementing new terms after an impasse. *See id.* at 2121. More importantly, the majority observed that over 40% of collective bargaining agreements in major industries including transportation, construction, manufacturing, and real estate are achieved through the use of multiemployer negotiating units. *See id.* at 2122.

Justice Breyer next recognized the inherent fallacy of allowing antitrust law to govern situations that relate to vital employee issues, such as salary and working hours.[102] The Court explained that if antitrust principles were invoked against a bargaining unit at impasse, tremendous uncertainty would ensue and possibly force an employer to violate either the Antitrust Act or labor laws.[103] Consequently, Justice Breyer refrained from creating "a web of detailed rules" and stressed that parties can avoid confusion by simply following the National Labor Relation Board's (NLRB's) established rules.[104]

Continuing, the Court indicated that the exemption's rationale permits it to encompass more than just labor-management agreements.[105] In addition, Justice Breyer dismissed the petitioner's proposal that would have required mutual consent for the exemption to continue.[106] The Court also rejected ending the exemption at impasse because the bargaining unit remains intact, the parties are obligated to continue bargaining, and individual interim agreements can be negotiated with the union.[107] Justice Breyer maintained that unless parties reach interim agreements, employers would be forced to act in unison—a facial violation of the Sherman Act.[108]

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[102] *See id.* The Court explained that antitrust law proscribes all unreasonable agreements between competitors; generally, liability will attach with nothing more than uniform behavior. *See id.*

[103] *See id.* at 2123. The Court observed that antitrust liability could be triggered by economic collusion amongst the employers. *See id.* Alternatively, as noted by the Court, if one unit deviated from the others, then that employer could violate labor laws. *See id.* The Court held that antitrust liability would only promulgate uncertainty in the bargaining process because antitrust law is at odds with collective bargaining principles. *See id.*

[104] *See id.* Justice Breyer explained that the NLRB determines what is socially or economically permissible through the collective bargaining process. *See id.*

[105] *See id.*

[106] *See Brown*, 116 S. Ct. at 2123-24. The Court explained that this was illogical and impractical because the collective bargaining process may occur before an agreement is finalized or after an agreement ends. *See id.* at 2123. Furthermore, the majority emphasized that employees should not be coerced to accept a negotiating position if an employer remains inflexible. *See id.* The Court also stressed that the prohibition on employer coersion extends to legitimate bargaining tactics such as lockouts or the use of replacement employees. *See id.* at 2124.

[107] *See id.* The Solicitor General made this argument because the status quo need not be maintained after an impasse. *See id.*

[108] *See id.* Justice Breyer outlined four permissible options employers may undertake at impasse: (1) preserve the status quo; (2) implement the last offer; (3) lock-out the workers; or (4) arrange for separate interim agreements. *See id.* (citing 1 PATRICK HARDIN, THE DEVELOPING LABOR LAW, 516-20, 696-99 (3d ed. 1992)). The Court also observed that the first three options require uniform employer action, which generally is not protected by antitrust law. *See id.*

The Justice also asserted that it is difficult to identify an impasse because of its subjective nature.[109] The Court therefore concluded that it would be unfair to subject employers to antitrust liability at such an uncertain and vague point in time.[110] Justice Breyer similarly rejected a modified impasse standard, which would reinstate the exemption upon the satisfaction of certain conditions.[111] The majority reasoned that future second guessing under such a standard would completely undermine the bargaining process.[112]

The Court also criticized a theory that would exempt post-impasse bargaining tactics, as opposed to substantive negotiation issues, because the two are often intimately related in the bargaining process.[113] Justice Breyer further stipulated that the collective bargaining process must be effected to justify employer compensation under various state regulations.[114]

Although the Court recognized that the economics of professional sports differ from other businesses,[115] Justice Breyer refused to accept

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[109] *See id.* at 2124-25. The Court held that impasses are "'a recurring feature . . . [of] negotiations which in almost all cases [are] eventually broken, through either a change of mind or the application of economic force.'" *Id.* at 2125 (quoting Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982)). In addition, impasses differ in degree and, according to the Court, are strategically manipulated to arise continually throughout labor negotiations. *See id.*

[110] *See id.* Justice Breyer noted that employers would have to guess whether parties had reached an ultimate impasse; an erroneous calculation, however, would entail either antitrust or labor law liability. *See id.*

