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ARTICLES

MULTIEMPLOYER BARGAINING, ANTITRUST LAW, AND TEAM SPORTS: THE CONTINGENT CHOICE OF A BROAD EXEMPTION

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I. INTRODUCTION

Twenty-four years after pronouncing that "Congress[,] . . . not . . . this Court[, must remedy] any inconsistency or illogic" in the long standing exemption of baseball, but not other sports from the reach of the antitrust laws,[1] the Supreme Court last term reduced substantially the uniqueness of Major League Baseball's control over its labor market. The Court did so not by exposing baseball to antitrust attack, but rather by clarifying that restrictions on player labor mobility and freedom of contract imposed by all North American leagues of professional sports teams[2] also enjoy an exemption from antitrust scrutiny as long as their labor markets are subject to collective bargaining.[3]

In *Brown v. Pro Football, Inc.*,[4] the Court held that employers could conspire and agree to take actions to impose controls on a labor market, if those actions "grew out of" and were "directly related to" a multiemployer bargaining process, did not offend the federal labor laws that sanction and regulate the process, affected terms of employment subject to compulsory bargaining,

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1. Flood v. Kuhn, 407 U.S. 258, 284 (1972).
2. *See* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2127 (1996).
3. *See id.*
4. *Id.*

and concerned only parties to the collective bargaining relationship.[5] All major professional team sports clubs have joined with other league clubs to bargain in multiemployer units with unions representing the athletes that they employ. As long as a multiemployer bargaining relationship exists, league-imposed restraints on player labor markets should easily meet the Court's other conditions. The *Brown* holding, therefore, effectively enables leagues in every sport to be as free of antitrust constraints in order to control player mobility and salaries as Major League Baseball has been under its special, long standing antitrust exemption.[6]

How one greets *Brown* inevitably will depend in part on how one views the antitrust challenges that players have made against such league-imposed labor market restraints as restrictions on mobility between teams,[7] rookie drafts,[8] and salary caps.[9] Those individuals who think that the antitrust laws should be concerned only with restraints on product markets, and not with restraints on input markets in general or with labor markets in particular, may welcome *Brown*'s exemption of

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5. *See id.*

6. Senators and Members of Congress can no longer claim that baseball's anomalous exemption imposes any special duty on baseball owners to compromise in negotiations with the baseball players' union. *See, e.g.*, Keith Bradsher, *Congressmen Pledge to Revoke Baseball's Antitrust Exemption*, N.Y. TIMES, Dec. 24, 1994, at 1. Eliminating the exemption without also overturning *Brown* will not pose an antitrust threat.

7. *See, e.g.*, McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979) (finding the National Hockey League's free agent compensation system to be exempt from antitrust challenge because the system was a product of arm's-length, collective negotiations); Mackey v. National Football League, 543 F.2d 606, 621-23 (8th Cir. 1976) (upholding a district court's finding that a National Football League (NFL or "the League") rule requiring compensation for a team's signing of a veteran free agent from another team violated antitrust law under "Rule of Reason" analysis).

8. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978) (upholding a finding that the NFL rookie draft violated antitrust law under "Rule of Reason" analysis).

9. *See, e.g.*, National Basketball Ass'n v. Williams, 45 F.3d 684, 691 (2d Cir. 1995) (finding the NBA's revenue sharing and salary cap system, as well as its rookie draft, to be exempt from antitrust challenge because each system arose out of collective bargaining with players); Wood v. National Basketball Ass'n, 809 F.2d 954, 962 (2d Cir. 1987) (finding the NBA's salary cap system to be exempt from antitrust challenge because the system was embodied in a collective bargaining agreement).

labor market restraints.[10] Those individuals who think that the labor market restraints typically imposed by sports leagues are reasonable under an antitrust analysis that weighs heavily the contributions of such restraints to maintaining athletic balance that enhances the league's competitiveness with other forms of entertainment also may welcome the decision.[11] Others who believe that the antitrust laws should protect a player's negotiation of a free-market wage for any extraordinary services the player provides should give *Brown* a cold reception. This should be true for those concerned with the ultimate impact on the sports product of restraints discouraging talent development[12]

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10. *See, e.g.*, Robert H. Jerry II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 184 (1984) (arguing that the Sherman Act was not intended to cover restraints on labor markets).

11. *See, e.g.*, JESSE W. MARKHAM & PAUL V. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY 99-115 (1981); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 386-87 (1986).

12. The argument that consumer welfare is harmed by agreements among professional sports clubs to restrain the salaries of the athletes whom they employ runs as follows: the wages that clubs would be willing to pay in competition for players in an unrestrained market would reflect the real worth of the players to those who purchase the clubs' products, either by attending games, watching or listening to broadcasts, or buying related merchandise. *See infra* note 255. Depressing wages below the competitive level would discourage some potential players from becoming professionals. Even if few potential players have alternative opportunities outside their sport, a reduction in salary levels at the least reduces the incentive for some young people to invest the human capital necessary to become a skilled professional and thereby subtracts from maximum potential consumer satisfaction. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 72-75 (1993). Professional sports clubs collectively are monopsonists in that they are "single buyer[s] of a well-specified good or service." *Id.* at 3. Blair and Harrison explain that even when those selling goods or services to monopsonists will not vary supply in the short run in response to price reductions, "consumers are hurt because the producers' profits are reduced and their response may be to reduce future supply." *Id.* at 72-73.

The foregoing argument can be challenged along several lines. First, professional sports clubs enjoy some degree of monopoly power in their product markets within particular regions. *See* GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL 194 (1989). The high salaries that clubs are willing to pay their players, therefore, derive substantially from monopoly profits that do not fully reflect the value that sports consumers would place on seeing and rooting for the players in fully competitive product markets. *See infra* note 255. Labor negotiations in sports, to an extent, concern the division of returns in excess of those necessary to induce capital investment. *See infra* note 255.

Second, the hiring of a star player by a particular club not only creates con-

and for those concerned with insuring the extraction of a "just" wage for labor from a cartel of employers.[13]

Regardless of their inclinations on these ultimate issues of antitrust law, however, both sports fans and lawyers (including those who are both), have reason to lament the result in *Brown*. For reasons elucidated in the final section of this Article,[14] sports fans interested primarily in uninterrupted presentations of athletic competition are likely to be disappointed by more work stoppages in professional sports as a result of *Brown*. For lawyers, whether sports fans or not, the *Brown* decision should be most troubling because it failed to provide a proper clarification of how antitrust law should accommodate federal labor law.

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sumer welfare for the fans of that club, it also subtracts somewhat from the welfare of the fans of competitive clubs. *Cf.* MARKHAM & TEPLITZ, *supra* note 11, at 21 (discussing the interdependence of baseball clubs with respect to team quality). This subtraction is an external effect that the hiring club does not take into account when calculating the worth of a star player. *But cf. infra* note 255 (noting that interclub mobility of athletes heightens players' value for fans). This effect is relevant to other labor markets, as well as the many product markets that are influenced by snobbery and other forms of peer comparison, but probably not to as great extent as the labor market for players for competing teams. *See id.*

Finally, confident predictions cannot be made concerning the effect of salary reductions resulting from particular labor market restraints on the number and quality of potential athletes who choose to develop their skills. As long as a few star players can secure multimillion dollar contracts, *see infra* note 269 and accompanying text, it may be that some reduction in average player salaries will affect the investments in skill development of few young athletes, especially given the economic alternatives that these athletes confront.

Although each of these arguments can in turn be individually challenged, suffice it to say here that those who believe that antitrust law should be available to challenge particular restraints on sports labor markets generally can respond that the antitrust laws presume that market restraints lead to inefficiency and a reduction in consumer welfare. *But cf.* BLAIR & HARRISON, *supra*, at 111 (noting that nonstatutory exemption "probably lowers the transaction costs of reaching agreements in industries in which there are a great number of employers"). This presumption at least warrants empirical analysis, perhaps through litigation, of whether particular restraints are justified. Speculative arguments, like the three suggested above, thus should be incorporated into an analysis of particular restraints, rather than be used as a blanket excuse for any kind of sports labor market restraint.

13. For arguments that the antitrust laws have distributive as well as efficiency goals, see, for example, Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982), and Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

14. *See infra* notes 251-65 and accompanying text.

The accommodation that *Brown* did articulate sacrificed antitrust goals to a degree unnecessary to the service of labor law goals.

As explained more fully below, in order to protect established and legally approved multiemployer collective bargaining in myriad industries other than sports, the Court properly rejected the players' lawyers' formulation of a limited antitrust exemption that would not have protected the concerted employer action challenged in *Brown*.[15] The Court, however, could have found that the challenged concerted action in *Brown* was not exempt from antitrust challenge under a different theory that would not have threatened multiemployer bargaining in any industry. That theory would have distinguished between joint employer actions in most industries designed to resist union efforts to use collective employee power to obtain *supra*competitive wages, and those joint employer actions, as in the sports industry, unilaterally to impose restraints on free, individual employee bargaining.

As a result of *Brown*, individuals whose special, differentiated talent would enable them to achieve extraordinary wages in a free, competitive labor market will have to make an unnecessary choice between two sets of statutory rights, those secured by federal labor laws and those secured by antitrust laws. In the near term, this choice may be imposed only on professional athletes, who both are interested in the benefits of multiemployer collective bargaining and also confront joint employer schemes to restrict their labor market.[16] In the longer term, however, the choice demanded by *Brown* may also unnecessarily and improperly constrain others with differentiated talent in the entertainment industry. Moreover, the Court's failure in *Brown* to clarify the extent to which labor law requires the accommodation of antitrust law could lead to a further unnecessary expansion of the labor exemption and consequential sacrifice of antitrust goals.

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15. *See* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2123-27 (1996).

16. *See* Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 169 n.11 (1982).

II.

The *Brown* case involved a challenge under section 1 of the Sherman Act[17] to the NFL's 1989 imposition on its twenty-eight member clubs of a flat wage of exactly $1000 per week for any player employed by any member club on a "developmental squad."[18] In the spring of 1989, while attempting to negotiate a new collective bargaining agreement with the NFL Players Association (NFLPA), the NFL proposed that each team establish a squad of up to six rookie, or first-year, players to play in practice games, and perhaps in regular games, when regular team members were injured.[19] At the same time, the NFL proposed that each team would pay all developmental squad players the same $1000 weekly salary.[20] The NFLPA refused to agree to the fixed salary level; it insisted that developmental squad players receive the same benefits and protections afforded other NFL players, "includ[ing] the right to negotiate their own salaries."[21] After two months, the NFL declared negotiations over the issue of developmental squad salaries to be at an impasse and, without the agreement of the union, unilaterally implemented the $1000 weekly salary.[22] The NFL advised each club that any deviations from this pay rate would result in disciplinary action by the League, including the loss of draft choices.[23]

Two hundred thirty-five players who were employed on the developmental squads and who received the $1000 weekly wage during the 1989 season initiated the *Brown* litigation in 1990.[24]

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17. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1994). The Supreme Court has applied this provision against agreements between buyers to restrain trade in an input market. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-44 (1948) (holding that an agreement among sugar refiners to set price offers for sugar beets violated the Sherman Act); Anderson v. Shipowners Ass'n, 272 U.S. 359, 364-65 (1926) (holding that an agreement among owners of merchant marine vessels to impose uniform terms and conditions of employment violated the Sherman Act).

18. *Brown*, 116 S. Ct. at 2119.

19. *See id.*

20. *See id.*

21. Joint Appendix at 18, *Brown* (No. 95-388).

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

23. *See id.*

24. *See id.*

The players claimed that the member clubs of the NFL conspired to restrain trade unreasonably in violation of the Sherman Act by agreeing, through their association in the NFL, to pay the same wage and therefore not to compete for developmental squad players.[25] The district court rejected the NFL's and its member clubs' defense that their joint imposition of the flat wage was exempt from antitrust challenge.[26] The Court then granted summary judgment to the players on the issue of antitrust liability,[27] and after trial of the damages issue to a jury, entered judgment on an award of treble damages that exceeded thirty million dollars.[28]

The district court's decision to reject the claim of an antitrust exemption should not have surprised the NFL. The Supreme Court previously had confirmed two bases for exempting labor market restraints from the reach of the antitrust laws,[29] but neither exemption directly fit the owners' unilateral imposition of the flat weekly wage on the developmental squad players. At the time of the district court's ruling no lower court had interpreted either exemption broadly enough to cover this imposition.

The Supreme Court established the first of the two exemptions in 1941. In *United States v. Hutcheson*,[30] Justice Frankfurter interpreted the Norris-LaGuardia Act of 1932[31] to provide labor unions with a broad exemption from the Sherman Act, allowing them to engage in economic pressure "[s]o long as a union acts in its self-interest and does not combine with nonlabor groups."[32] *Hutcheson* was important because it ensured that workers, through their unions, could conspire together to engage in any form of economic pressure, whether "licit" or "illicit," in attempts to achieve enhanced wages or to negotiate other terms of employment without being vulnerable to treble damag-

25. *See id.*
26. *See id.*
27. Brown v. Pro Football, Inc, 141 L.R.R.M. (BNA) 2942, 2948-50 (D.D.C. 1992).
28. Brown v. Pro Football, Inc., 821 F. Supp. 20, 21 (D.D.C. 1993), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996).
29. *See infra* notes 30-46 and accompanying text.
30. 312 U.S. 219 (1941).
31. 29 U.S.C. §§ 101-115 (1994).
32. *Hutcheson*, 312 U.S. at 232.

es, injunctions, or criminal prosecutions under the antitrust laws. Unions thought that they had achieved this kind of insulation with the passage of the Clayton Act in 1914,[33] but prior to *Hutcheson* the Court had interpreted the exemption of union economic weapons set forth in section 20 of that Act to be limited to union activities directed against an employer by its own employees.[34] In *Hutcheson*, Justice Frankfurter held that Congress intended to reject this limitation on union activities through its broad definition of a labor dispute in section 13 of the Norris-LaGuardia Act.[35]

The exemption established in *Hutcheson*, however, was not available to the employers in the *Brown* case. The *Hutcheson* decision concerned the Sherman Act's "application to trade union activities and the efforts to secure legislative relief from its consequences" for unions.[36] Justice Frankfurter's opinion addressed only union conduct and interpreted Congress's purpose in enacting Norris-LaGuardia as being "to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act."[37] In Justice Frankfurter's view, the "Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act."[38]

Unable to use the *Hutcheson* exemption to protect its unilateral imposition of the developmental squad wage, the NFL had to rely primarily[39] on the second exemption from the antitrust

33. 15 U.S.C. §§ 12-27 (1994).

34. *See* Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 49-55 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-77 (1921) (holding that section 20 does not insulate a union's "secondary boycott" from antitrust challenge).

35. *See Hutcheson*, 312 U.S. at 230-36.

36. *Id.* at 229.

37. *Id.* at 236 (quoting H.R. REP. NO. 669, at 3 (1932)).

38. *Id.*

39. The NFL also argued, based on language in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940), and in section 6 of the Clayton Act, that the Sherman Act does not reach any limitations on competition in a labor market that do not also directly affect competition in a product market. Brief for Respondents at 18-26, Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (No. 95-388). Although some lower court decisions supported this argument, *see, e.g.*, Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., 475 F. Supp. 482, 488-89 (S.D.N.Y. 1979),

laws that the Court had recognized in order to accommodate federal labor laws. The Court first applied this second, "nonstatutory"[40] exemption in *Local Union No. 189, Amalgamated Meat*

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vacated as moot, 638 F.2d 7 (2d Cir. 1980), neither *Apex Hosiery* nor section 6 ultimately provided a strong defense for the League.

In *Apex*, the Supreme Court held that section 1 of the Sherman Act did not reach a union's attempt to coerce a closed shop through a violent sitdown strike, seizure of the employer's property, and prevention of the interstate shipment of finished goods. *See Apex*, 310 U.S. at 513. Justice Stone's opinion for the Court contained assertions that the Sherman Act does not apply unless there is "some form of restraint upon commercial competition in the marketing of goods or services." *Id.* at 495. Justice Stone's analysis, however, including this language, was directed at distinguishing employees' efforts to control labor markets directly from business firms' attempts to control product markets, in order to achieve the same insulation of concerted union action that Justice Frankfurter achieved through his use of the Norris-LaGuardia Act in *Hutcheson*. *See id.* at 501-04. Nowhere in the *Apex* decision did Justice Stone consider the possibility that *Apex* might be relevant to business firms conspiring to restrain labor markets. Revealingly, the *Apex* opinion does not even cite the Court's earlier decision in *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926), holding that the Sherman Act encompassed an agreement between shipowners and operators not to compete in the hiring of seamen. *See id.* at 362-65. After *Apex*, the Court held in Radovich v. National Football League, 352 U.S. 445 (1957), that Radovich stated a viable antitrust claim by alleging that the NFL clubs had agreed to blacklist him for playing in a rival league. *See id.* at 449, 453-54. Although Radovich's allegations included claims that the blacklisting was part of a conspiracy against the rival league, the Court did not suggest that the success of his suit required proof of product market restraints. *See id.* at 448-49, 453-54.

