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1-1-1997

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## Recommended Citation

Robert A. McCormick, Labor or Antitrust - Let the Players Choose, 4 Vill. Sports & Ent. L.J. 39 (1997).

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## LABOR OR ANTITRUST? LET THE PLAYERS CHOOSE

ROBERT A. McCORMICK\*

Over the past twenty-five years, questions surrounding the nature and scope of the nonstatutory labor exemption have been pivotal in the many important antitrust challenges to player restraint mechanisms in professional team sports.<sup>1</sup> Recently, the issue of the exemption's duration has given rise to important litigation<sup>2</sup> and significant academic disagreement.<sup>3</sup>

In June 1996, the United States Supreme Court decided *Brown v. Pro-Football, Inc.*,<sup>4</sup> which addressed the critical question posed in professional sports and labor-management relations regarding the duration of the nonstatutory labor exemption to the antitrust laws.<sup>5</sup>

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\* Professor of Law, Detroit College of Law at Michigan State University. This Article grows out of a speech delivered at a symposium on labor relations in professional sports sponsored by the VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL in March, 1996.

1. See, e.g., *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976) (challenging validity of professional football league draft and its surrounding restrictions), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979); *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1975) (challenging validity of clause under National Football League constitution which restricted acquisition of free agents), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (challenging professional basketball league restrictions such as reserve clause, uniform player contracts, and college draft), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974) (challenging several rules of National Football League as unreasonable restraints on trade), *aff'd*, 586 F.2d 644 (9th Cir. 1978); *Boston Prof'l Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass.) (involving action brought against hockey players who signed contracts with clubs in newly organized league), *remanded*, 472 F.2d 127 (1st Cir. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (involving enforcement or threatened enforcement of reserve clause by established major professional hockey league to prevent players from playing in new league).

2. See, e.g., *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995) (concluding that nonstatutory labor exemption precluded antitrust challenge to continued imposition of terms of agreement after impasse was reached); *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989) (finding nonstatutory labor exemption from antitrust laws extends beyond impasse); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987) (holding collective bargaining agreements do not lose antitrust immunity upon expiration of agreement but cannot continue indefinitely beyond expiration of agreement).

3. For a discussion on the academic disagreement on the issue of labor exemption to the antitrust laws, see *infra* notes 17, 36-40 and accompanying text.

4. 116 S. Ct. 2116 (1996).

5. See, e.g., *id.* at 2120. For a discussion of the nonstatutory labor exemption, see *infra* notes 19-21 and accompanying text. For a discussion of the statutory labor

In *Brown*, the Court answered the specific question as to whether the labor exemption continues to insulate a labor issue from anti-trust examination even after a collective bargaining agreement has expired and the union and employers have reached an impasse in negotiations.<sup>6</sup> This Article will analyze the *Brown* decision.<sup>7</sup>

The implications of *Brown* are significant and this Article will discuss some of them.<sup>8</sup> This Article will conclude that the central teaching of *Brown* is that the nonstatutory labor exemption protects the collective bargaining process, with all its virtues and flaws, from antitrust scrutiny. It will also sound a warning for the federal courts overseeing labor-management conflicts in professional sports that the players must decide whether labor law or antitrust law will shape the future of employment relations in professional sports. If the players choose to do so, as they have done in the past, they may elect to be represented by unions. Under those circumstances, the players' terms of employment would be governed by labor law. On the other hand, players may forego union representation and thereby elect individual negotiations with the teams. If the players choose that option, antitrust principles would apply to their employment terms. The courts must not permit labor or management to distort collective bargaining by providing either party with the advantages of both avenues for redress.

## I. BACKGROUND

The conflict between labor and management in professional sports is among the most fascinating of such contests in all of employment law. It involves not only the inherent struggle between labor and capital,<sup>9</sup> but also because lurking, ever near, is the brood-

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exemptions, *see* *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 622 (1975) (noting that Clayton Act and Norris-Laguardia Act declare that labor unions are not combinations or conspiracies in restraint of trade and exempt specific union activities, including secondary picketing and boycotts from operation of antitrust laws). *See also* *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) (holding that multi-employer agreement with unions not to sell meat between 6 p.m. and 9 a.m. even in self-service markets was within labor exemption of Sherman Act); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (holding that agreements between labor and management to impose terms on third parties fall outside labor exemption and may well violate antitrust laws).