[111] *See Brown*, 116 S. Ct. at 2125. Arguing for the respondents, the Solicitor General suggested that the exemption should continue for a reasonable time so that parties can confirm with their attorneys that an impasse has in fact occurred. *See id.* At that point, if good faith bargaining resumes then the exemption should persist throughout negotiations. *See id.*

[112] *See id.* Justice Breyer showed how this modification would not solve the problem. *See id.* The Justice pointed out that once another impasse is reached, the exemption would disappear in the middle of negotiations. *See id.* At this juncture, the Court noted that antitrust courts can question and invalidate the parties' bargaining decisions, which may force them to take undesired action even though their conduct did not violate labor law. *See id.*

[113] *See id.* The Court explained that "employers can, and often do, employ the imposition of 'terms' as a bargaining 'tactic.'" *Id.* (citations omitted). For this reason, liability would rest on a detached antitrust court's determination about an employer's subjective motivation. *See id.* Justice Breyer indicated that this type of inquiry would be even more difficult than ascertaining a precise time of impasse. *See id.*

[114] *See id.* at 2126. The players also proposed utilizing state backdrop statutes, but the Court pointed out that those remedies are neither invoked to advance collective bargaining nor related to the antitrust/labor law history. *See id.*

[115] *See id.* The Court pointed out that individual teams do not directly compete economically but, rather, depend on one another for economic survival. *See id.* (citing National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101-02 (1984)).

that the industry as a whole warranted an alteration of the antitrust exemption.[116] Not persuaded that football players are different than other unionized workers, Justice Breyer concluded that the same legal principles must apply.[117]

In concluding that antitrust law did not apply to the owners' unilateral implementation of a fixed salary for the developmental players, the Court fashioned a four-prong test to analyze post-impasse conduct and actions.[118] Justice Breyer made it clear, though, that the exemption was not indefinitely absolute and, under appropriate circumstances, an antitrust violation might occur.[119] The Court, however, declined to define the full scope and parameters of the nonstatutory exemption and reiterated that the NLRB must serve in this function.[120]

In the only dissenting opinion, Justice Stevens declared that fixing developmental player salaries below free market prices directly conflicted with antitrust and labor law policy.[121] The Justice maintained that not

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[116] *See Brown*, 116 S. Ct. at 2126. Justice Breyer first indicated that the only special feature of professional sports revolves around its interest and excitement. *See id.* Furthermore, the Court considered the players' skills irrelevant because, according to the Court, depending upon their talent level, it could both enhance or detract leverage at the bargaining table. *See id.* The Court evinced that the antitrust exemption applies equally to all employees regardless of their specific field of work. *See id.*

[117] *See id.* Justice Breyer did not agree with the dissent's opinion that the relationship between players and owners was unique or atypical. *See id.* The Court also found it unnecessary and impractical to inquire into the dissent's concerns regarding the league's true purpose. *See id.*

[118] *See id.* at 2127. Justice Breyer upheld the owner's conduct because:

> [It] took place during and immediately after a collective bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective bargaining relationship.

Id.

[119] *See id.* The Court stated that the holding was narrower than the appellate court's decision, which completely waived antitrust liability so long as the process of collective bargaining was the primary reason for imposing trade restraints. *See id.* at 2119. Rather, Justice Breyer maintained that a Sherman Act violation could result if the restraints were imposed "sufficiently distant in time and in circumstances from the collective bargaining process." *Id.* at 2127. The Court's main concern, as highlighted by Justice Breyer, was to stop the Sherman Act from *significantly* interfering with the negotiation process. *See id.* (emphasis added).

[120] *See id.* While referring to the exemption's extreme outer boundaries, Justice Breyer submitted that the Court should defer to the NLRB's specialized judgment and Congress's apparent desire to vest in the NLRB this responsibility. *See id.*

[121] *See Brown*, 116 S. Ct. at 2128 (Stevens, J., dissenting). Justice Stevens began his analysis by insinuating that the majority had allowed economic theory to cloud the constitutionality of the owner's conduct. *See id.* Justice Stevens also emphasized that the fundamental principles of the Sherman Act were promotion of free competition, avoiding

only should deference be paid to the jury's finding that the salaries were dramatically inadequate, but that the burden rests with the owners to establish that the implementation was not illegal.[122] Referring to the basic reasons for promoting a unionized labor force, Justice Stevens stressed that exemptions enable employees to achieve higher present salaries, which would not be possible without collective bargaining.[123]