Section 6 of the Clayton Act provided an even weaker defense. The NFL argued that this section, which states that "[t]he labor of a human being is not a commodity or article of commerce," 15 U.S.C. § 6 (1994), was intended to insulate from antitrust challenge all restraints that only limit labor market competition. *See* Brief for Respondents, *supra*, at 21-22. This argument, however, was rejected, at least implicitly, by the Supreme Court in numerous cases since the passage of the Clayton Act in 1914, including early decisions, such as *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921), and *Anderson*, and later decisions, such as *Hutcheson* and *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965), both of which could have been more easily decided under the NFL's interpretation of section 6. *See infra* notes 41-47 and accompanying text. The NFL's interpretation of this open-ended statement in section 6 is not supported by the section's legislative history. *See* James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127, 147-50 (1982); Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 UTAH L. REV. 617, 635-49.

Not surprisingly, the Court's decision in *Brown*, which does not even acknowledge either the *Apex* or section 6 arguments, again placed limits on its holding that are inconsistent with the insulation of all labor market restraints from antitrust challenge. *See Brown*, 116 S. Ct. at 2127.

40. The "nonstatutory" exemption description was drawn by Justice Powell in his

Cutters & Butcher Workmen of North America v. Jewel Tea Co.[41] to avert an antitrust challenge to a union-imposed provision in a collective-bargaining agreement that required that meat marketing occur only between 9:00 a.m. and 6:00 p.m.[42] The *Hutcheson* exemption did not protect this provision because it involved an agreement, or collaboration, of the union with a nonlabor group, the signatory employer.[43] Justice White, in a plurality opinion for the Court, held that the agreement nonetheless was exempt from the provisions of the Sherman Act because, under the facts found by the trial court, the union imposed the marketing hours in order to protect its members from either longer working hours or a loss of work, rather than to restrain competition from self-service stores.[44] Justice White thereby distinguished the collective bargaining agreement provision that he and a majority of the Court struck down in the companion case of *United Mine Workers v. Pennington*.[45] In *Pennington*, the Court determined that the union's pledge to large coal mine operators that it would impose an unaffordable high wage level on smaller operators was designed to harm competition by restraining the product market for coal rather than simply to affect the labor market for the union's miners.[46]

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majority opinion in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), to distinguish *Hutcheson*'s "statutory" exemption. *See id.* at 622.

41. 381 U.S. 676 (1965).

42. *See id.* at 695.

43. *See supra* notes 30-38 and accompanying text.

44. *See Jewel Tea*, 381 U.S. at 688-94. Justice Goldberg also wrote a plurality concurring opinion for three Justices. *See id.* at 697 (Goldberg, J., concurring). He would have held the marketing hour restraints to be exempt because they were included in a collective bargaining agreement and treated what he judged to be a mandatory topic of bargaining that affected employees directly. *See id.* at 697, 735 (Goldberg, J., concurring).

45. 381 U.S. 657 (1965).

46. *See id.* at 667. Justice Goldberg's concurring opinion in *Jewel Tea* also contained a dissent from the majority opinion (though not the reversal) in *Pennington*. *See Jewel Tea*, 381 U.S. at 697 (Goldberg, J., dissenting). Citing both section 6 of the Clayton Act and *Apex*, *see supra* note 39, Justice Goldberg argued that the restraints in *Pennington*, like those in *Jewel Tea*, should be exempt from antitrust challenge because they were contained in a collective bargaining agreement and concerned what he viewed as a mandatory topic of bargaining. *See Jewel Tea*, 381 U.S. at 697 (Goldberg, J., dissenting).

Because the *Jewel Tea* nonstatutory exemption is based on the general policies favoring collective bargaining expressed in the federal labor laws, including the National Labor Relations Act,[47] rather than on particular, limited statutory provisions, it offered more promise as a defense for the NFL in *Brown* than did the *Hutcheson* statutory exemption. Nonetheless, as articulated by the Supreme Court, the nonstatutory exemption did not comfortably fit the NFL's action in *Brown* for two reasons, only one of which had been addressed by lower court decisions at the time that the district court considered the League's exemption defense.

First, the Supreme Court had recognized the nonstatutory exemption as protection only for union-initiated labor market restraints, not for any employer-initiated restraints. As Justice Powell explained in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*:

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.[48]

Under this view, the purpose of the nonstatutory exemption, like that of the statutory exemption, is to accommodate the antitrust laws to a central purpose of the labor laws, allowing workers to organize and freely take concerted action in attempts to raise wages and other terms of employment to levels higher than could be achieved by individual, noncollective bargaining in a free labor market. The Court in *Hutcheson* read the Norris-

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47. 29 U.S.C. §§ 151-692 (1994).

48. 421 U.S. 616, 622 (1975). Justice Powell cited *Pennington* and *Jewel Tea* for support. *See id.*

LaGuardia and Clayton Acts to protect concerted employee action to this end.[49] *Jewel Tea*'s nonstatutory exemption recognized that such concerted action ultimately cannot be meaningful if collective agreements securing higher wages and other benefits are themselves subject to antitrust attack.[50]

The Court's view of the purpose of the labor laws explains its focus in *Jewel Tea*, *Pennington*, and *Connell* on whether the purpose of the challenged agreements in those cases was to assist certain employers in gaining greater control over their product markets, rather than serving only the employees' interests in controlling the labor market.[51] Thus, the *Jewel Tea* decision turned on the finding that the union had pressed the marketing hours restraint in order to protect the working hours of butchers, rather than to protect the sales of traditional meat markets from supermarket competition,[52] while the *Pennington* decision stressed allegations that the union conspired with large coal operators to eliminate smaller competitors from the coal industry.[53]

Connell held nonexempt a contractor's agreement with a union not to subcontract work to subcontractors not organized by that union.[54] The Court stressed that the contractor did not have a collective bargaining relationship with the union.[55] The challenged restraint clearly was union initiated, but Justice Powell found it to be subject to an antitrust challenge because it directly eliminated nonunion competitors from favored unionized employers' product markets, "even if their competitive advantages were not derived from substandard wages and working condi-

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49. *See* United States v. Hutcheson, 312 U.S. 219, 230-36 (1941).

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

51. The fact that any greater product market control could ultimately indirectly benefit the signatory unions through an increase in product market returns to be shared with union-represented workers would not warrant exemption. *See* United Mine Workers v. Pennington, 381 U.S. 657, 667 (1965) (striking down an agreement designed to increase the employer's market share despite the fact that union members would benefit indirectly).

52. *See* Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 688-94 (1965).

53. *See Pennington*, 381 U.S. at 667.

54. *See Connell*, 421 U.S. at 635.

55. *See id.*

tions but rather from more efficient operating methods."[56]

This limitation on the use of the nonstatutory exemption did not, however, pose an insurmountable hurdle for the NFL when the district court considered its exemption defense in *Brown*. Prior antitrust challenges to labor market restraints in the sports industry had produced lower court decisions that expanded the reach of the nonstatutory exemption from union-initiated labor market restraints to at least some employer-initiated labor market restraints.[57] The Eighth Circuit had rendered the most important opinion on point in *Mackey v. National Football League*.[58]

Mackey involved an antitrust challenge to the NFL's "Rozelle Rule."[59] This rule provided that whenever a player whose employment contract with one club had expired, signed a contract to play for a different club, the NFL commissioner could award the former club one or more players from the roster of the acquiring club as the commissioner deemed "fair and equitable," unless the two clubs reached an alternative and mutually satisfactory arrangement.[60] The plaintiff players in *Mackey* made a strong case that this rule discouraged clubs from hiring players formerly under contract with other clubs and thereby restrained labor mobility and reduced player salaries.[61] Although a 1968 collective bargaining agreement with the players' union had incorporated the Rozelle Rule, the League had unilaterally first promulgated it in 1963.[62]

The Eighth Circuit, in an opinion by Judge Lay, held that the rule was subject to antitrust challenge,[63] but not simply because

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56. *Id.* at 623; *see also* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 810 (1945) (holding that a labor union may have violated the antitrust laws when it entered into agreements to "aid and abet" electrical manufacturers and contractors to monopolize their business markets in a metropolitan area).

57. *See, e.g.*, Powell v. National Football League, 930 F.2d 1293, 1303 (8th Cir. 1989).

58. 543 F.2d 606 (8th Cir. 1976).

59. *See id.*

60. *See id.* at 610-11.

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

62. *Cf. id.* at 610-11 (discussing the history of the Rozelle Rule).

63. *See id.* at 621-23.

cause it was framed by the NFL to enhance the teams' control of the labor market for players. The court instead found that "[because] the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, . . . under appropriate circumstances, . . . a non-labor group may avail itself of the labor exemption."[64] According to the court, those appropriate circumstances are present when the challenged restraint: first, "primarily affects only the parties to the collective bargaining relationship;"[65] second, concerns a subject over which labor law requires each party to bargain;[66] and third, "is the product of bona fide arm's-length bargaining."[67] The court concluded that the Rozelle Rule qualified for exemption under the first two standards, but nonetheless could be challenged by the players because it failed to meet the third.[68] In the court's view, the rule was not the product of arm's-length bargaining because the League initially imposed it unilaterally and then forced it into a collective agreement without modification and, according to a finding of the trial court, without the relatively weak union receiving any quid pro quo.[69]

A number of commentators criticized the *Mackey* decision, especially for using the third, quid pro quo standard to depart from established labor law principles disfavoring governmental evaluations of the substantive outcome of collective bargaining.[70] The decision, however, influenced other courts treating antitrust challenges to labor market restraints on professional athletes,[71] and no court or commentator questioned *Mackey*'s

64. *Id.* at 612.
65. *Id.* at 614.
66. *See id.*
67. *Id.*
68. *See id.* at 615-16.
69. *See id.*
70. *See, e.g.*, Goldman, *supra* note 39, at 655-56; Roberts, *supra* note 11, at 394; John C. Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, LAW & CONTEMP. PROBS., Autumn 1981, at 109, 126-27.
71. *See, e.g.*, McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979) (holding the National Hockey League's collectively bargained free agency compensation system exempt from antitrust challenge under the *Mackey* test); Reynolds v. National Football League, 584 F.2d 280, 288-89 (8th Cir. 1978) (holding the revised collectively bargained NFL free agency system to be exempt under the *Mackey* test); McNeil v. National Football League, 790 F. Supp. 871, 897 (D. Minn. 1992);

assumption that employers should be able to assert the nonstatutory exemption to insulate at least some restraints embodied in collective bargaining agreements. In light of *Mackey* and its progeny, therefore, the district court in *Brown* was not prevented from accepting the NFL's nonstatutory labor exemption defense by the fact that the League, rather than the union, had proposed the flat wage for developmental squad players.

Nevertheless, neither *Mackey* nor any other lower court decision issued prior to the district court's rejection of the NFL's nonstatutory labor exemption defense offered the NFL any direct support for overcoming a second argument available to the players to distinguish all of the Supreme Court precedents on the nonstatutory exemption. The *Jewel Tea*, *Pennington*, and *Connell* decisions all considered whether the exemption was available for agreements between a union and employers;[72] none of those cases addressed restraints like those at issue in *Brown* that not only were proposed by employers but also were unilaterally imposed by them without union acceptance in a collective agreement. Moreover, the players could ground the distinction between bilateral agreements and unilateral action by employers in the theory underlying the nonstatutory exemption, as expressed in *Connell* and implied in *Jewel Tea*:[73] A nonstatutory exemption protecting the fruits of concerted union action must supplement the statutory exemption protecting union action directed toward controlling the labor market for employees in order for the labor laws effectively to protect union efforts to raise wages above those that employees could achieve in individual negotiations.

Rather than circumventing this distinction, the *Mackey* deci-

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Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987); Zimmerman v. National Football League, 632 F. Supp. 398, 403-04 (D.D.C. 1986); *see also* Burt v. Blue Shield, 591 F. Supp. 755, 762 n.9 (S.D. Ohio 1984) (asserting that the *Mackey* test can apply outside of the sports industry).

72. *See supra* notes 42, 46, 48 and accompanying text. As stated by the Court in *Connell*, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some *union-employer agreements* be accorded a limited nonstatutory exemption from antitrust sanctions." Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (emphasis added).

73. *See supra* note 48 and accompanying text.

sion underscored it. The *Mackey* majority did not fully explain how it had derived its three standards, but, in a key footnote, it quoted a passage from Justice White's plurality opinion in *Jewel Tea*, which focused on whether the challenged provision was a product of "bona fide, arm's length bargaining" in pursuit of the union's own goals.[74] The *Mackey* opinion thus framed the third standard to allow employers to assert the nonstatutory exemption for their own labor market restraints only when they could establish that such restraints served the national labor policy favoring *employee* labor market cartelization, rather than *employer* cartelization. This required a demonstration that the union had achieved some enhancement of benefits for represented employees by trading its acceptance of the employers' restraints for the employers' grant of the benefits. Therefore, the key factual issue in *Mackey* was whether the union actually did achieve some quid pro quo, such as "increased pension benefits" for the players that it represented.[75]

The NFL could not rely on *Mackey* in its arguments to the district court in *Brown* because the League had never obtained the NFLPA's agreement to the flat wage.[76] At the time of the district court decision, moreover, no other lower court had formulated an alternative theory to justify exempting from antitrust challenge labor market restraints that had not been accepted by a union. The Eighth Circuit had held in *Powell v. National Football League*[77] that the nonstatutory exemption offered protection to the NFL's continued implementation of labor market restrictions incorporated in two collective agreements with the NFLPA after those agreements expired and even after the parties reached a bargaining impasse on continued implementation during negotiations for a new agreement. The Eighth Circuit in *Powell*, however, professing adherence to *Mackey*, noted that the parties did not dispute that the prior bargaining agreements met the *Mackey* standards, and seemed to limit its

74. *Mackey*, 543 F.2d at 615 n.15 (quoting Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965)).

75. *See id.* at 616 & n.17.

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

77. 930 F.2d 1293, 1301-02 (8th Cir. 1989).

holding to the protection of employer-initiated restraints that, at least at one time, had received union acceptance.[78] Furthermore, although the *Powell* decision did not explain how *Mackey*'s justification for exempting employer-initiated restraints could extend beyond the expiration of an agreement that guaranteed represented employees some quid pro quo, it also did not advance any other coherent and compelling rationale for exempting employer-initiated restraints not accepted by the union.

The Court of Appeals for the Second Circuit, however, did present such a coherent and compelling rationale just two months before the United States Court of Appeals for the District of Columbia Circuit reversed the district court's rejection of the NFL's exemption defense in *Brown*. In *National Basketball Ass'n v. Williams*,[79] the Second Circuit, in an opinion by Judge Ralph K. Winter, held exempt from antitrust challenge the NBA's continued imposition of certain labor market restraints, including a revenue sharing, salary cap system and the assignment of desirable rookies through a "college draft," after the expiration of a collective bargaining agreement in which the union had consented to the restraints.[80] Although the facts of *Williams* resembled those of *Powell* rather than those of *Brown*, inasmuch as the league only desired to continue restraints to which the union had previously agreed,[81] Judge Winter did not base the opinion on the *Powell* court's effort to expand *Mackey*. Indeed, the opinion was not even an attempt to expand the principles pronounced in *Jewel Tea*, *Pennington*, and *Connell*, none of which Judge Winter even cited. Instead, Judge Winter relied on the Court's and Congress's affirmation of the importance of the system of multiemployer bargaining to American labor relations.[82] Judge Winter concluded that failing to protect from antitrust challenge a sports league's authority to implement a labor market restraint after a bargaining impasse over that restraint would threaten the system of multiemployer bargaining.[83]

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78. *See id.* at 1298-99, 1303.
79. 45 F.3d 684 (2d Cir. 1995).
80. *See id.* at 690-93.
81. *See id.* at 685-86.
82. *See id.* at 689.
83. *See id.* at 687-93. Judge Winter's approach to the *Williams* case reflected

Judge Winter stressed that collective bargaining in the sports industry is an example of a common practice, involving millions of American employees and thousands of employers, and "probably as old as unionism itself."[84] Multiemployer collective bargaining is a process by which employers who may compete in both product and labor markets join together to bargain with a

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views he had first advanced in a law review article written during the *Flood v. Kuhn*, 407 U.S. 258 (1972), litigation. *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 22 (1971).

> It is commonplace for employers to bargain as a group rather than singly and the Supreme Court has explicitly declared multi-employer bargaining to be authorized by the National Labor Relations Act. . . . Flood's arguments, if accepted, would have absurd practical effects. For example, when the steel firms make a joint wage offer to the United Steelworkers, an employee dissatisfied with the offer might, if the claims pressed in *Flood* are right, sue the companies for engaging in a price fix.

Id.

Judge Winter's decision in *Williams* was also presaged by his opinion in *Wood v. National Basketball Association*, 809 F.2d 954, 962 (2d Cir. 1987), rejecting a rookie draftee's antitrust challenge to the NBA's salary cap. Because the players' union had consented to the challenged salary cap in a collective bargaining agreement in effect at the time of the *Wood* litigation, *see id.* at 957, Judge Winter did not have to stress the importance of protecting the processes of multiemployer bargaining in that case. He also did not cite *Mackey* or rest on the NBA players' union having obtained something of adequate value in return for their agreement to the restraints.