6. *Brown v. Pro-Football, Inc.*, 116 S. Ct. 2116, 2121 (1996).

7. For a discussion of the *Brown* decision, see *infra* notes 26-62 and accompanying text.

8. For a discussion on the implications of *Brown*, see *infra* notes 63-70 and accompanying text.

9. As Justice Holmes wrote, "[o]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services

ing presence of antitrust law. This mix of labor and antitrust has always been, and will always be, volatile because labor policy and antitrust policy are, in some ways, inherently in conflict.<sup>10</sup> This conflict arises because the purpose of antitrust policy is to foster economic competition,<sup>11</sup> while one important purpose of organized labor is to limit such competition among individual employees in the labor market.<sup>12</sup>

Organized labor limits competition because unions regularly seek agreements with employers that establish uniform terms and thereby limit the opportunity of any individual employee to sell his or her services for the most favorable terms.<sup>13</sup> Typical collective bargaining objectives, such as standardized wages and seniority systems, have anticompetitive effects for both younger and more highly skilled employees. At the same time, because such subjects are also mandatory subjects of bargaining under the National Labor Relations Act (NLRA),<sup>14</sup> they are plainly matters about which national labor policy encourages agreement.<sup>15</sup>

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for the least possible return." *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

10. See *Brown*, 116 S. Ct. at 2122. For a discussion of the inherent conflict between labor policy and antitrust policy, see *infra* notes 13-18 and accompanying text.

11. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("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 . . ."); *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 806 (1945) (stating that "[Antitrust policy] . . . seeks to preserve a competitive business economy . . ."); LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 14 (1977) (stating "[t]he purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply."). See also Clarence Fried & William H. Crabtree, *Labor*, 33 *ANTITRUST L.J.* 38 (1967) (tracing history of labor exemption to antitrust laws).

12. See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *Id.* at 666.

13. See, e.g., *id.* In *Pennington*, small coal mine operators sued the coal miner's union on the basis of an industry-wide collective bargaining agreement whereby the employers and union agreed on a wage scale that exceeded the financial ability of some operators to pay. See *id.* This agreement was found to have been made for the purpose of forcing some employers out of business. See *id.*

14. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685 (1965). Under the National Labor Relations Act (NLRA), an employer or union has the duty to bargain in good faith concerning "wages, hours, and other terms and conditions of employment." *Id.* (quoting 29 U.S.C. § 158 (1994) (as amended)).

15. Section 8 of the National Labor Relations Act (NLRA) reads in pertinent part:

In light of this inherent conflict, if the natural anticompetitive objectives of unions are to be accepted and protected, then restrictions on the free operation of the labor market must follow. As Professor St. Antoine has so nicely written, "we have long since concluded that the value of unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide by some of the consequences."<sup>16</sup>

The relationship between antitrust policy and labor policy in professional sports is something like a contentious marriage; the two live together, but they cannot get along.<sup>17</sup> The Supreme Court aptly recognized this contentious marriage when it observed:

We have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to pre-

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It shall be an unfair labor practice for an employer-(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

29 U.S.C. § 158 (1994) (emphasis in original).

16. Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 631 (1976) (discussing outlines of antitrust law as it relates to labor field and concluding that unions and antitrust laws are premised on fundamentally opposing philosophies of competition).