Although the dissent agreed that the nonstatutory exemption legitimately protects certain collective action,[124] Justice Stevens steadfastly objected to the exemption's allowance of employer wage depression.[125] Because the exemption was created to protect collective employee action, Justice Stevens found it ironic that employers could now avoid individual salary negotiations under the exemption's guise.[126] Furthermore, Justice Stevens articulated three reasons why the players' dilemma was not a typical collective bargaining case.[127]

First, Justice Stevens opposed broadening the labor exemption because of the unique character of the sports industry; although collectively represented, each player has always negotiated his own individual salary.[128] Second, the Justice declared that the league designed the imposed salary restraint as a means of exerting pressure on individual owners, rather than as a negotiating tactic against the players.[129] Third, Justice Stevens stressed that a bargaining impasse was never achieved; the play-

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collusive agreements, and discouraging arrangements that establish wages below fair market value. *See id.*

[122] *See id.* The Justice noted that the Rule of Reason may have ultimately found the implementation of fixed salaries justifiable; however, the fundamental legal principles were more important to his analysis. *See id.* at 2128-29 (Stevens, J., dissenting).

[123] *See id.* at 2129 (Stevens, J., dissenting). Justice Stevens then briefly discussed the origins of the statutory exemption as well as the purpose of the judicially created nonstatutory exemption. *See id.*

[124] *See id.* According to Justice Stevens, promoting the collective bargaining process and upholding the essence of a multiemployer bargaining unit are two valid reasons to immunize certain employer conduct. *See id.*

[125] *See id.* Aside from the fact that the salaries were undervalued, Justice Stevens's other major contention was that developmental squads were neither a part of past agreements nor requested by the players. *See id.* at 2130 (Stevens, J., dissenting).

[126] *See Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting).

[127] *See id.*

[128] *See id.* Justice Stevens argued that this practice enabled a player to utilize the economic forces of a free and competitive market to determine his salary. *See id.* Justice Stevens objected to eliminating this established practice solely because the developmental squads were a new aspect of the league. *See id.* n.3.

[129] *See id.* at 2130. Justice Stevens stated that the restraint was initially imposed to force the owners to comply with the league's rule that limited a team's roster. *See id.* For this reason, Justice Stevens observed that antitrust laws should govern because the owners' interest is competitive rather than regulatory. *See id.*

ers "promptly and unequivocally" rejected any notion of fixed salaries, and no bargaining over this issue occurred.[130]

The dissent argued that the nonstatutory exemption allows employees, not employers, to act collectively and limit competition for wages.[131] Moreover, Justice Stevens maintained that professional football players are entitled to the same antitrust protections afforded to other employees directly harmed by concerted employer action.[132]

Continuing, Justice Stevens steadfastly disagreed with the majority opinion surrounding the theory that the players' only recourse to "obviously offensive" restraints rests with the NLRB.[133] Specifically, Justice Stevens proclaimed that the Supreme Court has always examined the motives of a bargaining party before declining to apply the nonstatutory exemption.[134] Justice Stevens asserted that the current decision contradicted *United Mine Workers v. Pennington*, noting that the Court did not closely examine the underlying labor law policy justifying the exemption.[135] According to Justice Stevens, the Court had erroneously created a new, expansive exemption by simply immunizing unilateral action if it occurred during the negotiating process and concerned a required bargaining subject.[136]

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[130] *See id.* Justice Stevens cited the letter from NFLPA representative Upshaw that articulated that no matter what salary was imposed—higher or lower—the new policy contravened the settled principle allowing players to negotiate their individual salaries. *See id.* n.4.

[131] *See Brown*, 116 S. Ct. at 2131 (Stevens, J., dissenting).

[132] *See id.* Justice Stevens opined that the Sherman Act should protect any employee who is directly harmed by a concerted employer agreement and whose bargaining position has been weakened, notwithstanding the fact that the union still exists. *See id.*

[133] *See id.* Although Justice Stevens agreed that limiting a court's intervention is warranted under some circumstances, those courts were never intended to be completely powerless to address egregious behavior. *See id.*

[134] *See id.* at 2132 (Stevens, J., dissenting). Justice Stevens noted that the Supreme Court denied the defense of the nonstatutory exemption after specifically examining one of the bargaining party's motives. *See id.* (citing United Mine Workers v. Pennington, 381 U.S. 657, 667 (1965)); *see also supra* notes 46-48 and accompanying text (discussing *Pennington* in further detail). For this reason, the dissent disagreed with the majority's decision to forbid antitrust courts from hearing labor-related conflicts. *See Brown*, 116 S. Ct. at 2131 (Stevens, J., dissenting).