In *Caldwell v. American Basketball Association*, 66 F.3d 523 (2d Cir. 1995), subsequent to the D.C. Circuit's decision in *Brown*, Judge Winter relied on his analysis in *Williams* to affirm a grant of summary judgment dismissing an ex-basketball player's antitrust claim that the clubs of the old American Basketball Association (ABA) had conspired to prevent him from playing during the period when the ABA was merging with the NBA because of his involvement with the ABA players' union. *See id.* at 529-31. Judge Winter asserted that under *Williams* it was irrelevant that the union had not agreed to the alleged blacklisting, as long as there was an extant multiemployer collective bargaining relationship that could have addressed the terms of the player's employment. *See id.* at 529-30. As suggested at the end of Judge Winter's *Caldwell* opinion, however, labor law could have displaced antitrust law in this case, even if there had been no collective bargaining relationship, because Caldwell's claims of blacklisting did not allege joint employer efforts to suppress competition in the players' labor market. *See id.* at 530. Rather, the alleged discrimination against union activities would have supported unfair labor practice charges under the National Labor Relations Act. *See id.*

For another forceful expression of what is essentially the Winter thesis, see Douglas L. Leslie, *Brown v. Pro Football*, 82 VA. L. REV. 629 (1996).

84. *Williams*, 45 F.3d at 688.

common union or unions.[85] Relying on the Court's exposition in *Charles D. Bonanno Linen Service, Inc. v. NLRB*,[86] Winter explained that multiemployer bargaining benefits both employers and employees in many industries outside of sports.[87] Such bargaining benefits employers by enabling them "to form a common front" against a union that otherwise could strike against one employer at a time in order to achieve its demands, and by ensuring that particular employers will not face competitive disadvantage by agreeing to more generous terms of employment than those that the union might negotiate with other employers.[88] Multiemployer bargaining benefits employees by enabling their unions to assure employers that their granting of generous terms will not place them at a competitive disadvantage and by making available group benefit programs, such as pension entitlements, that are funded more securely and can be carried between employers.[89] Finally, multiemployer bargaining benefits both employers and employees by eliminating the costs of duplicative negotiations.[90]

Judge Winter emphasized that numerous opinions of the Supreme Court, including *Bonanno Linen* and *NLRB v. Truck Drivers Local Union No. 449* (*"Buffalo Linen"*),[91] had approved the practice of multiemployer bargaining. In *Buffalo Linen*, the

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85. *See id.*

86. 454 U.S. 404, 409-10 & n.3 (1982).

87. *See Williams*, 45 F.3d at 688-89.

88. *See id.* at 688.

89. *Cf. id.* at 688-89 (describing the benefits of multiemployer bargaining to employers).

90. *See id.* The *Bonanno Linen* discussion of the benefits of multiemployer bargaining helps explain why both employers and unions would voluntarily choose a form of bargaining that could not simultaneously increase the bargaining leverage of each side. For another thoughtful explanation, treating the *Bonanno Linen* factors as well as the need for union leadership to satisfy their members' demand for equitable treatment between employers, see Jan Vetter, *Commentary on "Multiemployer Bargaining Rules": Searching for the Right Questions*, 75 VA. L. REV. 285 (1989). *See also* Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241, 260-69 (1989) (providing an economic analysis of multiemployer bargaining and its attendant legal rules); Theodore J. St. Antoine, *Commentary on "Multiemployer Bargaining Rules": The Limitations of a Strictly Economic Analysis*, 75 VA. L. REV. 279, 282-83 (1989) (emphasizing "the noneconomic aspects of a labor union's nature" and supplementing economic analysis of multiemployer bargaining).

91. 353 U.S. 87 (1957).

Court held that the nonstruck members of a multiemployer bargaining unit did not violate the labor laws by temporarily locking out their employees as a defense to a union's strike against one of their members.[92] The Court reasoned that the employers' objective to preserve the multiemployer unit was legitimate under federal labor law because Congress had recognized the importance of such bargaining to American industrial relations.[93]

Making the reasonable assumption that the holding in *Buffalo Linen* meant that a defensive lockout by a multiemployer association not only can survive the labor laws, but also cannot be challenged under the antitrust laws, Judge Winter argued that *Buffalo Linen* required rejection of the plaintiff's antitrust claims in *Williams* because the challenged practice, the maintenance of restrictive terms after the termination of a collective agreement on such terms, could not be distinguished from the use of economic coercion, such as a lockout, to impose those terms.[94] For Judge Winter, both practices exemplified bargaining tactics that would be legal for single employers under the labor laws and therefore must be legal for multiemployer associations given the Court's and Congress's endorsement of multiemployer bargaining.[95]

As explained above, in *Williams* the NBA maintained restrictive terms to which the players' union consented in prior collective agreements; the NBA did not impose new terms unilaterally, as the NFL did in *Brown*.[96] Judge Winter's reasoning and his stated holding, however, clearly cover the *Brown* scenario as well. As Judge Winter noted, labor law permits a single employer to impose unilaterally terms of employment over which it has bargained to impasse.[97] If multiemployer associations are to be insulated from antitrust attack for engaging in a bargaining tactic that would be legal under the labor laws for a single em-

92. *See id.* at 93-97.

93. The Court cited the rejection of proposals to outlaw multiemployer bargaining during the debates on the Taft-Hartley Act, 29 U.S.C. §§ 141-187 (1994). *See Buffalo Linen*, 353 U.S. at 94-95.

94. *See Williams*, 45 F.3d at 692.

95. *See id.*

96. *See id.* at 686, 687.

97. *See id.* at 691.

ployer, then the NFL's unilateral imposition of the flat wage for developmental squad players after bargaining to impasse also must be exempt from antitrust challenge. Indeed, Judge Winter concluded his analysis by rejecting the *Williams* plaintiffs' theory because it would prevent a group of printers from bargaining to impasse and implementing only a five percent wage increase, rather than the ten percent raise demanded by the union.[98] Such constraints on employers, asserted Judge Winter, cannot result in "collective bargaining as intended by Congress."[99]

Not surprisingly the *Williams* decision provided a strong basis of support for the District of Columbia Circuit Court of Appeals' reversal of the district court's rejection of the NFL's exemption defense in *Brown*.[100] Relying heavily on *Williams*, Judge Harry Edwards held that the antitrust laws allowed the NFL to take the same unilateral action after impasse that labor law doctrine makes clear is allowable for a single employer.[101] Judge Edwards, like Judge Winter, argued that it was "wholly untenable" that the presence of a multiemployer bargaining unit should affect the tactics available to the parties.[102] The analysis in *Brown* only supplemented that in *Williams* by connecting the antitrust exemption for multiemployer bargaining with the nonstatutory labor exemption delineated in the earlier Supreme Court decisions.[103] Judge Edwards read these cases broadly to shield not only collective bargaining agreements, but also any part of a collective bargaining process that is legal under federal labor law.[104] Restraints, therefore, that are imposed through such a process, and that primarily affect only a labor market subject to such a process, cannot be condemned under the antitrust laws.[105]

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98. *See id.* at 693.
99. *Id.*
100. *See* Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995), *rev'g* 821 F. Supp. 20 (D.D.C. 1993).
101. *See id.* at 1056-57.
102. *See id.* at 1055.
103. *See id.* at 1056.
104. *See id.* at 1049-51.
105. *See id.* at 1046.

III.

In order for the players' lawyers in *Brown* to fare better before the Supreme Court, they had to provide a compelling answer to the argument that their antitrust claims threatened the established process of multiemployer bargaining in a range of industries regulated by federal labor laws. This need became even more acute when amici briefs from employer associations representing industries heavily engaged in multiemployer bargaining, such as trucking, construction, shipping, hospital care, coal mining, railroad, and entertainment, inundated the Supreme Court.[106] Each of these briefs emphasized that even if multiemployer bargaining is mandatory in the sports industry, in which clubs belong to a joint venture in marketing team competitions,[107] and therefore must establish at least some common terms of employment, in other industries it rests on the consent of each employer and union involved.[108] The amicus

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106. *See* Brief of the Alliance of Motion Picture and Television Producers as Amicus Curiae, *Brown* (No. 95-388) [hereinafter Brief of the Alliance]; Brief for American Trucking Associations as Amicus Curiae, *id.*; Brief Amicus Curiae for the Associated General Contractors of America, Inc., *id.*; Brief of Bituminous Coal Operators' Association, Inc. and Trucking Management, Inc. as Amici Curiae, *id.*; Brief on the Merits for Carriers Container Council, Inc. et al. as Amici Curiae, *id.*; Brief of the Chamber of Commerce of the United States of America and the National Association of Manufacturers as Amici Curiae, *id.*; Brief of League of Voluntary Hospitals and Homes of New York et al. as Amici Curiae, *id.*; Brief of the National Electrical Contractors Association, Inc. as Amicus Curiae, *id.*; Brief of the National Railway Labor Conference as Amicus Curiae, *id.*

107. *See* North Am. Soccer League v. NLRB, 613 F.2d 1379 (5th Cir. 1980) (enforcing a Board order requiring teams in a professional soccer league to bargain as "joint employers" in a league-wide bargaining unit).

108. The National Labor Relations Board's (NLRB or "the Labor Board") conditioning of multiemployer bargaining on the consent of each employer and of the union representative derives from the fact that the formation of multiemployer units is not explicitly authorized by the National Labor Relations Act. Section 9(b) refers only to units defined by employer, craft, plant, or subdivision thereof. *See* National Labor Relations Act § 9, 29 U.S.C. § 159(b) (1994). It is, thus, an unfair labor practice for either the union or an employer to attempt to coerce the other side into commencing multiemployer bargaining. *See* United Mine Workers, Local No. 1854, 238 N.L.R.B. 1583, 1586-87 (1978), *rev'd on other grounds*, NLRB v. Amax Coal Co., 453 U.S. 323 (1981).

Nevertheless, the Labor Board, with judicial assent, asserted the authority to recognize multiemployer units voluntarily agreed to by all participants soon after passage of the Act. *See* Shipowners' Ass'n, 7 N.L.R.B. 1002, 1040-41 (1938), *aff'd*,

briefs issued the quite credible warning that employers would have to reevaluate their participation in multiemployer bargaining if the Supreme Court held that jointly engaging in a bargaining tactic that is legal under the labor laws but not consented to by a union could subject them to antitrust litigation.[109] If employers withdrew from multiemployer bargaining units, then employees and employers of multiemployer bargaining would lose the common benefits recognized in *Bonanno Linen*.

Logic and precedent offered the players' lawyers in *Brown* two approaches to allay concerns about the general impact on multiemployer bargaining of allowing the NFL to be subjected to antitrust scrutiny. The players' lawyers could have attempted to distinguish the purpose and effect of joint actions by employers engaged in collective bargaining in the sports industry from those of joint actions in other industries. Alternatively, the players' lawyers could have attempted to distinguish the particular joint action challenged in *Brown*, the unilateral imposition of terms after impasse, from other joint actions, such as a joint lockout, that have been specifically endorsed for multiemployer bargaining under federal labor law.[110] The first distinction had to rest on some important difference between collective bargaining in the sports industry and multiemployer bargaining in other industries. That distinction would enable the Court to allow players to mount antitrust challenges to employer restraints in the sports industry without disturbing collective bargaining in other industries.[111] The second distinction had to explain why allowing employees in any industry to challenge joint employer

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308 U.S. 401 (1940). Moreover, since 1958 the Labor Board has held that, when a union and employers agree to negotiate in a multiemployer unit, neither side can withdraw from the unit after negotiations on a collective agreement have begun, absent "unusual circumstances" or the consent of the other side. *See, e.g.*, Retail Assocs., Inc., 120 N.L.R.B. 388, 395 (1958). In 1973, the Labor Board held that a bargaining impasse is not an unusual circumstance justifying an employer's withdrawal from a unit without union consent. *See* Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23-24 (1973) (denying retroactive enforcement of new doctrine because employer could not anticipate change in law).

109. *See, e.g.*, Brief of the Alliance at 1, *Brown* (No. 95-388) (declaring that adoption of the players' position "would threaten the continuation of multi-employer bargaining" in the entertainment industry and other industries).

110. *See supra* note 92 and accompanying text.

111. *See infra* Part IV.B for a discussion of how this distinction should work.

imposition of unilateral terms after impasse would not threaten multiemployer bargaining.

The players' lawyers chose to make the second distinction. Supported by Judge Patricia Wald's dissent from the Court of Appeals decision in *Brown*,[112] they argued that the unilateral implementation of terms after impasse should be treated not as an economic weapon or tactic of bargaining, like strikes or lockouts, but rather as a "one-sided substitute for a bargaining agreement."[113] That is, unilateral imposition is not a "means" by which to advance bargaining, but rather is "an end in itself, principally designed to serve the employers' business interests rather than to influence the bargaining process."[114] In the view of the players' lawyers, and Judge Wald, terms of employment unilaterally imposed after impasse in collective bargaining should be as subject to state and federal background laws as are employment terms imposed unilaterally outside of collective bargaining.[115] In this view, exposure of such terms to antiturst challenge does not disrupt the regulation of the collective bargaining process that is the province of federal labor law.[116]

The players' lawyers also distinguished unilateral imposition of terms from bargaining tactics in order to answer the claims of Judge Winter, and of the amici from other industries, that allowance of the players' antitrust claims would threaten multiemployer bargaining by denying employers an important bargaining strategy.[117] The players' brief stressed that antitrust scrutiny of unilaterally imposed employment restraints would not deny employer associations the collective exercise of a "panoply of economic weapons,"[118] including: lockouts;[119] the

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

113. Brief for Petitioners at 36, *Brown* (No. 95-388).

114. *Id.* at 36; *see also Brown*, 50 F.3d at 1066-69 (Wald, J., dissenting) (arguing that the employers' unilateral imposition of the fixed salary "had nothing to do with tactical [bargaining] advantages," but everything to do with self-interest).

115. *See Brown*, 50 F.3d at 1066-69; Brief for Petitioners at 36, *Brown* (No. 95-388).

116. *See Brown*, 50 F.3d at 1069 (Wald, J., dissenting).

117. *See* Brief for Petitioners at 37-41, *Brown* (No. 95-388).

118. *Id.* at 40.

119. *See id.* (citing NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of

hiring of temporary replacement workers during lockouts;[120] and the maintenance of a strike insurance fund to reduce the impact of a whipsaw strike directed at one of their members.[121] The brief also asserted that each individual employer could independently impose employment terms, such as the flat salary for developmental squad players at issue in *Brown*, without being subject to antitrust challenge, as long as the association of employers, like the NFL, did not enforce the terms.[122] The brief then claimed that "these options provide sufficient flexibility for employer associations to bargain jointly for the terms they want."[123]

The players' brief, however, did not adequately explain how the Court could allow the NFL's unilateral imposition of the flat salary to be subject to antitrust attack without also exposing Judge Winter's printers and multiemployer associations in other industries[124] to potential antitrust challenges for jointly imposing an employment term other than that for which a union had bargained to impasse. The players' proposed rule would operate identically in the printing or trucking industry; employer associations in each industry would be insulated from antitrust attack for their joint use of economic weapons to coerce the union's agreement to economic restraints, but they would not be insulat-

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Teamsters (*"Buffalo Linen"*), 353 U.S. 87, 97 (1957)).

120. *See id.* (citing NLRB v. Brown, 380 U.S. 278, 285 (1965)).

121. *See id.* at 40 (citing *Brown*, 380 U.S. at 285; *Buffalo Linen*, 353 U.S. at 97); *cf.* Kennedy v. Long Island R.R. Co., 319 F.2d 366, 373-74 (2d Cir. 1963) (allowing competitive railroads to pool funds to protect against a strike directed at one of their number).

122. *See* Brief for Petitioners at 41, *Brown* (No. 95-388).

123. *Id.* Judge Wald made the same argument. She also would include multiemployer 'bargaining tactics,' such as joint lockouts and strike insurance pacts, within the scope of the nonstatutory exemption, *see Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1067 n.7 (D.C. Cir. 1995) (Wald, J., dissenting), and concluded that such options were adequate to preserve "the 'delicate balance' of the collective bargaining process," without also exempting postimpasse unilateral imposition of terms, *id.* at 1070 (Wald, J., dissenting). Unlike the *Brown* players' lawyers, moreover, Judge Wald suggested that an employers' association's maintenance of the status quo in employment terms after impasse, as in *Williams*, should also be exempt from antitrust challenge. *See id.* at 1070 & n.9 (Wald, J., dissenting). Judge Wald did not clarify how exempting status quo terms was consistent with her distinction between "terms" and "tactics."

124. *See supra* text accompanying note 98; *infra* note 125.

ed if they imposed such restraints unilaterally.[125]

The Supreme Court's decision in *Brown* makes clear that the players' lawyers chose the wrong distinction. The players' lawyers failed to distinguish the purpose and effect of traditional multiemployer bargaining from that conducted in the sports industry. Consequently, the Court's rejection in *Brown* of the proposed distinction of unilateral imposition of terms from other joint employer actions during collective bargaining was fully predictable.