17. *See, e.g.*, *United States v. Hutcheson*, 312 U.S. 219 (1941) (holding Sherman, Clayton and Norris-LaGuardia Acts must be considered jointly in arriving at conclusion as to whether labor union activities run counter to antitrust legislation); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (holding labor unions are still subject to Sherman Act to "some extent not defined."); *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989) (discussing scope of nonstatutory labor exemption); *Wood v. National Basketball Ass'n*, 809 F.2d 954, 962 (2d Cir. 1987) ("[a]ny claim of unreasonable bargaining behavior must be pursued in an unfair labor practice proceeding charging a refusal to bargain in good faith, . . . not in an action under the Sherman Act."); *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (discussing application of nonstatutory labor exemption in professional sports and restrictions on free agency).

serve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.<sup>18</sup>

How are these two opposing doctrines to be reconciled? Such reconciliation is achieved by invocation of the so-called *nonstatutory* labor exemption<sup>19</sup> to the antitrust laws, a common law doctrine created by the Supreme Court. The exemption is designed to establish the circumstances under which certain otherwise anticompetitive agreements between labor and management will be insulated from antitrust interdiction by virtue of their place in collective bargaining.<sup>20</sup>

What kinds of agreements qualify for this exemption? Generally speaking, the Supreme Court has determined that agreements which primarily affect the parties to the agreement are to be governed solely by labor law principles and not antitrust principles. Such agreements are part of mandatory bargaining under the

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18. *Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers*, 325 U.S. 797, 806 (1965).

19. The nonstatutory labor exemption, as its name denotes, should be distinguished from the exemption accorded specific unilateral union activities under sections 6 and 20 of the Clayton Act. Ch. 323, §§ 6, 20, 38 Stat. 730, 731, 738 (1914) (codified at 15 U.S.C. § 17 (1994) and 29 U.S.C. § 52 (1994)). Judicial review of congressional efforts to create an antitrust exemption for labor has limited the statutory exemption to specific unilateral union activities. *See, e.g.*, *Connell Constr. Co. v. Plumbers* 421 U.S. 616, 622-26 (1975) (concluding multi-employer collective bargaining agreement was not entitled to antitrust exemption because it placed direct restraints on subcontractor competition); *United States v. Hutcheson*, 312 U.S. 219, 233-37 (1941) (concluding that conventional union activities directed at rival union are not prohibited by antitrust laws). *Cf.* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 475-83 (1981) (discussing Supreme Court cases interpreting statutory exemption). *See also* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 665-66 (1965) (concluding that attempt to impose industry-wide standards in negotiated agreement with employer would not be entitled to statutory antitrust exemption).

As early as 1941, however, the Supreme Court recognized in *United States v. Hutcheson* that accommodating antitrust and labor policy required some labor-management agreements be accorded a nonstatutory exemption from the antitrust laws. *See Hutcheson* 312 at 233-37 (discussing broad legislative purpose behind enactment of labor statutes).

As Justice Goldberg observed, to do otherwise would permit unions and employers to conduct "industrial warfare" but would prohibit them from peacefully resolving their disputes. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 712 (1965) (Goldberg, J., dissenting).

20. *See* Handler & Zifchak, *supra* note 19 at 475-86 (following progression of common law labor exception to antitrust laws).

NLRA, dealing namely with wages, hours and other terms and conditions of employment.<sup>21</sup>

Why does this conflict between labor and antitrust policy arise so often in professional sports? At the risk of noting the obvious, sports leagues, from the first playground basketball or baseball game to professional organizations, restrain trade by allocating talented players among teams and discouraging their subsequent movement. The justification for this restraint rests upon the need to provide for an athletic *contest*, the outcome of which will be in doubt. Without such uncertainty, there would be no real drama and the incredible appeal of competitive athletic contests would be jeopardized.

Allocating players among teams and discouraging their subsequent movement requires some agreement among teams to restrain themselves when attempting to acquire the most talented employees available. Such agreements, however, are highly likely to be contracts, combinations or conspiracies in restraint of trade, and thus in apparent violation of the Sherman Act.<sup>22</sup>

At the same time, a majority of players in all professional sports leagues have decided to be represented collectively by unions known as players' associations.<sup>23</sup> In so doing, those players have elected to use the leverage of collective bargaining and the threat of strikes in order to achieve the ends they desire. Having so elected, they must be prepared to abide by the consequences of this decision.