[135] *See Brown*, 116 S. Ct. at 2132 (Stevens, J., dissenting). Justice Stevens was not satisfied that the *Pennington* rule had not been met. *See id.* Conceding that the restraint was encompassed in the bargaining process and related to a subject that had to be jointly negotiated, Justice Stevens submitted that the same was true when the Court denied the exemption in *Pennington*. *See id.* Lastly, Justice Stevens contended that the fourth prong—"concerned only the parties to the collective bargaining relationship"—could not justify the exemption. *See id.*

[136] *See id.* Justice Stevens complained that the majority neither used precedent to expand the limited exception nor explained its repudiation of *Pennington*. *See id.*

Justice Stevens expressed that the majority excessively misplaced its reliance on a concurring opinion in *Jewel Tea*.[137] Specifically, Justice Stevens speculated that Justice Goldberg's *Jewel Tea* concurrence did not support the Court's present holding, which was evidenced by his personal advocacy in a subsequent case involving professional sports.[138] The dissent reasoned that if the majority strictly followed Justice Goldberg's views, antitrust courts would supplant the NLRB, which contradicts the majority's holding.[139] Additionally, Justice Stevens emphasized that labor laws exist to promote collective bargaining and in parallel contexts, the Court has not shielded employers from similar liability.[140]

In concluding his opinion, Justice Stevens urged that Congress, not the Supreme Court, possesses the authority to exempt anticompetitive employer activity.[141] Lastly, Justice Stevens argued that the nonstatutory exemption, which was created to protect employee action, would now act as a hindrance to employees and force them to strike in order to retain previously enjoyed rights.[142]

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[137] *See id.* The dissent noted that the Court cited Justice Goldberg's *Jewel Tea* concurrence five times, yet the *Jewel Tea* majority simply dismissed it as too broad. *See id.* The *Brown* Court's analysis, according to Justice Stevens, was misguided because *Jewel Tea* simply upheld the proposition that certain employer-union agreements are exempt. *See id.* Rather, the Justice argued, the Court should have re-read the opinion in *Jewel Tea*, which held that the effect on the market, not an agreement's form, should determine whether the exemption applies. *See id.* at 2132-33 (Stevens, J., dissenting). Justice Stevens further observed that Justice Goldberg dissented in *Pennington* at a time when antitrust courts were permitted to scrutinize the bargaining process—the basis for the Court's holding in the present case. *See id.* at 2133 (Stevens, J., dissenting).

[138] *See id.* First, Justice Stevens clarified that Justice Goldberg's primary argument in *Jewel Tea* was that antitrust law should not undermine a union's demands during a bargaining session. *See id.* In addition, the dissent reminded the majority that Justice Goldberg's opinions concerning the relationship between antitrust and labor law were more clearly espoused when he represented a baseball player challenging the statutory exemption. *See id.* Justice Stevens stressed that Justice Goldberg, in his briefs to the Supreme Court, asserted that baseball's reserve clause should not elude antitrust scrutiny because "agreements between unions and nonlabor groups on hard-core restraints like 'price-fixing and market allocation' were not exempt." *Id.* (citation omitted). The exemption, according to the Justice, was similarly inapplicable because the alleged scheme was in place before collective bargaining became legal. *See id.* at 2134 (Stevens, J., dissenting). The importance of this, Justice Stevens stated, rested on the fact that the NFL created a new restraint as opposed to preserving an old one. *See id.*

[139] *See id.*

[140] *See Brown*, 116 S. Ct. at 2134 (Stevens, J., dissenting). Justice Stevens proffered that if the Court truly believed that the NLRB's authority would be undermined in these situations, then the present holding would have been adopted long ago. *See id.*

[141] *See id.*

[142] *See id.* at 2134-35 (Stevens, J., dissenting). Citing the district court's opinion, Justice Stevens quoted:

> 'Because the developmental squad salary provisions were a new concept . . . the policy behind continuing the nonstatutory labor exemp-

While the Supreme Court overwhelmingly agreed that the nonstatutory labor exemption permits employers, upon an impasse in negotiations, to impose unilateral restraints on employees, the effect may potentially cripple the future process of collective bargaining. Ironically, part of the Court's reasoning presumed that any judicial involvement would foster additional instability and uncertainty.[143] The holding's practical effect, however, ultimately will introduce even more confusion because the Court did not enunciate firm guidelines or parameters.