Justice Breyer's opinion for the eight-Justice majority expressed concern that subjecting the "familiar" multiemployer bargaining practice of jointly implementing proposed terms after impasse to antitrust law would "place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve."[126] Citing *Buffalo Linen*, *Bonanno Linen*, a congressional committee report, and a statistical appendix to his own opinion showing that more than forty percent of major collective bargaining agreements in the United States are the products of multiemployer bargaining, Justice Breyer described multiemployer bargaining as "a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor . . . [that] comprise[] an important part of the Nation's industrial relations system."[127] Perhaps influenced by the threats of amici employer associations to review

125. The players' brief did assert that "[i]n the more traditional bargaining context, where labor organizations seek standardized industry-wide compensation terms," Brief for Petitioners at 39, *Brown* (No. 95-388), rather than the preservation of individual negotiations that players' unions seek in the sports industry, there have been no significant antitrust challenges because employees in those other industries "accept the legitimacy of common employment terms for all employees." *Id.* The absence of such challenges, however, may indicate that unions, as well as employers, engaged in traditional multiemployer bargaining assumed that the antitrust laws were not applicable. Significantly, the brief did not explain why antitrust challenges could not be expected in other industries if the Court were to adopt the players' suggested rule. Workers in a printing industry union who accept the legitimacy of common employment terms might still wish to use the antitrust laws to challenge a printers' association's unilateral imposition of a pay increase below that for which the union bargained to impasse. Based on the position taken in the players' brief in *Brown*, the workers could claim that the printers would have to obtain the union's consent before the printers could jointly impose terms.

126. *Brown*, 116 S. Ct. at 2122.

127. *Id.*

their participation in multiemployer bargaining,[128] as well as the absence of briefs from unions outside the sports and entertainment industries or from the NLRB that might have included countervailing assurances,[129] Justice Breyer expressed unwillingness to allow antitrust challenges to multiemployer collective bargaining practices accepted under the federal labor laws.[130]

The players' arguments failed to persuade the eight-Justice majority that multiemployer associations would retain adequate strategic options at impasse in bargaining if the joint imposition of terms were subject to antitrust attack. The majority opinion rejected the players' contention that individual employers in a multiemployer bargaining association would be free to impose terms independently after impasse without the threat of antitrust attack.[131] The opinion noted that labor law restricts postimpasse imposition to terms "reasonably comprehended" within the employers' last offer,[132] and that a joint action by all the employers to "impose terms similar to their last joint offer . . . invite[s] an antitrust action premised upon identical be-

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128. *See supra* note 109.

129. The NLRB did not join the brief for the United States and the Federal Trade Commission as amici curiae supporting the petitioners. A footnote at the end of this brief, raising more questions than it answered, stated that "[t]he National Labor Relations Board concurs that the court of appeals' expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed." Brief for the United States and the Federal Trade Commission as Amici Curiae at 27 n.10, *Brown* (No. 95-388). In any event, the government's brief did not address the potential impact of allowing the players' claims on multiemployer collective bargaining in other industries.

Unions in the entertainment industry filed the only other amicus brief in support of the players from parties outside the sports industry. *See* Brief of the Screen Actors Guild, Inc. et al. as Amici Curiae, *Brown* (No. 95-388). This brief claimed that an exemption of the NFL's unilateral imposition of terms would free movie production companies to cap the salaries of movie stars, *see id.* at 6-10; it made no attempt to allay concerns about the impact of a ruling for the developmental squad players on multiemployer collective bargaining in other industries.

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

131. *See id.*

132. The Court cited the case that first used the "reasonably comprehended" language, *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968), as well as a more recent confirmation, *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989). *See Brown*, 116 S. Ct. at 2121. It also cited the Supreme Court decision from which this doctrine is drawn, *NLRB v. Katz*, 369 U.S. 736, 745 & n.12 (1962). *See Brown*, 116 S. Ct. at 2121.

havior (along with prior or accompanying conversations) as tending to show a common understanding or agreement."[133] The majority opinion did not address directly the option of employer-imposed economic coercion, such as joint lockouts and hiring temporary replacement workers. The opinion viewed these options as "limited" and potentially as vulnerable to antitrust challenge as the joint imposition of terms if the *Brown* plaintiffs prevailed.[134]

The last view reflects Justice Breyer's summary rejection of the players' lawyers' attempt to press Judge Wald's distinction of postimpasse employer agreements about bargaining "tactics" from the postimpasse joint imposition of bargaining "terms."[135] Justice Breyer stressed prior judicial and Board acceptance of the imposition of terms at impasse as a bargaining "tactic" designed to compel a union to return to the bargaining table willing to accept further compromises.[136] Justice Breyer further

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

134. *See id.* at 2124. The Court's description of the lockout and temporary replacement options as "limited" is included in an analysis dismissing a position taken by the Solicitor General in a brief filed for the United States and the Federal Trade Commission. *See id.* The Solicitor General did not rely on the distinction between bargaining tactics and bargaining terms stressed by the players' union and Judge Wald. He instead argued that the blanket nonstatutory exemption should be completely lifted when an impasse in collective bargaining is reached. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 17, *Brown* (No. 95-388). Thus, the Solicitor General argued that a joint lockout and hiring of temporary replacements, as well as the joint imposition of terms, could be challenged if implemented after impasse. *See id.* The Court dismissed this position as providing limited and inadequate options for employers in multiemployer associations who reach impasse in collective bargaining, because these options (other than the negotiation of separate interim agreements), including the joint use of economic coercion, could be subject to potential antitrust attack. *See Brown*, 116 S. Ct. at 2124. The Court also emphasized that employers cannot be certain how long a particular impasse will last or when an antitrust court would mark its beginning, and that employers may have to deal with multiple impasses in any negotiation. *See id.* at 2124-25.

135. *See supra* notes 112-16 and accompanying text.

136. *See id.* at 2125; *see also* Colorado-Ute Elec. Assn., Inc. v. NLRB, 939 F.2d 1392, 1404 (10th Cir. 1991), *cert. denied sub nom.* International Bhd. of Elec. Workers, Local No. 111 v. Colorado-Ute Elec. Ass'n, 504 U.S. 955 (1992); Circuit-Wise, Inc., 309 N.L.R.B. 905, 921 (1992); Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973). The Court also cited *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965), in which it had characterized the unilateral imposition of terms as one of the "economic weapons" available to employers in bargaining. *See Brown*, 116 S.

suggested that applying Judge Wald's distinction would require antitrust courts to investigate the subjective motivations of employers to determine whether they intended the imposition of terms in a particular case to terminate rather than advance bargaining, and concluded that such an "amorphous" judicial inquiry would be inconsistent with the regulation of collective bargaining by the national labor laws.[137]

IV.

A.

The Court's treatment of the arguments pressed by the players' lawyers in *Brown* deserves little criticism. Without a clear directive from Congress, it would have been irresponsible for the Court to risk the destabilization of multiemployer collective bargaining by effectively denying the option of postimpasse imposition of terms to multiemployer associations outside of the

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Ct. at 2125.

137. *See Brown*, 116 S. Ct. at 2125. Justice Breyer also dismissed an argument advanced by both the players, *see* Brief for Petitioners at 29-30, *Brown* (No. 95-388), and by Judge Wald in her dissent, *see* Brown v. Pro Football, Inc., 50 F.3d 1041, 1068-69 (D.C. Cir. 1995) (Wald, J., dissenting), based on prior Court decisions finding not preempted by federal labor law state statutes that require employers to grant minimum benefits to all employees, including those represented by unions. *See Brown*, 116 S. Ct. at 2126 (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). The players and Judge Wald contended that these cases established that federal labor law allows other law to regulate the substance of the employment terms implemented by an organized employer, even though it does not allow other law to regulate the process of collective bargaining. *See id.* As stated in the text, however, Justice Breyer and the *Brown* majority recognized that the unilateral imposition of terms could itself be part of the process of bargaining. *See id.* at 2127. Surely a state law could not directly prohibit multiemployer bargaining associations from unilaterally implementing terms after impasse. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 155 (1976) (holding that state law cannot upset the balance of economic power by regulating bargaining tactics not regulated by federal labor law). Thus, it was consistent for the Court to hold in *Brown* that antitrust law could not condemn the process of joint imposition of terms, the substance of which both state and federal law could regulate. By contrast, had the NFL jointly imposed a wage for developmental squad players that was below the minimum wage demanded under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1994), then nothing would have exempted the league from a FLSA challenge.

sports industry. The Court had good reason to understand that multiemployer collective bargaining units had often utilized such an option and that its availability was important to the attractiveness of such bargaining for many employers.[138] Furthermore, the players' distinction between the joint imposition of terms and joint economic coercion to induce union agreement to the same terms was not ultimately persuasive. Labor law and labor law policy make no such distinction; both postimpasse imposition of terms and economic coercion are part of the same process of collective bargaining, whether through single employers or multiemployer associations. It is hard to understand why antitrust law should accept economic coercion to compel unwilling victims to accept restraints if it does not accept the direct imposition of the restraints.

Nevertheless, the result in *Brown* does not present a proper accommodation of the federal antitrust and labor laws. The accommodation is inadequate because it does not account for the distinction that the players' lawyers failed to make between the purpose and effect of joint employer bargaining tactics in the sports industry and that of similar joint bargaining tactics in other industries. Interestingly, Justice Breyer's majority opinion begins to ring hollow when he attempts to respond to the suggestion of this distinction in the insightful dissent of Justice Stevens.[139]

Justice Stevens began his dissent with a statement of the premises of the relevant antitrust and labor laws, followed by an explanation of why the potential conflict between these premises has required labor exemptions from antitrust prohibitions.[140] Antitrust law assumes that collusion among competitive economic entities may produce prices that ultimately harm consumers.[141] Labor law assumes that without collusion through collective action, applicants for employment may not be able to achieve a price for their labor that is as high as society deems fair and in society's ultimate interest.[142] The labor laws there-

138. *See supra* note 136.
139. *See Brown*, 116 S. Ct. at 2126.
140. *See id.* at 2128 (Stevens, J., dissenting).
141. *See id.* (Stevens, J., dissenting).
142. *See id.* at 2128-29 (Stevens, J., dissenting).

fore "were enacted to enable collective action by union members to achieve wage levels that are higher than would be available in a free market."[143] Quoting language from the *Connell* decision, Justice Stevens explained the purpose of both the statutory and nonstatutory exemptions as ensuring that employees, without interference from antitrust law, can do that which the labor laws are to facilitate: collective action to achieve *supra*competitive wages.[144]

Justice Stevens then demonstrated why extension of the nonstatutory exemption to the *Brown* case cannot serve that purpose. He briefly acknowledged, without much elaboration, that a union's efforts to achieve higher wages through collective bargaining may also be facilitated by protecting collective action taken by employers in multiemployer units "in response to a collective bargaining agent's demands for higher wages."[145] He asserted, however, that the purpose of the nonstatutory exemption cannot be served by protecting collusion between employers to "depress wages below the level that would be produced in a free market" by denying "employees the opportunity to negotiate their salaries individually in a competitive market."[146] For Justice Stevens, the primary aspect of both the *Brown* case and multiemployer bargaining in the sports industry in general that makes them both atypical, is that "it is the employers, not the employees, who seek to impose a noncompetitive uniform wage on a segment of the market and to put an end to competitive wage negotiations."[147] Thus, in a case like *Brown* the goals of the antitrust and labor laws are not in tension; both are served by preventing labor market restraints that would depress wages below competitive levels.

Justice Stevens thereby provided the critical piece missing from the players' argument to the Court, a distinction of the joint action of the NFL clubs in *Brown* from the joint actions, including the joint postimpasse imposition of terms, traditionally taken by employers bargaining in multiemployer associations in

143. *Id.* at 2129 (Stevens, J., dissenting).
144. *See id.* (Stevens, J., dissenting).
145. *Id.* (Stevens, J., dissenting).
146. *Id.* at 2129-30 (Stevens, J., dissenting).
147. *Id.* at 2130 (Stevens, J., dissenting).

other industries. Justice Stevens provided an answer to Judge Winter's hypothetical involving the printers who wished to impose a five percent wage increase, rather than the ten percent increase demanded by their employees' union,[148] and to the amici employer associations who warned of the disintegration of multiemployer bargaining in their industries.[149] An exemption could protect employers who were joining together to resist a union's efforts to raise wages above competitive levels, without also protecting employers who were joining together to deny particular union-represented employees the benefits of a competitive labor market. The Court could exempt the typical multiemployer association's implementation of some collective term of employment at a level below the *supra*competitive level sought by a union, without also exempting a sports league's unilateral implementation of restraints in contravention of a players' union's desire to allow the players to remain free for competitive, individual bargaining.

Justice Breyer's response to Justice Stevens's effort to distinguish the *Brown* case and the sports industry was not convincing. Breyer characterized Stevens's distinction as merely highlighting the fact that football players often have individual talents that enable them to negotiate their pay individually.[150] Breyer then simply asserted that the majority did not understand how this "feature" of bargaining in professional football should affect the underlying regulatory framework, and concluded that "it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power)."[151] Justice Breyer did not respond to Justice Stevens's argument that the NFL owners in *Brown* did more than merely resist an effort by the players' union to raise wages above their competitive level, but also colluded to depress the wages of the developmental squad players below those that the players could have commanded in a competitive market.[152] Nor did Breyer's opinion respond to

148. *See supra* text accompanying notes 98, 125.
149. *See supra* text accompanying notes 106-08, 125.
150. *See Brown*, 116 S. Ct. at 2126.
151. *Id.* at 2126.
152. *See id.* at 2130 (Stevens, J., dissenting).

Stevens's contention that there is no conflict between the premises of labor law and those of antitrust law in such a case.[153]

Justice Stevens chided the majority for misunderstanding the relevance of his distinctions between *Brown* and typical multiemployer bargaining, and for failing to probe, as the Court did in *Pennington*, whether the policies of labor law support extending the labor exemption to the NFL's unilateral imposition.[154] In the end, however, reading the *Brown* opinions leaves the impression that Justice Breyer responded summarily to Justice Stevens because Breyer failed to appreciate the full force of Stevens's position.

Such a failure surely would be understandable. Justice Stevens did not provide a description or defense of how antitrust courts could apply the distinction he suggested between employer collusion to depress a labor market below a competitive wage and employer collusion to resist collective employee efforts to inflate a labor market above such a wage. Instead, he provided only a skeletal justification for the distinction, and then further obscured and diluted it by highlighting two other unrelated aspects of the *Brown* case.[155] He also repeatedly emphasized that the flat wage was a restraint never before imposed by the employers or agreed to by the union,[156] and critiqued at length the majority's reliance on Justice Goldberg's concurrence in *Jewel Tea* and dissent in *Pennington*.[157] More importantly, the arguments submitted to the Court, including those advanced by the players' lawyers, did not clarify or develop Justice Stevens's distinction.

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153. *See id.* at 2131-34 (Stevens, J., dissenting).

154. *See id.* at 2130-32 (Stevens, J., dissenting).

155. Justice Stevens stressed the likelihood that the unilateral imposition of the flat $1000 wage was not designed to recharge a stalled bargaining process and the limited actual bargaining that preceded the NFL's claim of impasse. *See id.* at 2130 (Stevens, J., dissenting).

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

157. Justice Stevens argued that "the main theme of [Justice Goldberg's] opinion was that the antitrust laws should not be used to circumscribe bargaining over *union demands*." *Id.* at 2133 (Stevens, J., dissenting) (emphasis added). Stevens also quoted heavily from a brief filed by then-attorney Goldberg in the *Flood* case, in which the former Justice distinguished unilaterally imposed employer restraints from the collectively bargained restraints at issue in both *Jewel Tea* and *Pennington*. *See id.* (Stevens, J., dissenting).

We will never know whether the result in *Brown* was contingent on the choice made by the players' lawyers not to press the distinction suggested by Justice Stevens. Nevertheless, in light of *Brown*'s potential impact on collective bargaining in at least two industries, sports and entertainment, and of the real possibility that the Court will confront attempts to expand the broad labor exemption suggested by the analysis of *Brown*, a more persuasive case employing Justice Stevens's distinction is worth exploring.

B.

This case should begin by acknowledging, as did Justice Stevens, that the judicially created nonstatutory labor exemption requires a second component that accommodates the facilitation of multiemployer bargaining.[158] This second component should be independent of and in addition to that component recognized in *Jewel Tea* and developed in *Mackey*, that the exemption protects labor market restrictions as long as a collective bargaining agent has voluntarily consented to those restrictions.[159] The second component should protect employers' postimpasse, joint, unilateral imposition of terms, as well as other lawful conduct that grows out of and is directly related to the multiemployer bargaining process,[160] but only insofar as the conduct resists a union's effort to achieve *supra*competitive terms of employment through collective employee bargaining power. This second component should not protect joint bargaining conduct that imposes or seeks to coerce a union to agree to impose restraints to prevent employees from bargaining freely as individuals in a competitive labor market.[161] Therefore, this multiemployer bargaining component of the nonstatutory exemp-

158. *See id.* at 2131 (Stevens, J., dissenting) (citing NLRB v. Brown, 380 U.S. 278, 289 (1965)).