The result of this mix of labor and antitrust in professional sports provides for a rich compost that will inevitably ferment and create heat. Over the past quarter century, all significant antitrust challenges to player restraint mechanisms<sup>24</sup> have involved the question of whether these mechanisms are exempt from antitrust review by virtue of the nonstatutory labor exemption.<sup>25</sup>

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21. See 29 U.S.C. § 158 (1994).

22. See 15 U.S.C. § 1 (1994). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ." *Id.*

23. See, e.g., *Brown v. Pro-Football, Inc.*, 116 S. Ct. 2116 (1996).

24. See, e.g., *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989) (discussing scope of nonstatutory labor exemption); *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (discussing application of nonstatutory labor exemption in professional sports and restrictions on free agency). See also NFL Management Council & National Football League Players Association, 1982 Collective Bargaining Agreement arts. XII-XVI, at 28-45.

25. See *supra* notes 2-4 and accompanying text.

II. *BROWN V. PRO-FOOTBALL, INC.*

In *Brown v. Pro-Football, Inc.*,<sup>26</sup> the latest manifestation of the labor-antitrust conflict in professional sports, the Supreme Court addressed the duration of the nonstatutory labor exemption. The circumstances giving rise to *Brown* began in 1987 when the professional football players, represented by the National Football League Players' Association (NFLPA), engaged in a brief work stoppage after their collective bargaining agreement with the National Football League (NFL or the League) expired and negotiations for a new contract proved unsuccessful.<sup>27</sup> When the players were replaced and games continued uninterrupted, veteran players began to cross the picket line, and within three weeks the NFLPA capitulated.<sup>28</sup> Thereafter, the players played for six years, until 1993, without a successor contract.<sup>29</sup>

In 1987, when the existing collective bargaining agreement expired, the League and the NFLPA began to negotiate a new agreement.<sup>30</sup> After long negotiations,<sup>31</sup> the NFL implemented one of the proposals it made during negotiations — a \$1000 per week salary cap for the so-called “developmental squad” players.<sup>32</sup> The unilateral implementation of this proposal, which was consistent with the League's offer to the NFLPA during bargaining, was entirely permissible under the NLRA as one of the rules of bargaining.<sup>33</sup>

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26. 116 S. Ct. 2116 (1996).

27. See *Brown v. Pro-Football, Inc.*, 50 F.3d 1041, 1045 (D.C. Cir. 1995). During the course of collective bargaining between the NFL and the NFLPA, the NFL proposed to pay a fixed salary of \$1000 per week to any player assigned to newly formed practice squads. See *id.* The parties did not reach settlement on this issue and therefore the proposed salary was not fixed for any player assigned to these squads. See *id.* The parties bargained to impasse over the issue and the clubs consequently imposed the fixed salary for the 1989 NFL season. See *id.*

28. See *id.*

29. See *id.* at 1047 n.3.

30. See *Brown v. Pro-Football, Inc.*, 116 S. Ct. 2116, 2119 (1996).

31. For a discussion of the negotiations underlying the *Brown* case, see *supra* note 27.

32. See *Brown*, 50 F.3d at 1045. Had the parties been able to reach a settlement on this issue, they could have concluded an agreement establishing \$1000 per week as the salary for practice squad players, and this agreement would have posed no legal problems under the federal labor or antitrust laws. See *id.* Such was not the case and the parties bargained to impasse over the issue. See *id.*

33. See *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989) (stating employers may implement reasonably comprehended changes after impasse); *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967) (stating “after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.”), *enforced*, 395 F.2d 622 (C.A.D.C. 1968). See also *NLRB v. Katz*, 369 U.S. 736, 745 & n.12

Anthony Brown and the other 235 developmental squad players sued the League on antitrust grounds, claiming that the \$1000 salary cap was unlawfully anticompetitive.<sup>34</sup> Should Brown have been permitted to challenge the agreement among team owners to limit developmental player salaries as a violation of the antitrust laws? It was obviously anticompetitive and, but for the labor exemption, very likely unlawful.