By its own acknowledgment, the Court recognized that the nonstatutory exemption was initially created to protect employees through the promotion of collective bargaining.[144] The decision, however, completely undermines that principle because it now allows employers to circumvent the collective bargaining process without suffering any consequences. Employers will implement whatever terms they desire so long as they can assert that a good faith impasse in bargaining occurred.

The problem with *Brown*, though, is that identifying an impasse is an extremely vague and subjective undertaking. The majority admits that an impasse is often temporary and easily manipulated for leverage during a bargaining session.[145] Furthermore, the majority admonished courts for investigating an employer's actual intent and purpose.[146] For that reason, it simply is not logical for the Court to immunize collective action at the point of impasse without assessing the party's intentions. The exemption will now discourage, rather than promote, collective bargaining. Employers will be rewarded if they do not waiver or make concessions on controversial issues of employment contracts.

The Court rhetorically asked, "[W]hat are *employers* to do once an impasse is reached?"[147] In the scope, context, and purpose of the limited nonstatutory exemption, this question epitomizes the flaws of the Court's holding. The majority appears to have either forgotten or discarded the notion that the exemption was originally created to protect the employee rather than the employer. The more appropriate question should have

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> tion . . . does not apply. . . . [T]o shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, [ ] but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually acceptable to employer and labor union alike.'

See id. (quoting Brown v. Pro Football, Inc., 782 F. Supp. 125, 139 (D.D.C. 1991) (citations omitted)).

[143] *See id.* at 2123.

[144] *See id.* at 2120.

[145] *See Brown*, 116 S. Ct. at 2125.

[146] *See id.*

[147] *Id.* at 2122 (emphasis added).

been, "What can the *parties* do once an impasse is reached?" The Court, though, implies that its question should be resolved by the NLRB. If no labor violation is found by the NLRB and the Supreme Court immunizes employers from antitrust liability, however, then management will retain limitless power.

The *Brown* Court has in essence adopted the standard set forth by the Eighth Circuit in *Powell v. National Football League*.[148] The most puzzling aspect of *Brown* is that the Court must have been aware of the effect of *Powell*: the union was forced to decertify, and a flood of individual player lawsuits commenced. Surprisingly, though, *Brown* did not cite *Powell*. It is apparent, however, that future litigants will be forced to take similar action in order to circumvent the exemption's new and broader scope.

In viewing the actual criteria set forth by the Court, it is questionable whether the facts of this case support the holding. Specifically, *Brown* states that the conduct must involve "a matter that the parties were required to negotiate collectively."[149] Developmental player squads were never incorporated into a previous collective bargaining agreement between the owners and the players' union. This was a new concept only applicable to players not talented enough to make the real team. Having already survived and excelled without developmental players, it is hard to imagine the league suffering negative repercussions if this initiative failed to garner union approval. For those reasons, the Court illogically considered this novel proposal as encompassing a mandatory subject of negotiation.

Lastly, the Court stated that the holding does not immunize all actions undertaken by employers.[150] The Court, though, does not define where to draw the line on those "extreme outer boundaries."[151] Rather, the Court willingly defers to the NLRB's judgment to determine whether a violation has occurred.[152] The problem with such an approach is that the Supreme Court created a limited exemption but now asks an independent third party to define its boundaries. Because the Supreme Court created the nonstatutory exemption, it alone should retain the responsibility to explain and define its application. Without an established endpoint for the exemption, future litigants in all fields of collective bargaining will be forced to guess whether their actions are "sufficiently distant

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[148] 930 F.2d 1293 (8th Cir. 1989). For further discussion of the Eighth Circuit *Powell* opinion, see *supra* notes 87-90.

[149] *Brown*, 116 S. Ct. at 2127.

[150] *See id.*

[151] *See id.*

[152] *See id.*

in time and in circumstances" as to avoid antitrust liability.[153] Considering that treble damages may be awarded if employers guess incorrectly, the Court has created a standard that benefits no one.

Michael Pepper Nachman

[153] *See id.*