159. *See supra* text accompanying notes 73-75.

160. *Cf. Brown*, 116 S. Ct. at 2127 (employing similar language to justify the application of the nonstatutory antitrust exemption).

161. *See id.* at 2129-30 (Stevens, J., dissenting) ("[I]t would be most ironic to extend an exemption crafted to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market.").

tion should not distinguish between multiemployer associations using weapons of economic coercion, such as lockouts, to achieve restrictive employment and their imposing restrictive terms unilaterally and directly.

The scope of the multiemployer bargaining component of the exemption should be no broader than is its justification.[162] Congress, the Labor Board, and the courts have approved multiemployer bargaining in part to allow employers to join together to offset and stabilize the employee collective bargaining power protected by the labor laws.[163] Such bargaining has not been approved to allow employers to achieve through joint collective bargaining what the antitrust laws presumably would not allow them to achieve through collusion outside collective bargaining: the depression of employment terms below the level that would be set in a free, competitive labor market.[164] As suggested by Justice Stevens, allowing such collusion would serve neither the goals of the labor laws nor those of the antitrust laws.[165]

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162. *See generally* National Basketball Ass'n v. Williams, 45 F.3d 684, 688-89 (2d Cir. 1995) (explaining the purposes of multiemployer bargaining).

163. *See* NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters (*"Buffalo Linen"*), 353 U.S. 87, 94-96 (1957); Richard A. Bock, Note, *Multiemployer Bargaining and Withdrawing from the Association After Bargaining Has Begun: 38 Years of "Unusual Circumstances" Under* Retail Associates, 13 HOFSTRA LAB. L.J. 519, 520 (1996). As stated by the Court in *Buffalo Linen*, the debates during consideration of the Taft-Hartley amendments to the NLRA over proposals to limit or outlaw multiemployer bargaining "demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95.

164. *Cf.* Leslie, *supra* note 83, at 637 n.30 (1996) ("[C]ases involving employer cartel agreements in the labor market are apparently quite rare. . . . They may be rare because it is widely assumed that such conduct violates the antitrust laws.").

165. *See Brown*, 116 S. Ct. at 2129 (Stevens, J., dissenting). It might be argued that the authority to impose restraints jointly on individual bargaining helps employers to resist union efforts to raise wages collectively above a competitive rate in that employers can use the threat of restraints on individual bargaining as an inducement of union agreement to a compromise on collective terms. Multiemployer bargaining, however, has been approved in part to stabilize the impact of collective employee bargaining power, not to minimize that power; otherwise, multiemployer bargaining would be in tension with the original goal of the NLRA to allow employees to join together to raise wages, and it would not be conditioned on union consent.

This does not mean that employers should be vulnerable to antitrust challenge when they induce a union to agree to employment terms that restrict the ability of some employees represented by the union to achieve benefits equal to those they could have achieved as individuals in a competitive labor market. The first, consent-based component of the nonstatutory exemption, as approved in *Jewel Tea*[166] and developed in *Mackey*,[167] should continue to apply independently of the multiemployer bargaining component. The first component should protect labor market restrictions that depress wages, as well as those that inflate wages, provided a collective bargaining agent voluntarily accepts these restrictions. The rationale for this first component, as suggested in this Article's discussion of *Mackey*,[168] derives from federal labor law's investment of the exclusive bargaining authority of unions enjoying majority support in some appropriate bargaining unit, including one of

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See Bock, *supra* note 163, at 519-20 (explaining that employers use multiemployer bargaining to gain leverage when dealing with larger unions, and that such bargaining potentially works to the advantage of the union by fostering security). Furthermore, allowing employers jointly to impose restraints on individual bargaining may enable them to push wages not only down toward a competitive free market level, but also, for at least some workers within a bargaining unit, below that level.

It also might be argued that antitrust law need not be concerned with the aggregate wages of employees in a union bargaining unit being pushed below a competitive level because it would not be rational for employees to continue collective bargaining that had not raised their aggregate wages above such a level. Employees, however, may be attracted to collective bargaining for reasons other than the enhancement of wages and other benefits. Moreover, in some industries, such as the sports industry, employees rationally may conclude that collective bargaining enables them to achieve aggregate wages above that which they could achieve through bargaining as individuals against an employer cartel, even with the opportunity of uncertain antitrust litigation. Furthermore, depressing the wages of some employees below a competitive level may have efficient, as well as distributive, effects, even if aggregate wages in a bargaining unit are at a competitive level. For instance, some marginal professional football players could have been discouraged from continuing to play football by the NFL's cap on developmental squad wages, regardless of the salaries of NFL stars. In any event, the argument against antitrust liability treated in this paragraph is based on antitrust policies, rather than labor law goals, and therefore should be treated as part of the antitrust analysis of particular restraints, rather than as support for a blanket labor exemption.

166. *See supra* text accompanying notes 40-44.

167. *See supra* text accompanying notes 73-75.

168. *See supra* notes 58-75 and accompanying text.

multiemployer breadth.[169] That authority, as affirmed by the Court, includes the power to trade the bargaining advantages of individual employees for the collective good of the bargaining unit.[170]

When bargaining with single employers, unions must have authority to trade the bargaining leverage of especially skilled members of their unit by agreeing to a flat wage that may be below that which those members could extract in individual bargaining, but is still above that which most members of the unit could command. When bargaining with a multiemployer unit unions must also have authority to trade the rights of talented individual employees in order to achieve the maximum aggregate gains for represented employees. If unions did not have this authority, employers could not agree to accept a set wage level for a group of especially skilled employees without fear of antitrust liability. Collective bargaining agreements in the sports industry that incorporate restraints on individual player mobility and bargaining trade talented players' rights under the antitrust laws for collective benefits that may be attractive to a majority of the bargaining unit.[171]

Commentators appropriately criticized the *Mackey* decision's conditioning of the nonstatutory exemption's availability for a challenged employment restriction on whether it was the "product of bona fide arm's-length bargaining."[172] Implicitly, this decision authorized antitrust courts to evaluate collective bargaining agreements that the labor laws insulate from public review.[173] The first component of the nonstatutory exemption should encompass any employment restriction to which a union

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169. *See* 29 U.S.C. § 159(a) (1994).

170. "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

171. *Cf.* Scott J. Faraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 163 n.38 (1985) (conceding that although players do not benefit from a salary cap, the players do benefit from other provisions in the collective bargaining agreement of which the salary cap is a part).

172. Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976).

173. *See supra* note 70 and accompanying text.

has agreed, for the time period it agreed to that restriction. The courts should presume that the union received some quid pro quo for its membership. Nevertheless, *Mackey*'s attempt to impose a "bona fide arm's-length bargaining" condition on the *Jewel Tea* exemption reflects the Eighth Circuit's understanding of the first, union consent or trade, basis for insulating employer-initiated labor market restrictions from antitrust challenge.[174]

Note, however, that, unlike the multiemployer bargaining facilitation component's insulation of all joint employer bargaining conduct based on the collective bargaining relationship, this first component insulates employer collusion to impose restrictions on free, individual employee bargaining, but only insulates restraints for as long as agreements with unions are in effect. Employer restraints on labor markets that are not imposed to resist union efforts to insist on collective terms should be insulated from antitrust challenge only if the restraints retain the consent of a collective bargaining representative.[175] A sports league, like other multiemployer associations, should be able to impose labor market restrictions to depress wages below a competitive market level only for as long as the relevant players' union consents.[176]

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174. *See Mackey*, 543 F.2d at 615-16.

175. *Cf.* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2129 (1996) (Stevens, J., dissenting) (explaining that the purpose of the "limited judicial exemption" is to "accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions"); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975) (holding that the nonstatutory labor exemption did not apply to an agreement achieved outside of a collective bargaining relationship).

176. The *Brown* majority, therefore, correctly rejected the suggestion of the United States government's brief and that of some lower courts and commentators, that the nonstatutory exemption should continue for terms agreed to by a union until, but only until, a bargaining impasse is reached on a new collective agreement. *See Brown*, 116 S. Ct. at 2124-25. For examples of the rejected argument, see *Powell v. National Football League*, 678 F. Supp. 777, 788-89 (D. Minn. 1988) (concluding that the labor exemption for a mandatory bargaining subject survives the expiration of a collective bargaining agreement until the parties reach impasse as to that particular issue), *rev'd on other grounds*, 930 F.2d 1293 (8th Cir. 1989), and Goldman, *supra* note 39, at 679-84 (suggesting that an employer's labor market restraint should not remain exempt postimpasse unless: No party seeks to discuss the expired restraint or the union challenges a "parallel agreement" among members of a multiemployer bargaining group). As the *Brown* majority explained, however, impasse may be tem-

In support of his view that joint employer restrictions on the free competitive operations of union-organized labor markets should be exempt from antitrust review, regardless of union consent, Judge Winter repeatedly has asserted that the establishment of a collective bargaining relationship extinguishes the rights of bargaining unit members to bargain individually with their employers.[177] He has stated that any rights to bargain individually that exist during such a relationship must be secured by the union through the collective bargaining process.[178] Judge Winter's argument distorts not only the relevant labor and antitrust law issues, but also the nature of collective bargaining in an industry like sports, where especially skilled employees bargain individually for many employment terms.[179]

First, even without being part of a collective bargaining unit, no individual employee or employment applicant has the legal right to bargain with any employer. An employer with no collective bargaining obligations simply may offer take-it-or-leave-it terms to the labor market and hire those who take the terms. The employer has full discretion under the common law to decide whether it will bargain with any individual employee.[180]

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porary and does not necessarily mark the end of the collective bargaining process; it therefore should not bound the period during which employers in multiemployer associations may take joint action to resist efforts by a union to achieve collective *supra*competitive benefits. *See Brown*, 116 S. Ct. at 2124-25; Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982). Using impasse as a temporal boundary only would encourage unions to force an impasse through bargaining obduracy. *Cf. Bonanno Linen*, 454 U.S. at 412 n.8 (discussing the potential for a party to strategically "precipitate an impasse"). Absent a union's consent to extend its acceptance of restrictions on individual employee bargaining, however, the continued imposition of such restrictions before a bargaining impasse should be no more exempt from antitrust review than their imposition by employers after impasse. *See* Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 888-89 (1991) [hereinafter *Releasing Superstars from Peonage*].

177. *See* Caldwell v. American Basketball Ass'n, 66 F.3d 523, 528 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996).

178. *See id.*; Wood v. National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987); Jacobs & Winter, *supra* note 83, at 7-8; *see also* Brief for Respondents at 16-18, *Brown* (No. 95-388) (echoing Judge Winter's view).

179. *See Brown*, 116 S. Ct. at 2130 (Stevens, J., dissenting) (distinguishing the sports industry from other areas of labor law because player salaries are individually negotiated).

180. *See* Bowen v. United States Postal Serv., 459 U.S. 212, 220 (1983).

What the establishment of a collective bargaining relationship extinguishes is not the right of individual *employees* to bargain, but rather the right of *employers* to bargain, absent union consent, with individual employees with whom the employers would like to bargain directly.[181] The reason for this extinguishment is the protection of the union's exclusive bargaining status, not the extraction of some payment from individual employees for enjoying the benefits of collective bargaining.[182]

In the sports and entertainment industries, therefore, union-represented employees negotiate individualized employment contracts not because unions have "secured" the *employees'* rights to do so. This process rather occurs because the unions have waived part of the exclusive bargaining authority, imposed by labor law, that prevented the *employers* from bargaining directly with especially talented employees as individuals. No collective bargaining agreement in the sports or entertainment industry grants any particular employee the right to bargain individually with any employer that does not choose to exercise its preserved

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181. Indeed, the National Labor Relations Act (NLRA) does not render illegal any individual employee action; it condemns only an employer for circumvention of an exclusive bargaining agent by direct dealings with individual employees. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (holding that an employer violated its bargaining obligations under section 8(a)(5) of the NLRA by negotiating wage increases with individual employees represented by a union, even though negotiation was initiated by the employees).

Dictum in a Supreme Court decision upholding the authority of unions to enforce fines against members for crossing picket lines stated that labor law policy "extinguishes the individual employee's power to order his own relations with his employer." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). The reference to "power" rather than "right" in this passage, however, reflects the legal consequence of the selection of an exclusive bargaining agent; the individual employee can have no power to bargain individually with an employer that is legally restrained from such bargaining absent the bargaining agent's consent. *Cf. Medo Photo Supply*, 321 U.S. at 683-84 (declaring that the employer's NLRA duty to bargain collectively with the chosen representative of his employees implies a "negative duty to treat with no other") (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1936)). Thus, the Labor Act does not protect employee efforts to coerce an employer to bargain with individual employees without the consent of an exclusive bargaining representative. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 72 (1975) ("Under the [NLRA], conduct which is not protected concerted activity may lawfully form the basis for the participants' discharge.").

182. *See* Jacobs & Winter, *supra* note 83, at 8 ("Forbidding the exercise of individual bargaining is thus a means of strengthening the collectivity.").

discretion to conduct such negotiations. For instance, no NFL club would violate the League's collective agreement with the football players' union if the club independently chose to offer a low, flat wage on a take-it-or-leave-it basis to an identified group of players.[183] The club probably would suffer a dismal record during the next season, but the club would not breach any term of the League's collective bargaining agreement with the players.

More importantly, what has been at issue in cases such as *Brown* is not the right of employees to bargain individually with employers *or* the right of employers to bargain with individual employees, but rather the right of individual employees to be free from collusion by a group of competitive employers.[184] Contrary to the assertions of Judge Winter,[185] that right is founded on the antitrust laws and is not created in collective bargaining by unions.[186] For the reasons stated above, the exclusive bargaining authority granted to unions by federal labor law must include the authority to waive this right.[187] A union's exclusive bargaining authority is contracted, however, and not expanded, by extinguishing the right to be free from collusion directly upon the grant of the authority. Moreover, to hold that by choosing to be represented by a union, employees sacrifice their antitrust rights rather than merely transfer them into the union's control discriminates against employees for choosing collective bargaining. This conflicts with labor law's goal of government neutrality in employee choice on unions.[188]

Treating a union's consent to multiemployer bargaining as consent to the waiver of rights of represented employees under the antitrust laws to be free from employer collusion on labor market restraints also would serve neither antitrust nor labor law policies.[189] In the first place, such treatment would have to

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183. *See supra* note 181 and accompanying text.
184. *See Brown*, 116 S. Ct. at 2119.
185. *See supra* note 178 and accompanying text.
186. *See Brown*, 116 S. Ct. at 2127.
187. *See supra* text accompanying notes 165-71.
188. *Cf.* Livadas v. Bradshaw, 512 U.S. 107, 132 (1994) (holding preempted by federal labor law a state law that predicated the grant of benefits on whether employees chose to refrain from collective bargaining).
189. For a brief discussion of these distinct policies, see *Brown*, 116 S. Ct. at 2128-29 (Stevens, J., dissenting).

rest on a fictional construct, as no reason would exist for union leaders to waive such rights without first obtaining some concession from the employers.[190] Second, making such consent a legal condition of multiemployer bargaining effectively would abrogate antitrust rights without being necessary to encourage multiemployer collective bargaining, as long as the antitrust laws do not restrain joint employer resistance to union attempts to obtain *supra*competitive benefits through collective employee leverage.

Nor would it be sensible to allow multiemployer associations, such as sports leagues, to pressure unions to agree to the waiver of represented employees' antitrust rights. As suggested by Judge Winter in *Williams*,[191] if a multiemployer association acts as an illegal cartel in proposing and implementing labor market restrictions, it surely must be acting illegally when it resorts to economic force to enforce the restrictions.[192] Furthermore, the purposes of neither the *Mackey* union-trade component,[193] nor the *Williams* facilitate multiemployer bargaining component,[194] of the nonstatutory exemption would be served by allowing employers to engage in joint economic coercion, such as lockouts, to pressure the waiver of antitrust rights. Such pressure does not enable unions to trade antitrust rights freely for collective benefits,[195] nor is the allowance of such pressure necessary to enable multiemployer associations to resist employee collectivization of the labor market.[196]

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190. As noted below, however, by agreeing to make adequate concessions, a multiemployer association, such as a sports league, should be able to extract a long-term waiver before commencing collective bargaining on a new collective agreement. *See infra* notes 228-29 and accompanying text.

191. 45 F.3d 684 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996).

192. *See id.* at 692 ("A cartel that proposes common terms hardly ceases to be a cartel when it resorts to economic force to enforce those terms. If anything, the resort to economic force enhances rather than diminishes the effect on competition.").

193. *See generally supra* notes 58-75 and accompanying text (discussing the decision in *Mackey*).

194. *See generally supra* notes 79-99 and accompanying text (discussing the decision in *Williams*).