Courts and commentators have suggested many alternatives as to how long the labor exemption should shelter anticompetitive arrangements.<sup>35</sup> Some have taken the position that the exemption should be coextensive with the parties' collective bargaining agreement.<sup>36</sup> Others have argued that the exemption should end at impasse<sup>37</sup> or "modified impasse."<sup>38</sup> Still others have suggested that the exemption should apply until it is "clearly unreasonable" for the parties to believe the disputed provision will appear "in that form in the succeeding agreement."<sup>39</sup> Thus if the exemption continued past the time impasse was reached, then the challenge to the

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(1962) (stating that employer could institute wage increase unilaterally that was identical to that which union rejected during impasse).

34. See *Brown v. Pro-Football, Inc.*, 50 F.3d 1041, 1045 (D.C. Cir. 1995). Nine players who had been assigned to practice squads filed this class action antitrust lawsuit against the clubs and the NFL in the United States District Court for the District of Columbia, alleging that the fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act. See *id.*

35. For a discussion of the case law on the labor exemption, see *supra* notes 2-6 and accompanying text.

36. See Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 395-400.

37. See Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U.L. REV. 135, 153 (1990) (arguing in absence of antitrust exemption, NFL's current system of free agency violates antitrust law); Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U.L.J. 123, 144 (1990) (explaining simultaneous expiration of labor exemption with collective bargaining agreement provides unstable environment for negotiations because employers fear antitrust liability); Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 888-94 (1991) (suggesting labor exemption should expire at same time as collective bargaining agreement that spawned it); Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1233 (1993) (stating that ending exemption at impasse appears to be best judicially recognized alternative because it provides incentives for parties to negotiate, without giving either side excessive bargaining power).

38. See Bradley R. Cahoon, Note, *Powell v. National Football League: Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 381, 401-06.

39. Kieren M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1071-75 (1994). See also *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987) (holding player restraining system would be exempt from antitrust scrutiny so long as owners left system unchanged and so long as owners "reasonably be-

League's action would plainly be foreclosed; if not, then the League's antitrust liability was patent. The *Brown* case would provide the vehicle for ultimate resolution of the question.

### A. The Lower Court Decisions

The United States District Court for the District of Columbia held that the suit was not barred by the labor exemption.<sup>40</sup> The court found for the plaintiffs and entered a judgment of more than \$30 million against the NFL.<sup>41</sup> On appeal the United States Court of Appeals for the District of Columbia Circuit reversed the lower court, holding that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market . . . ."<sup>42</sup> In so holding, the court of appeals sought "to shield the entire collective bargaining process established by federal law."<sup>43</sup>

On appeal the players argued that because federal labor laws are designed to foster employee rights to collectively bargain, a collective bargaining agreement ought to be a precondition to the exemption.<sup>44</sup> The court recognized, however, that the collective bargaining process envisions much more than parties successfully reaching agreements.<sup>45</sup> Thus, in *Brown* the court of appeals held that under the NLRA, "the right to engage in collective bargaining does not encompass the right of agreement."<sup>46</sup> Specifically, it ruled

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lieve[d] that the practice or a close variant of it will be incorporated in the next collective bargaining agreement.").

40. See *Brown v. Pro-Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991).

41. See Civ. Action No. 90-1071 (D.D.C. Oct. 5, 1992) (judgment on the verdict). The district court also granted the players' request for a permanent injunction barring the clubs from ever again setting a uniform regular season salary for any category of players. See *Brown v. Pro Football, Inc.*, 821 F. Supp. 20 (D.D.C. 1993).

42. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir. 1995).