195. No bargainer's authority to trade is enhanced by the protection of its bargaining adversary's power to coerce.

196. Allowing employee antitrust suits against coercive tactics of multiemployer associations that are directed toward obtaining agreements on individual bargaining

It is also revealing that labor law does not distinguish between the unilateral imposition of terms and the use of economic pressure to obtain the same terms.[197] The Supreme Court has limited the statutory obligation to bargain collectively to those "mandatory" topics included within the "wages, hours, and other terms and conditions of employment" phrase in section 8(d) of the National Labor Relations Act.[198] If the Act classifies a particular topic as being a "mandatory" topic, both parties must negotiate about it in good faith,[199] either party may use economic pressure to impel the other side to compromise,[200] and, generally, neither party may attempt unilaterally to implement its proposals concerning the topic until impasse occurs.[201] The Act also permits bargaining on topics outside of the mandatory scope.[202] If the Act classifies a topic as a permissive topic for bargaining, although it may be the basis for a negotiated, voluntary compromise between the parties, neither party has a legal

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restraints need not expose employers to any uncertainty about whether they could be subject to antitrust challenge even after obtaining the union's agreement to such restraints. The law could include a rebuttable presumption that the associations did not coerce the union's actual agreement to the labor restraints. The presumption might be rebutted only by an express clause in the agreement stating that the union preserved an antitrust suit against the multiemployer association's tactics in securing the agreement. *See Releasing Superstars from Peonage*, *supra* note 176, at 887 & n.88. The clarity of such a presumption is probably worth the costs of forcing a union wanting to preserve the antitrust option to refuse to enter into an unqualified agreement before initiating suit against coercive employer tactics to obtain such an agreement. In any event, labor law generally authorizes the Labor Board, and reviewing courts, to make judgments about whether a party used coercive tactics over permissive terms. *See, e.g.*, Curry, 184 N.L.R.B. 976, 977 (1970) (ruling that the conduct of negotiations on a basis broader than the established bargaining unit is not mandatory and that the union's insistence that the employer engage in such bargaining violated the NLRA), *rev'd sub nom.* AFL-CIO Joint Negotiating Comm. for Phelps Dodge v. NLRB, 459 F.2d 374 (3d Cir. 1972).

197. *See infra* notes 198-203 and accompanying text.

198. *See* NLRB v. Katz, 369 U.S. 736, 742-43 (1962); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).

199. *See Katz*, 369 U.S. at 742-43; *Borg-Warner Corp.*, 356 U.S. at 349.

200. *See Borg-Warner Corp.*, 356 U.S. at 349 ("[W]ithin that area neither party is legally obligated to yield.").

201. *See Katz*, 369 U.S. at 747 ("Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.").

202. *See Borg-Warner Corp.*, 356 U.S. at 349.

obligation to bargain about it and neither party may use economic pressure to induce compromise on the topic. Further, the party that would control the topic without labor law bargaining obligations can exercise unilateral control over it at any time, before or after negotiations, and without regard to bargaining impasse.[203]

An antitrust court should treat the waiver of antitrust rights as labor law treats a permissive topic of bargaining within the legal control of a union. A union's uncoerced agreement to waive antitrust rights through acceptance of labor market restraints, like its agreement to trade any permissive term within its control, should be legally enforceable. Employers' efforts to coerce union agreement to labor market restraints, however, whether through lockouts or through unilateral implementation of such restraints, should not be insulated from antitrust challenge. As explained above, granting unions exclusive bargaining authority must entail giving them control over the antitrust rights of represented employees.[204] This same authority must also allow unions to trade these rights for benefits to the collective unit they represent.[205] The authority, however, does not require subjecting antitrust rights to the economic pressures of bargaining any more than it requires subjecting employee rights secured by other statutes to such pressures.[206]

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203. The critical decisions establishing this doctrine are, of course, *Borg-Warner Corp.*, 356 U.S. at 348-50 and *Katz*, 369 U.S. at 742-48. For a more complete statement of the consequences of defining a subject as "mandatory" or "permissive," see Michael C. Harper, *The Scope of the Duty to Bargain Concerning Business Transformations, in* LABOR LAW AND BUSINESS CHANGE: THEORETICAL AND TRANSACTIONAL PERSPECTIVES 25, 26-27 (Samuel Estreicher & Daniel G. Collins eds., 1988).

204. *See supra* notes 166-71 and accompanying text.

205. *Cf.* Mackey v. National Football League, 543 F.2d 606, 614-16 (8th Cir. 1976) (allowing an employer to utilize the nonstatutory exemption when the challenged restraint is the product of a quid pro quo bargain).

206. In a series of cases, the Court has held that unions do not relinquish employees' independent statutory claims by the negotiation of private grievance arbitration clauses in collective bargaining agreements. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 566-67 (1987) (allowing a personal injury damage action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1994)); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (allowing a minimum wage claim under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) (allowing a claim against status discrimination under Title VII of Civil Rights Act of 1964, 42

Treating the waiver of antitrust rights as if it were a permissive topic of bargaining and yet exempting from antitrust law employer-initiated restrictions voluntarily accepted by a union is not in tension with the plurality opinions in *Jewel Tea*.[207] Both of these opinions considered the legally mandatory nature of bargaining over hours of employment as at least a factor weighing in favor of antitrust exemption for agreements setting such hours.[208] Both opinions, however, considered the labor law requirement of mandatory bargaining over hours of employment as relevant to whether the union-requested restrictions in *Jewel Tea* concerned controlling the labor market to benefit employees, rather than controlling the product market to benefit some employers.[209] As explained above, the labor market versus product

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U.S.C. § 2000e (1994)). Of course, in these cases, the Court indicated that the union would not have authority to waive the rights at issue. *See Buell*, 480 U.S. at 564-65; *Barrentine*, 450 U.S. at 740; *Alexander* 415 U.S. at 51-52. None of these cases, however, involved rights to challenge an agreement to restructure employment terms to benefit most members of the unit at the possible expense of the most skilled, and thus, none challenged the basic exclusive bargaining authority of unions. *See, e.g.*, *Barrentine*, 450 U.S. at 737 ("[D]ifferent considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

It is also true that the Labor Board and the courts have held that no-strike clauses are mandatory topics of bargaining, even though they constitute a waiver of individual employee rights secured under the NLRA. *See, e.g.*, *Borg-Warner Corp.*, 356 U.S. at 349-50; NLRB v. Tomco Communications, Inc., 567 F.2d 871, 879 (9th Cir. 1978). The right to strike, however, is secured by the same statutory scheme that allows the compromise of that right in collective agreements, and this compromise is central to the accommodation and industrial stabilization secured by most such agreements. *Cf.* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 247-48 (1970) (explaining that a no-strike obligation is the quid pro quo for the employer's submission of grievance disputes to arbitration and that absent such agreements, actions for damages would "tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.").

207. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676 (1965). For a general discussion of the *Jewel Tea* case, see *supra* text accompanying notes 40-46.

208. For Justice White, the factor deserved heavy weight. *See Jewel Tea*, 381 U.S. at 689-91 (White, J., plurality opinion). For Justice Goldberg, it was critical. *See id.* at 709-10, 729-32 (Goldberg, J., plurality opinion).

209. This distinction was evident on the face of Justice White's opinion. *See id.* at 689-94 (White, J., plurality opinion). As Justice Stevens explained in his dissent in *Brown*, it was also the intent of Justice Goldberg's opinion. *Cf.* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2133 (1996) (Stevens, J., dissenting) ("[T]he main theme of [Justice Goldberg's opinion in *Jewel Tea*] was that the antitrust laws should not

market distinction is not at issue in cases like *Brown* in which employer-initiated restraints on the labor market are challenged.[210]

Furthermore, an antitrust court's treatment of the waiver of antitrust rights as if the waiver were a permissive topic of bargaining on which a multiemployer association cannot insist would be fully consistent with labor law treating the market restraints desired by the employers as mandatory topics of bargaining that the employers could impose unilaterally postimpasse.[211] A union's agreement to labor market restraints and its concomitant waiver of antitrust rights, not the restraints themselves, should be treated as the permissive term. This distinction is not important for labor law's treatment of an employer association's economic coercion of union agreement and insistence on terms during bargaining; insistence on union agreement to the terms should be treated as tantamount to insistence on union waiver of represented employees' antitrust rights. The distinction is important, however, to the treatment of postimpasse unilateral imposition. If, following the lead of the antitrust exemption suggested here, the Labor Board and the labor law courts found an unfair labor practice in the attempt to coerce union agreement to the waiver of employee antitrust rights, then the postimpasse, unilateral imposition of a system of restraints on individual bargaining would not have to be treated as an unfair labor practice. The unilaterally imposed restraints would be subject to antitrust scrutiny, but the multiemployer association could obtain antitrust review of the reasonableness of its desired labor market restraints without committing an unfair labor practice.[212]

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be used to circumscribe bargaining over union demands.").

210. *See supra* text accompanying notes 4-10.

211. *See supra* notes 198-203 and accompanying text.

212. The Labor Board would not have to follow the lead suggested by the labor exemption from antitrust law; the Labor Board would not have to find an employer's insistence on a union's agreement to labor market restrictions to be an unfair labor practice. Every collective bargaining tactic that is an antitrust violation need not be a labor law violation. If, however, a union's agreement to restrictive labor market terms is a mandatory topic for bargaining under labor law, then the union must be willing to negotiate in good faith about, though not necessarily concede to, such an agreement. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349

In sum, the labor exemption should serve the labor law goal of protecting employees' freedom to choose whether to join together to attempt to control their labor market to raise their benefits above the level that would be set by a fully competitive market.[213] This requires the insulation from antitrust challenge of concerted employee action directed toward such labor market control.[214] It also requires the insulation of agreements of employers with unions to accept enhanced benefits.[215]

Protecting employees' freedom of collective action does not, however, require the insulation from antitrust challenge of employer collusion to depress benefit levels by restricting the free operation of labor markets, except in either of two limited circumstances. First, any agreements among or between employers to restrain labor markets should be insulated from antitrust challenge when the collective bargaining representative of the affected employees consents to the restraints in presumed exchange for other collective employee benefits.[216] Second, because the processes of multiemployer collective bargaining can enhance union efforts to control labor markets,[217] the labor exemption should protect these processes by insulating joint employer tactics to resist union attempts to insist on particular collective terms, even when the union does not consent to the tactics. Protecting from antitrust challenge agreements among or between employers not to compete for the services of individual employees represented by a union that authorizes and seeks such competition, however, serves no labor law goal.

(1958). Because such an obligation to bargain seems in tension with the union's control over the antitrust rights of represented employees, in my view, the Supreme Court ideally would have made the antitrust and labor laws congruent on this issue by appropriately phrased dictum in the decision that should have been engendered by the *Brown* litigation.

213. *See Brown*, 116 S. Ct. at 2128-29 (Stevens, J., dissenting) (explaining the basic premise of national labor policy).

214. *See id.* at 2129 (Stevens, J., dissenting).

215. *See id.*

216. *See supra* notes 171-76 and accompanying text.

217. *See supra* notes 87-90 and accompanying text.

C.

The foregoing two-part theory of the nonstatutory labor exemption not only is coherent, but also would be fully practical. Unlike the theory advanced by the plaintiffs in *Brown*, adoption of the above theory could not threaten multiemployer collective bargaining outside of the sports industry. Other than players' unions in professional team sports, only unions representing actors and other performing artists in the entertainment industry normally negotiate collective agreements that allow talented performers to bargain individually for special compensation and other terms of employment.[218] Even in the entertainment industry, multiemployer associations have not sought to impose joint restraints on maximum compensation or on employee mobility between employers.[219] Outside of the sports industry, employers use joint bargaining in multiemployer associations not to impose restraints on the ability of individual employees to obtain compensation that would be offered by a free competitive labor market, but only to resist union efforts to use collective employee leverage to achieve *supra*competitive wages.[220]

In line with labor law theory and doctrine, adopting the more limited nonstatutory labor exemption advanced above would protect unions' ability to achieve *supra*competitive wages by trading the bargaining advantages of individual bargaining unit members for collective benefits, without also impeding the ability of

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218. *See, e.g.*, H.A. Artists Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 707 (1981) ("[A]n actor or actress is free to negotiate wages or terms more favorable than the collectively bargained minima.").

219. Collective bargaining agreements negotiated in the entertainment industry with unions representing actors, directors and writers set minimum terms of employment, but allow talented individuals to negotiate additional compensation and other perquisites. *See, e.g., id.* These agreements do not cap salaries or otherwise restrict what any particular employer can offer. *See* Alan Paul & Archie Kleingartner, *The Transformation of Industrial Relations in the Motion Picture and Television Industries: Talent Sector, in* UNDER THE STARS: ESSAYS ON LABOR RELATIONS IN ARTS AND ENTERTAINMENT 156, 161-66 (Lois S. Gray & Ronald L. Seeber eds., 1996); Jan Wilson, *Special Effects of Unions in Hollywood*, 12 LOY. L.A. ENT. L.J. 403, 407 (1992). This is the reason that performers in the entertainment industry have not brought antitrust challenges against the joint imposition of terms or other bargaining tactics of multiemployer associations. *See* Brief of the Alliance at 5-7, *Brown* (No. 95-388).

220. *Cf.* Brief of the Alliance at 6-7, *Brown* (No. 95-388) (distinguishing multiemployer bargaining in the sports and motion picture industries).

multiemployer bargaining associations to employ joint tactics to resist unions using the collective leverage of unit members. A union could threaten or actually use represented employees' antitrust actions to prevent employers from eliminating individual bargaining leverage through joint restraints.[221] As long as a multiemployer association did not impose or attempt to coerce union agreement to restraints on individual bargaining, however, the association could use joint bargaining tactics without concern of antitrust liability.

Assume, for instance, that the union bargaining with Judge Winter's hypothetical multiemployer association of printers seeks to utilize antitrust law by demanding not only a minimum ten percent pay increase, but also an opportunity for every represented employee to bargain individually for a wage higher than this minimum.[222] The multiemployer association would not face antitrust scrutiny for attempting to coerce the union to forego the first demand.[223] The association would be subject to antitrust review for attempting to coerce a sacrifice of the second demand,[224] but this challenge would only preserve the union's leverage in gaining the association's agreement to the first demand, to the extent that the association worried about the ability of individual employees to command, through individual bargaining, increases beyond the ten percent sought by the union for all represented employees. This replicates the balance of bargaining between a union and a single employer who may be persuaded by the special talents of a few employees to grant a wage increase to all employees only to the extent that those few employees could command through individual bargaining more

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221. Contrary to the claims of the NFL in *Brown*, *see* Brief for Respondents at 29-32, *Brown* (No. 95-388), it is fully appropriate for a union to use the antitrust laws to protect the bargaining leverage that individual players would enjoy in a free competitive labor market in order to trade some of that leverage to serve the union's collective bargaining goals. Doing so may serve the antitrust goal of more competitive markets, the labor law goal of more effective collective bargaining, or more likely both, because the players' labor market is less restrained and some collective benefits are secured.

222. *See* National Basketball Ass'n v. Williams, 45 F.3d 684, 688-89 (2d Cir. 1995) (contrasting the printing industry with the sports industry).

223. *See id.*

224. *See* J. I. Case Co. v. NLRB, 321 U.S. 332, 336, 338 (1944).

than the general wage increase.

Assuming, as is likely, that only the employees' collective leverage concerned the printers' association, the association could bargain to impasse over a smaller collective increase, or no increase at all, implement its last collective proposal, and allow individual employers to bargain with individual employees, knowing that any such individual bargaining would not undermine the collective wage level that it was imposing. If the union chose to strike against one of the printers, then the association could impose a lockout of all the printers' employees as long as the union demanded the ten percent increase in addition to individual bargaining.[225] Whether or not the association imposed a lockout, given the absence of individual employee bargaining leverage, the printers' association need not be concerned about the union using individual bargaining to whipsaw the employer targeted by the strike to raise the general wage level above the level imposed by the association. In any event, the union would risk eroding strike solidarity by allowing individual employees to bargain to their best deal with the targeted employer; the employer could undermine the strike by giving special wage inducements to more valued workers. Moreover, the association should be able to enforce antitrust-insulated sanctions, such as agreed-upon fines or boycotts, on the targeted employer for bargaining collectively with the union for a wage increase for all its employees beyond that imposed by the association.[226]

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225. *See* NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters ("*Buffalo Linen*"), 353 U.S. 87, 96-97 (1957) (holding that members of a multiemployer association could lock out their employees even if the strike was against only other members of the association).

226. The printing employers would not need to be concerned that the independent refusal of each printing employer to negotiate higher wages with individual employees could be used by the employees as evidence of an agreement among the printing employers to restrict such bargaining. It is true that antitrust courts will permit a finding of agreement based on parallel behavior when there are additional "plus factors", including the opportunity to collude, that tend to show concerted action. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221, 232 (1939) (discussing concerted action through conscious parallelism). An antitrust court could not, however, infer agreement from employers refusing to engage in individual bargaining in an industry, such as printing or trucking, in which employers always have found it to their advantage as independent firms to offer only set wages for particular jobs. Only in industries such as sports or entertainment, in which individual bar-

In the sports industry in which employers have sought to impose labor market restrictions in response to their concern with individual player bargaining leverage, adoption of the more limited, nonstatutory, labor exemption advanced above would change collective bargaining from its pre-*Brown* status. To the extent that the owners of professional sports clubs wished to ensure the insulation of the joint imposition of a labor market restriction by means of the nonstatutory exemption, they would know that they would have to purchase that insulation from the union representing their players. Moreover, at least in the near term, that purchase probably would have to come at an even higher price than the purchase of the ambiguously bounded exemption for which the leagues negotiated before the *Brown* decision clarified its breadth. In order to reduce the cost of union consent, sports leagues would have to establish through litigation that some joint system, such as revenue sharing between teams or perhaps flexible salary caps, did not violate the antitrust laws because each league reasonably restrained labor market competition to ensure competitive games between clubs with variant-sized fan populations.

Adoption of the more limited exemption described here, however, would neither threaten the existence of multiemployer bargaining in the sports industry nor effect an inappropriate level of revenue distribution from professional sports clubs to their players. Multiemployer bargaining in sports certainly would not be disrupted. As a joint venture of competitive teams, each sports league would continue to bargain jointly with a union representing its players in order to ensure a consistent, competitive product.[227]

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gaining with nonfungible employees would be expected without agreement, would it be appropriate to infer agreement from the parallel refusal of employers to negotiate.

227. *See supra* note 107. In my view, employment conditions that define the sports product offered to fans, such as the designated hitter rule in baseball or the use of hand-checks in basketball, should not be mandatory topics for bargaining with a union. *See* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1465-71 (1982). Even if this view is correct, however, a league may wish to bargain over such topics. Furthermore, even a league that does not seek to impose limits on the benefits its players can achieve through individual bargaining will want to have all its clubs offering the same collective terms of employment, such as minimum sala-

Moreover, continual focus on the purchase of the union's agreement to labor market restraints would not inhibit such bargaining. The duration of a union's waiver of the antitrust claims of represented players would not exceed the period agreed to by the union.[228] The union's permission, however, would need not be limited to the duration of a collective bargaining agreement governing all the terms relating to the players' relationships with the clubs. The waiver could extend for as long as the union agreed and as long as the union continued to be the players' exclusive bargaining representative. The waiver certainly could extend past any impasse in the bargaining of a particular collective agreement, and it could be extended by further negotiations independent of the negotiations of any particular comprehensive agreement. Similarly, the collective benefit exchanged, whether it be some sharing of league revenues with all players or some enhancement in league pension contributions, would not have to be identical in duration. Collective bargaining is flexible; labor law never has required the parties to bound all their commitments with the same temporal limits.[229] No reason exists to restrict this flexibility when a union waives a statutory right that is under its control by virtue of its exclusive representative status.[230]

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ries or pension contributions, to benefit players who move between clubs.

228. In accordance with the treatment of the union's waiver as a permissive term, the waiver could be withdrawn without further bargaining to impasse. *See* NLRB v. Katz, 369 U.S. 736, 747 (1962) (holding that the proscription on preimpasse unilateral changes applies only to mandatory terms).

229. Indeed, the fact that the prohibition of unilateral changes before impasse applies only to mandatory topics of bargaining, *see supra* note 228, means that the NLRA must contemplate the permissive terms of a collective agreement having different effective durational bounds than mandatory terms. *See Katz*, 369 U.S. at 748.

230. The players' lawyers in *Brown* suggested in a cryptic sentence in their brief to the Supreme Court that, if the players' claims were allowed, then "agreements" with willing unions could assuage the "fears" of multiemployer associations in industries other than sports that antitrust claims would be brought against their postimpasse unilateral imposition of terms. *See* Brief for Petitioners at 39, Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (No. 95-388). This suggestion actually may have been the players' best attempt to address the argument that allowing their claims would disrupt established multiemployer bargaining in other industries. Had the players' lawyers' theory been adopted by the Court, many, if not most, employers interested in multiemployer bargaining in industries outside sports, before consenting to such bargaining, probably would have been able to extract from a union, that itself de-

The expiration of a union's waiver without the negotiation of an extension would mean that the league could not continue implementation of restrictions on the players' labor market, including salary caps and restrictions on mobility between teams, without exposing itself to antitrust challenge. This situation would exist even for those restrictions that first had been implemented under a collective agreement with the union during a period when the union's waiver was in effect. Contrary to the claims of Judge Winter in *Williams*,[231] however, even if expiration occurred before an impasse in collective bargaining for a new agreement, employers need not be placed in a dilemma between exposure to violation of the antitrust or labor laws. Labor law does require that employers continue the status quo on most mandatory terms in an expired collective agreement until the bargaining parties reach impasse in negotiating a new agreement.[232] Antitrust courts, however, could condition lifting the employers' antitrust exemption on the union's willingness to ac-

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sired multiemployer bargaining, an agreement not to use the antitrust laws against the joint imposition of terms. The players' lawyers, however, did not adequately explain why employers in industries outside sports should have to risk the uncertainties of bargaining to obtain an exemption from the antitrust laws that the Court could grant directly.

231. *See* National Basketball Ass'n v. Williams, 45 F.3d 684, 692 (1995) (stating that applying antitrust principles to multiemployer bargaining would lead to per se violations of the Sherman Act).

232. In *NLRB v. Katz*, 369 U.S. 736, 739 (1962), the Court approved the Board's determination that an employer violates the NLRA by unilaterally changing a condition of employment without first bargaining to impasse. This change occurred after the union's certification as a bargaining representative and before the parties negotiated their first agreement. *See id.* The Court, however, has acknowledged the extension of the *Katz* doctrine to cases in which existing terms were set in an expired agreement. *See, e.g.*, Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991).

The fact that the *Katz* doctrine applies only to mandatory rather than permissive topics of bargaining, *see Katz*, 369 U.S. at 747-48, would not free employers from the dilemma described in the text. No one would argue that employers have no obligation to bargain over restrictions on the free operation of their employees' labor market. Even if the union should be able to reject such restrictions without bargaining, an employer should not be able to implement the restrictions without bargaining. In any event, as suggested above, *see supra* notes 200-12 and accompanying text, the Labor Board would protect legitimate employer interests better by treating the restrictions themselves, as opposed to the union's waiver of antitrust claims against the restrictions, as mandatory topics for purposes of employer unilateral implementation after impasse.

cept the employers' elimination of the labor market restrictions to which it had agreed in prior negotiations.[233] Because the purpose of the labor law restriction on unilateral change prior to impasse is to protect the union's exclusive bargaining authority,[234] the union should be as free to waive the restriction as it is to waive antitrust claims of represented employees.[235]

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233. Players' unions easily could make such an acceptance clear. Consider, for instance, the following statement in a September 15, 1993, letter from Robert W. Goodenow, Executive Director of the National Hockey League Players' Association, to National Hockey League Commissioner Gary B. Bettman:

> First, the Association is ready to continue to negotiate in good faith after the [Collective Bargaining Agreement (CBA)] expires. However, consistent with the Players' Association's position throughout negotiations, now that the CBA has expired, please understand that we do not agree or consent to a continuation of those terms of the expired CBA that establish restraints on competition for player services. We also expressly waive any rights under the labor laws that we may have to object to a change to such restraints prior to a lawful impasse.

Brief of the National Hockey League as Amicus Curiae in Support of Respondents app. at 1a, *Brown* (No. 95-388).

234. *Cf. Katz*, 369 U.S. at 742 ("[A]n employer's unilateral change in conditions of employment negotiation is similarly a violation of [29 U.S.C. § 158(a)(5) (1994)], for it is a circumvention of the duty to negotiate which frustrates the objectives of [29 U.S.C. § 158(a)(5)] much as does a flat refusal."). Contrary to the claims of some commentators, therefore, *see, e.g.*, Goldman, *supra* note 39, at 664 n.236, it is not somehow unfair to allow a union to authorize unilateral changes on some terms of an agreement and not on others. A sports league that trades some collective benefits, such as pension fund contributions, for restrictions on free individual player bargaining, should do so with full awareness that the duration of its pension fund obligations may be greater than the duration of the union's agreement to the restrictions. Of course, depending on the bargain struck by the league, *see supra* note 228 and accompanying text, the duration of the union's agreement to the restrictions could also be greater than the duration of the pension fund obligations, which would cease with a bargaining impasse on a new general agreement.

235. Conditioning on union consent the exemption of multiemployer restraints on free individual bargaining also would not lead to a proliferation of litigation on the question of whether restraints imposed by employers were within the scope of the union's consent. Collective bargaining agreements in the sports industry have specified systems of restraints on player mobility and salaries. *See, e.g., Williams*, 45 F.3d at 686 (discussing the restraining effect of the right of first refusal). Before *Brown*, there had been no reported antitrust litigation over whether league-imposed restraints were consistent with contractual specifications. In any event, under the exemption established in *Brown*, a union can advance a similar issue: whether the restraints unilaterally imposed by a league are consistent with the proposals made by the league in collective bargaining. *See Brown*, 116 S. Ct. at 2126. If the restraints are not consistent, their unilateral implementation would not be an acceptable bargaining strategy under the labor laws and thus would not be exempt under

Adopting the limited exemption advocated here also would not lead to the transfer to players of a level of revenues that should be deemed excessive under governing social policy. The level of revenues that a league would transfer to the collectivity of players in order to purchase antitrust immunity for its joint imposition of labor market restraints would be bounded by the bargaining leverage that its players would have as individuals in a free competitive labor market. This is the price for the purchase of the players' services that an antitrust plaintiff would contend best ensures an adequate supply of talent with which to satisfy consumers.[236] As explained above, federal labor law policy does not provide a reason to question this contention.[237] If a judgment is to be made that the antitrust laws should not protect labor markets, as well as product markets, then that judgment should be made for all labor markets, not just those subject to multiemployer collective bargaining.[238] Alternatively, if a judgment is to be made that ensuring adequate competitive balance among professional sports clubs justifies at least some league-imposed restraints, then that judgment should be made through the analysis of particular restraints, not by a blanket exemption unsupported by federal labor policy.[239]

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the *Brown* holding. *See id.* Moreover, unions are more likely to support litigation that challenges league action in the absence of an agreement than to support action that purports to comply with the terms of an agreement.

236. *See supra* note 12.

237. *See supra* note 12.

238. Admittedly, Congress did not enact federal labor laws to ensure that highly compensated, especially talented workers could command even higher salaries; however, neither did Congress pass those laws to justify the depression of any workers' wages below a competitive free market level. If we wish to facilitate the suppression of the extraordinary salaries of superstars in team sports, we should be forced to do so directly, rather than through a dubious exemption from general legal doctrine founded on the same economic doctrine used to justify the extraordinary salaries achieved by other American "superstars," including those who excel in individual sports such as golf, tennis, and auto racing, as well as movie stars and corporate executives.

239. In my view, adequate competitive balance between clubs representing more lucrative, major markets and those representing less lucrative, smaller markets, should be able to be maintained—without salary caps—by some level of revenue sharing between clubs. Revenue sharing inhibits player salaries by reducing the clubs' incentive to compete to sign the best players in order to have a winning team that can attract more fan support. The inhibition is indirect, however, and will be limited as

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The actual holding in *Brown* likely will have limited direct impact outside of the sports industry. As emphasized above, in most other industries, employers have no interest in agreeing not to compete with higher salaries for the employment of especially talented, unionized workers.[240] Aside from sports, only in the entertainment industry have unions reserved the freedom of especially talented, represented employees to negotiate compensation and perquisites that exceed those guaranteed in collective agreements.[241]

Within the entertainment industry, multiemployer bargaining

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long as all revenues are not shared and entrepreneurs with large egos continue to be attracted to the world of professional team sports. *See, e.g.*, Norman Chad, *NFL's Two Biggest Egos Set to Clash Sunday*, TORONTO STAR, Oct. 26, 1996, at B3, *available in* 1996 WL 3394023 (describing the desire of the "two biggest egos in football" to destroy each other as presenting a "duel" on the scale of "Beta vs. VHS"). Revenue sharing thus is likely to enable sports leagues to achieve more competitive balance for each dollar of player salary suppression than can any direct labor market restraint, including any form of salary cap.

For a theoretical argument that the competitive balance achieved within a sports league with restrictions on player mobility will not be greater than that in a league allowing the free movement of players, but also allowing revenue sharing through the free sale of player contracts, see JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 240-83 (1992). Quirk and Fort also offer empirical support for their theory in a statistical analysis of comparative winning percentages before and after the elimination of restrictions on free agency in baseball and basketball. *See id.* at 284-93; *see also* SCULLY, *supra* note 12, at 93-97 (1989) (rejecting empirically the hypothesis that the freer labor market in baseball has lessened competition on the field); Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 671-78 (1989) (analyzing baseball and football and supporting the same conclusion).

Of course, some labor market restrictions sought by sports leagues may have procompetitive justifications other than the maintenance of competitive balance on the field, court, or rink. For instance, restrictions on baseball player mobility for several years at the beginning of a major league career encourages the clubs' development of the skills of players through a minor league system. *Cf.* SCULLY, *supra* note 12, at 194 ("The farm system permitted the monopolization of playing talent and . . . choked off the competitive supply of players to [other, smaller] clubs."). Rookie drafts not only help maintain competitive balance, they also help engage fan interest.

240. *See supra* notes 218-20 and accompanying text.

241. *Cf.* H.A. Artists & Assocs., Inc. v. Actors Equity Ass'n, 451 U.S. 704, 707 (1981) (noting that individual actors and actresses may "negotiate wages or terms more favorable than the collectively bargained minima").

has been common in film production and music recording,[242] and *Brown* conceivably could encourage major movie or recording production studios to agree to emulate the efforts of professional sport clubs by imposing mutual restraints on their competition for talent.[243] Multiemployer associations in the entertainment industry, however, would have significant difficulty depressing salaries under the cover of the *Brown* holding, primarily because entertainment production companies, in contrast with clubs in a professional sports league, are not engaged in a joint venture in which the economic success of each depends upon the economic success of others. The more purely competitive structure of the entertainment industry has two relevant effects.

First, entertainment production companies would have difficulty sustaining an effective cartel. Because they are not engaged in a joint venture as are professional sports leagues, entertainment companies are not legally or practically compelled to bargain jointly[244] and would have an advantage in luring stars to their productions by remaining outside of a multiemployer association that bargained for salary restraints.[245] Indeed, star performers may be able to raise capital to start their own production companies to challenge any cartel that attempts to suppress their wages. Producers might imagine that they could better restrain the salaries of talent that cannot claim star status; but how any system could be structured to allow production

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242. Multiemployer bargaining generally has not been practiced in television, radio, and live entertainment. *See* Lois Gray & Ronald Seeber, *Introduction* to UNDER THE STARS, *supra* note 219, at 1, 9.

243. In their amicus brief in *Brown*, the entertainment unions predicted that the major movie studios would collude to limit the extra income actors, writers, and directors could derive from the profits of films and from the "residual" returns of films in other media such as video cassettes and television. *See* Brief of Amici Curiae the Screen Actors Guild, Inc. et al. at 7-9, Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (No. 95-388).

244. *See supra* notes 107-08 and accompanying text.

245. Before the birth of the Screen Actors Guild in the 1930s, the major movie studios agreed to impose strict restraints on the salaries and mobility of actors between studios. *Cf.* Wilson, *supra* note 219, at 408-09 (describing the harsh environment of early Hollywood). During this period, actors signed contracts to perform for only one studio for some period, rather than negotiating separate deals for individual movie projects. *See id.* at 408. Neither the present economics of the industry nor the strong actors' unions would allow a return to the 1930s system. *See* Brief of the Alliance at 3-5, *Brown* (No. 95-388).

companies to compete without restraints for stars, but not allow unrestrained competition for others in the same bargaining unit is unclear.[246]

Second, if entertainment production companies started to achieve effective salary restraints through multiemployer bargaining associations,[247] any union representing talent whose salaries had been limited would have the option to withdraw from multiemployer bargaining, and presumably thereby eliminate the studios' antitrust exemption.[248] The union would have to sacrifice the benefits of multiemployer bargaining, including the establishment of consistent minimum terms for all projects.[249] Unlike a players' union in the sports industry, however, the entertainment union would not have to terminate collective bargaining totally in order to escape the insulation directly provided by *Brown*.[250]

Within the sports industry, however, the *Brown* holding may directly affect sports fans as well as professional athletes. Good reason exists to predict that *Brown* will result in both more strikes and more lockouts. As stressed in the briefs filed in *Brown*,[251] baseball, under the cover of a blanket antitrust exemption, historically has been plagued by more work stoppages than other sports, especially before lower courts developed the exemption for sports labor markets that the Court confirmed in *Brown*.[252] After *Brown*, players' unions in other sports, deprived of the threat of antitrust litigation, will depend more on

246. In contrast to what has proven attractive to sports clubs, *see infra* note 255, for instance, movie production companies probably would hesitate to impose caps on the aggregate percentage of returns from individual movies or programs that could be distributed to union-represented talent. Producers probably would want the freedom to vary percentages depending on the extent to which the film attracted viewers through the identity of particular talent.

247. It is most plausible that producers would have success capping the compensation of less visible talent in separate bargaining units. *Brown*, for instance, might provide an effective cover for agreements between movie production companies to limit the compensation of script writers whose individual talents can command different salaries, but whose reputations do not command the loyalties of fans.