43. *Id.* at 1051. The court noted that the National Labor Relations Act makes clear that federal labor policy focuses on collective bargaining as a process, rather than on collective bargaining agreements alone. See *id.* Thus, federal labor policy favors neither party to the collective bargaining, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices. See *id.*

44. See *id.* at 1051-52.

45. See *id.*

46. *Id.* The court noted that some commentators have suggested that union agreement ought to be a precondition to any invocation of the nonstatutory labor exemption, but that this is not in fact required. See *id.* The NLRA protects the right to join and form unions, but federal labor law has always expressed a "policy of voluntary unionism." See Labor Management Relations Act of 1947, 29 U.S.C.

that under the NLRA, an employer may unilaterally implement its pre-impasse proposals after good faith impasse has been reached.<sup>47</sup>

In her dissent, Judge Wald pointed out that one effect of the majority's decision is that employees who choose to be represented by unions forfeit their antitrust rights.<sup>48</sup> She correctly observed, "[t]hus, employees must now choose between foregoing collective bargaining altogether, thereby retaining antitrust protection against employer restraints on the labor market; or engaging in collective bargaining at the risk of forfeiting all antitrust remedies if bargaining fails and the employers unilaterally foist unagreed-to industry-wide terms upon them."<sup>49</sup>

In a very real sense, Judge Wald's observation is precisely the point of this Article. Antitrust law is inimical to the collective bargaining process and thus the players must choose how they wish to order their employment relationship. If they choose to negotiate collectively, as they have thus far done, then in exchange for the advantages of collective action, they must be prepared to forego antitrust review of their employment terms. On the other hand, if they elect to negotiate with their employers individually and relinquish the advantages of collective action, then the antitrust laws will be available to them. The choice is theirs.

### B. The Supreme Court's Analysis

The Supreme Court affirmed the court of appeals decision which it characterized as consistent with "both history and logic."<sup>50</sup> As a matter of history, the Court reasoned, the nonstatutory labor exemption "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict."<sup>51</sup> As a matter of logic, the Court wrote, "it would be difficult, if not impossible" to require employers and employees to bargain together, but at the same time to forbid them from making agreements "potentially necessary to make the process work."<sup>52</sup>

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§§ 141-187 (1994) [hereinafter LMRA]. Thus, employees have an equal right to join or refrain from joining unions and engaging in collective bargaining. *See id.*

47. *See Brown*, 50 F.3d at 1051 (citing *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992)).

48. *See Brown*, 50 F.3d at 1058 (Wald, J., dissenting).

49. *Id.* (Wald, J., dissenting).

50. *Brown v. Pro-Football, Inc.*, 116 S. Ct. 2116, 2120 (1996).

51. *Id.*

52. *Id.*

Covering some of the same territory reviewed by the District of Columbia Circuit, the Supreme Court observed that labor law permits employers unilaterally to implement changes in the status quo after reaching an impasse in bargaining, as the NFL did in *Brown*, so long as those changes are “reasonably comprehended” within the employer’s pre-impasse proposals.<sup>53</sup> Moreover, the Court noted, this same principle applies to multi-employer bargaining units like the NFL. The Court summarized its findings nicely when it wrote:

In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours and working conditions is to proceed - the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever.<sup>54</sup>

The Court then listed the practical problems which would result from the application of antitrust laws to collective bargaining agreements.<sup>55</sup> Most importantly, the Court queried, if the antitrust laws apply after impasse is reached, what should employers do when negotiations are not fruitful?<sup>56</sup> If employers continued to impose terms similar to those offered in bargaining, “they invite an anti-trust action premised upon identical behavior.”<sup>57</sup> If, on the other hand, they individually impose terms that differ significantly from those contained in the offer, “they invite an unfair labor practice

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53. *Id.* at 2121. Employers may not unilaterally impose terms which are more or less favorable than their pre-impasse proposals, because such imposition would undermine the union’s status. *See id.* (citing *Storer Communications, Inc.* 294 NLRB 1056, 1090 (1989); *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (C.A.D.C. 1968); *National Labor Relations Board v. Katz*, 369 U.S. 736, 745 & n.12 (1962)). The Court noted that such proposals are “typically the last rejected proposals” offered by the employer. *Id.*

54. *Id.* at 2122.

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

56. *See id.* at 2123.

57. *Id.*

charge.”<sup>58</sup> Indeed, the Court found other proposed alternatives, such as the Solicitor General’s suggestion that the exemption be extended after impasse “for such time as would be reasonable in the circumstances,” similarly unworkable.<sup>59</sup>

In the end, the Court held that the nonstatutory labor exemption applied to the employer conduct under examination.<sup>60</sup> Such conduct “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.”<sup>61</sup> Consequently, the Court concluded, the exemption continued to shelter the unilateral imposition of the employment term.<sup>62</sup>

### III. DISCUSSION

The Supreme Court’s holding in *Brown* is the proper one. In order for collective bargaining to work, the parties must be free to discuss and decide matters involving wages, hours and terms and conditions of employment without the threat of antitrust challenge if they are unable to agree.<sup>63</sup> Without that assurance, collective bargaining would be subject to the uncertainty that would accompany the availability of antitrust review. Plainly put, the players’ association would have a substantial disincentive to reach an agreement if it knew that an antitrust challenge would be available at impasse. This would be an unprecedented trump card and fundamentally upset the rules and mechanisms of collective bargaining.

Antitrust principles and labor law principles do not comfortably coexist.<sup>64</sup> The collective bargaining process often involves actions or agreements which restrain trade in apparent violation of the antitrust laws.<sup>65</sup> As a result, if collective bargaining is to work, it

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58. *Id.* The Court also noted that employers would no longer be able to safely discuss offers even before impasse. *See id.*

59. *Id.* “[A]ntitrust liability here threatens to introduce instability and uncertainty into the collective bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires.” *Id.*

60. *See Brown*, 116 S. Ct. at 2127.

61. *Id.*

62. *Id.*

63. For a discussion of the interaction between labor law and antitrust law, see *supra* notes 9-25 and accompanying text.

64. For a discussion of the inherent conflict between labor policy and antitrust policy, see *infra* notes 17-18 and accompanying text.

65. For a discussion of such apparent violations of antitrust laws, see *supra* notes 21-25 and accompanying text.

must be given free reign, without the shadow of potential antitrust examination. The Supreme Court's holding in *Brown* has accomplished that purpose.

It is true, of course, that the *Brown* holding puts players in a difficult position: if they elect to be represented by player associations, then they must be "prepared to abide by some of the consequences."<sup>66</sup> One of those consequences is that their employment terms will be shaped by collective bargaining and not antitrust law. If they reject collective representation, as they have occasionally done or threatened to do, then recourse to antitrust review remains. Some combination of the two approaches, such as was sought in *Brown*, is not available because it will not work.

In *Brown v. Pro-Football, Inc.*, NFL players had a choice — they chose to be represented by a labor organization. The NFLPA on their behalf bargained to impasse with the NFL on the issue of developmental squad salaries, and many other subjects.<sup>67</sup> Why at that point, should they not be able to lodge their suit? The answer is because the players have agreed to fix the terms and conditions of their employment through the agency of collective bargaining. This was *their* choice. They had another alternative. They could have opted for individual bargaining and retained the availability of the antitrust laws to challenge league rules.<sup>68</sup> But they rejected that choice and chose to be represented. In so doing, they also elected to order their employment terms through collective bargaining and the labor laws.

What must be remembered is that the labor exemption protects the collective bargaining process.<sup>69</sup> Part of that process is that sometimes, unfortunately, the parties do not and cannot agree.<sup>70</sup> Under these circumstances, the labor laws establish the rights and responsibilities of the parties. And these rules of economic competition between capital and organized labor are well defined and worthy of protection. In its decision in *Brown v. Pro-Football, Inc.*, the Supreme Court has taken a major step towards preserving that process.

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66. See St. Antoine, *supra* note 16, at 631.

67. *Brown v. Pro-Football, Inc.*, 116 S. Ct. 2116, 2119 (1996).

68. For a discussion of the choice facing employees to bargain individually or collectively, see *supra* notes 48-49 and accompanying text.

69. For a discussion of how the labor exemption protects the collective bargaining process, see *supra* notes 20-21 and accompanying text.

70. For a discussion of impasse, see *supra* notes 37-38 and accompanying text.