248. *See* Brief of the Alliance at 5-6, *Brown* (No. 95-388).

249. *See id.* at 6.

250. *But see infra* text accompanying note 273.

251. *See, e.g.*, Brief for Petitioners at 44, *Brown* (No. 95-388).

252. *See id.*; *supra* notes 77-105 and accompanying text.

strikes to exert leverage in bargaining.[253] Furthermore, the holding in *Brown* assures the leagues that they can engage in lockouts that are legal under federal labor laws to attempt to compel the players' unions to accept labor market restraints.[254]

To be sure, the labor laws contemplate the private resolution of disagreements under the pressure of economic weapons such as strikes and lockouts, and the initiation of antitrust litigation may protract a bargaining process that would have been more quickly resolved through a painful work stoppage. The sports fan, however, cares primarily about the continuation of uninterrupted athletic competition and little about whether the unions and management sign collective bargaining agreements later under the pressure of an antitrust threat that might add to judicial dockets rather than sooner, without judicial involvement.[255]

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253. *See* Brief for Petitioners at 44-45, *Brown* (No. 95-388).

254. Even before the Court's decision in *Brown*, some evidence existed that the broad exemption that *Brown* granted would encourage the use of lockouts in the sports industry. In the wake of the *Williams* decision providing to the NBA basically the same broad antitrust exemption confirmed in *Brown*, *see supra* notes 79-99 and accompanying text, the NBA owners jointly implemented a lockout of the players in an attempt to secure the players' union's agreement to a tightening of the NBA's salary cap. *See* John Helyar, *Power Plays: Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute*, WALL ST. J., Aug. 7, 1995, at A1. The NBA and its players' union, however, finally concluded a new collective agreement, after the Supreme Court's *Brown* decision in the summer of 1996, after only a brief, 10 minute lockout. *See* Clifton Brown, *Deal Is a Lock, Not a Lockout, For the N.B.A.*, N.Y. TIMES, July 10, 1996, at B11.

255. Of course, sports fans also care about the price of tickets to games, and the owners of sports teams are wont to claim that restraints on player salaries help them reduce the fares they charge their consumers. *See* QUIRK & FORT, *supra* note 239, at 219. In fact this claim does not make economic sense. *See id.* In the short run, assuming a set number of teams, games, and stadium seats, profit-maximizing club owners will set ticket prices to maximize revenues, regardless of the salaries paid to their players. *See id.* at 220. The owners will offer salaries to players no greater than their expected marginal contributions to revenue. *See id.* If economically rational owners can hire players for less, they will do so to increase profits, not to reduce prices. *See id.* at 219-23 (offering empirical evidence that enhanced player mobility in baseball has not correlated with increased ticket prices). Teams often use the interest engendered by the signing of an expensive free agent, such as Albert Belle or Roger Clemens, as an occasion for raising ticket prices. *See id.* at 221. This ticket price increase only suggests, however, that the movement of players between teams enhances the value of sports tickets for fans. *See id.* at 221-22.

In the long run, of course, team owners can change the amount of sports product offered to fans through some form of expansion or contraction. *See id.* Such action is economically rational with attention to the marginal factor costs of the

In addition, the ultimate resolution of antitrust challenges to sports labor market restraints might have provided a structure for future collective bargaining agreements. Antitrust courts cannot be expected to articulate the same compromise that the leagues and players' unions ultimately reach through the use and threatened use of economic weapons in collective bargaining. If, however, antitrust courts required sports leagues to utilize alternative ways to ensure balanced competition with reduced restriction of free labor markets, collective bargaining might have been focused around potential fulcrums of compromise.

The *Brown* decision does not absolutely preclude the development of an antitrust doctrine on the legality of labor market restraints in sports leagues outside of baseball; it concludes by suggesting that some "joint imposition of terms by employers . . . could be sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."[256] Presumably, professional team sport athletes outside of baseball, therefore, can still free themselves to bring antitrust challenges to league-imposed labor market restraints by decertifying their union and thereby eliminating any collective bargaining process with which antitrust challenges could interfere.[257]

The availability of this option is unlikely to help stabilize labor relations in the sports industry for the benefit of fans, however. Sports unions must deal with a deep, potential conflict of interest within their bargaining units between the interests of

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owners' inputs, including the athletes they hire. *See id.* at 220-22. Economic theory also predicts, though, that when competitive buyers collude to act as a monopsonist ("a single buyer of a well-specified good or service," *id.* at 3) to hold down the price of an input, the cartel will not pass along its savings to consumers of its products through expansion. *See* BLAIR & HARRISON, *supra* note 12, at 42. Its *marginal* costs will not be lower. *See id.* Indeed, where monopsonists, such as professional sports leagues, also enjoy a degree of monopoly power in their product markets, the use of monopsony power in an input market predictably will result in lower product output and higher consumer prices. This process will occur in the usual case where the monopsonist confronts an upward sloping labor supply curve that leads to the marginal factor cost of labor being higher than the wage level. *See id.* at 41-42.

256. Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2127 (1996).

257. All parties certainly made this presumption in the *Brown* case. *See* Brief for Petitioners at 42, *Brown* (No. 95-388).

star players and those of average players.[258] The former players are interested primarily in the elimination or reduction of mobility restraints and salary caps that impair their ability to negotiate more lucrative contracts.[259] Many of the latter players, recognizing that they will never achieve star status, may be more interested in negotiating more attractive collective terms, such as a more generous pension system, collective revenue sharing, or higher minimum salaries.[260] Star players and their agents may calculate after *Brown* that unless their union gives absolute priority in bargaining to their interest in eliminating labor market restraints that depress the salaries of star players,[261] decertification and the consequent freeing of the antitrust weapon would benefit them more than collective bargaining.[262] Any such calculations will make the players' unions' task in satisfying both parts of their units more difficult. Unproductive posturing during collective bargaining, and perhaps extra work stoppages, may result.

It certainly will be more difficult for a players' union, under the threat of a decertification challenge, to trade agreeing to labor market restraints for enhanced collective benefits.[263] Moreover, any decertifications that result from the incentives provided by the *Brown* decision also will delay the achievement, through mature, established collective bargaining, of lasting

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258. *See* Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 398-99 nn.5-8 (1996).

259. *See id.*

260. *See id.* Strong empirical evidence shows that the elimination of the traditional labor market restrictions in the sports industry through collective bargaining has increased the disparity in players' salaries substantially. *See* QUIRK & FORT, *supra* note 239, at 235-39.

261. Certain restraints, such as the fairly generous team salary cap imposed by the NBA, may allow star players to obtain lucrative contracts, but may restrict the clubs' capacity to compete for a supporting cast of average players. *See infra* note 269 and accompanying text.

262. Indeed, after the *Williams* decision, a number of star NBA players led an ultimately unsuccessful effort to decertify their players' union. *See* Helyar, *supra* note 254, at A1. Had the *Williams* decision, instead, assured the players that their antitrust claims could be sacrificed only by their union's agreement to restraints on their ability to bargain, these players could have fought for their interests inside the union without threatening decertification.

263. *Cf. id.* (noting the division among NBA players as a result of decertification challenge).

compromise on labor market restraints.[264] Not only will bargaining time be lost during decertifications, but collective benefits also may be eliminated or cut back, producing ill will and suspicions.[265]

Even if these predictions about the effect of *Brown* on labor peace in the sports industry prove correct, however, the holding in *Brown* will not soon be eroded. Even more clearly than *Flood v. Kuhn*,[266] *Brown* makes the alignment of antitrust law's treatment of the union-organized sports labor market with antitrust law's treatment of other labor markets dependent on congressional action.[267] The likelihood of legislative action in the foreseeable future seems slim.

In order to make a strong case for legislation, the players would not only have to show an increase in disruptions of team sports competition, but also carry the difficult burden of correlat-

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264. A decertified union might advise a sports league that it is willing to begin multiemployer bargaining with the league again if the league is willing to waive the exemption provided by *Brown* and then only implement restraints agreed to by the union. The *Brown* exemption, based on protecting the labor process rather than employers, *see* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2119 (1996), most likely would not be waivable. A decertified union might also try bargaining with the league over acceptable restraints before agreeing to resume its representational status. Such bargaining, however, might be treated as itself an acceptance of representational status.

265. The history of labor relations in the NFL before the Supreme Court's decision in *Brown* provided an illustration of how collective bargaining could be disrupted by a broad exemption's encouragement of union decertification. In 1989, the Court of Appeals for the Eighth Circuit held that the NFL could continue to impose restraints on player mobility that had been agreed to by the NFLPA even after the expiration of the agreement for as long as an ongoing collective bargaining relationship existed. *See* Powell v. National Football League, 930 F.2d 1293, 1303-04 (8th Cir. 1989); *supra* notes 77-78 and accompanying text. In response, more than 60% of the players signed a petition revoking the authority of the NFLPA to act as their bargaining agent, *see* Powell v. National Football League, 764 F. Supp. 1351, 1354 n.1 (D. Minn. 1991), and the NFLPA modified its bylaws to eliminate its authority to bargain with the NFL and advised the League that it would no longer bargain. *See id.* at 1354. Soon thereafter, eight players, supported by the NFLPA, filed another antitrust suit against the restrictions challenged in *Powell*. *See id.* at 1353-54. The union did not resume acting as the players' bargaining agent until after settling this new litigation in 1993. *See* McCormick, *supra* note 258, at 417. In the interim, the NFL was under no legal obligation to continue to grant collective benefits secured by the union in past agreements. *See, e.g.*, *Powell*, 764 F. Supp. at 1357-59.

266. 407 U.S. 258 (1972).

267. *Cf. supra* note 6.

ing that increase with pressures emanating from *Brown*. In light of the political muscle that club owners throughout the country can flex,[268] the support of sports fans would be critical to any inducement of congressional action. Fans, however, are less and less likely to sympathize with the plight of athletes whose most prominent representatives will continue to receive millions of dollars for work that seems more attractive to many fans than that in which they themselves toil.

The continuation of extraordinarily high salaries for superstars seems likely after *Brown*, as the threat of decertification battles and the necessity of maintaining superstars' support of any work stoppage will continue to require players' unions to use their bargaining leverage to allow the stars to obtain close to free market salaries.[269] Instead, *Brown* probably will make it more difficult for the unions to advance the position of average players, either through collective benefits or through individual bargaining free of limitations on aggregate team salaries that

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268. Sports clubs, of course, make an economic impact in many states and congressional districts, and club owners have been known to make sizeable campaign contributions. *See* Jonathan P. Decker, *Congress Steps Off Sidelines in Sports Flap: Pro-Football Team Relocations Spark Hearings*, CHRISTIAN SCI. MONITOR, Jan. 25, 1996, at 3, *available in* 1996 WL 5038804 (noting that NFL team owners contributed approximately $260,000 to congressional campaigns between 1989 and 1995). The players, by contrast, seem not yet to have been inclined or able to convert their economic muscle into political power.

269. Team salary caps, such as those extant in the NBA, *see* Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports League*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 245 (1995), and the NFL, probably will continue to be negotiated. Such caps enable superstars to reap huge salaries while forcing the clubs to limit the amount of aggregate revenues allocated to the players by preventing them from also competing for the services of supporting players. *See* McCormick, *supra* note 258, at 398-99 nn.5-8. The Los Angeles Lakers' signing of Shaquille O'Neal to a record $120 million contract after clearing their roster of several other million dollar players presents a good example of the impact of an aggregate salary cap on the structure of salaries within a league. *See* Charles Stein, *Sure Shot or Flagrant Foul? N.B.A. Pay Makes Many Roar*, BOSTON GLOBE, July 19, 1996, at A1, *available in* 1996 WL 6869868.

The new NBA collective bargaining agreement executed in the wake of *Williams* and *Brown* probably enhanced the ability of NBA stars to reap the benefits of competitive bidding for their services by eliminating the teams' rights under the last agreement to match any offer made to one of their players by another team after the expiration of the player's first NBA contract. *See* Peter May, *Money to Burn with Heat*, BOSTON GLOBE, July 28, 1996, at D6, *available in* 1996 WL 6871078.

result in most wages paid by clubs being directed toward stars.[270] Fans are not likely to focus on the salaries of average players when assessing the equities of the players' case for law reform.

In sum, the *Brown* decision almost certainly will influence labor relations in the sports industry for a considerable period, in part because its impact will be bounded and of limited political effect. The impact of the failure of the *Brown* decision to clarify adequately an appropriate basis for the labor exemption is more uncertain.

On the one hand, reason exists to wonder whether the *Brown* Court's articulation of the "intent" of the labor exemption "as limiting an antitrust court's authority to determine . . . the appropriate legal limits of industrial conflict,"[271] rather than to advance "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions,"[272] will lead to a much greater expansion of the exemption. Might antitrust courts also refuse to review agreements not to compete for especially talented workers between employers not engaged in multiemployer bargaining if those employers all have collective bargaining relationships with the same union? If so, *Brown* will have a much greater impact on the entertainment industry than that suggested above, because unions could not ensure the preservation of the antitrust protections of repre-

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270. The developmental squad players whose salaries the NFL set by employer collusion in *Brown* present a good illustration of how the *Brown* decision will make it much more difficult for the players' unions to protect the salaries of average players. The Court, in *Brown*, effectively remitted the NFLPA to its collective bargaining weapon of a strike or threatened strike to fight the NFL owners' joint imposition of the $1000 a week salary. NFL star players, conscious of how short-lived their careers are likely to be, probably will not be willing even to consider sacrificing part of their high salaries to fight for the freedom of marginal players to bargain individually for their salaries.

By contrast, the NFLPA was willing to fight for the developmental squad players through antitrust litigation to preserve the principle that all individual player salaries should be subject to negotiation. The need to maintain solidarity in the union around this principle presumably discouraged the NFLPA from trading the limited, individual bargaining leverage of the developmental squad players for more freedom for star players.

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

272. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).

sented employees by refusing to agree to multiemployer bargaining.[273] Might antitrust courts also refuse to review even employer restraints on product market competition that are imposed through use of the collective bargaining process? If so, *Brown* will have led to the repudiation of the basic limitation on the labor exemption established in *Pennington* and *Jewel Tea*.[274]

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273. *See supra* note 247 and accompanying text.

274. That this is not a totally fanciful prospect is suggested by a recent decision of the Seventh Circuit authored by Judge Easterbrook, *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 685 (1997). Relying on the language, rather than the holding, of *Brown*, Easterbrook held exempt from antitrust review a trenching contractor's agreement with a major purchaser of its services that the purchaser would require a competitor of the contractor to use labor represented by the same union that represented the contractor's employees. *See id.* at 241. The contractor desired such an agreement because its contract with the union included a "most-favored-nation" clause under which the union agreed to provide the contractor with the benefit of any more favorable contract signed with a competitor. *See id.* at 239. The contractor wanted assurance that its competitor would not underbid it because of lower labor costs. *See id.* Even though the contractor designed the challenged agreement to protect its product market, and even though the facts of the case were similar in important respects to those of *Pennington* and *Connell*, *see supra* text accompanying notes 46 and 56, Easterbrook concluded that *Brown* was controlling without any analysis of the two prior cases or of the distinction of product market versus labor market restraints on which the Court based these cases and *Jewel Tea*. *See Ehredt*, 90 F.3d at 240-41.

Pennington, in fact, could have been distinguished in *Ehredt*. The contractor's agreement with its major purchaser protected the contractor in its product market only by perfecting the union's control of the labor market. *See id.* at 239. It thus advanced the labor law policy of allowing employees to associate in order to eliminate competition over wages. *See Connell*, 421 U.S. at 622. Unlike the challenged provision in the collective agreement in *Pennington*, which required the union to impose certain terms on competitive employers, rather than just requiring the union to grant equal terms to all employers, *see* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 660 (1964), the "most-favored-nation" clause in *Ehredt* did not restrict the ability of the union to achieve labor market control. *See Ehredt*, 90 F.3d at 239.

Easterbrook would have had more difficulty distinguishing *Connell*. The restraint held subject to antitrust scrutiny in *Connell*, similar to the restraint in *Ehredt*, committed a purchaser of construction services to use only labor represented by a particular union. *See Connell*, 421 U.S. at 618-19. The fact that a particular contractor secured the commitment in *Ehredt* to protect its product market, *see Ehredt*, 90 F.3d at 239, in contrast with the union-secured commitment in *Connell*, *see Connell*, 381 U.S. at 659-61, makes *Ehredt* seem an even more appropriate case for antitrust scrutiny. In my view, the *Connell* decision improperly restricted a legitimate union attempt to achieve labor market control, but the decision presumably remains good law. The use of *Brown* in *Ehredt* suggests that Judge Easterbrook would find exempt any product market restraint that "stemmed directly from a collective bargain-

On the other hand, reason remains to hope that *Brown* will not be the last word from the Court on the labor exemption. *Brown* easily could be limited to the protection of multiemployer bargaining and its effects, and thus primarily confined to the sports industry. The Court's prior doctrine on the labor exemption could still be formulated coherently as suggested above. As could have been said after *Flood v. Kuhn*,[275] it may be better that appropriate doctrine be tainted by an anomaly than that the doctrine be forsaken totally.

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ing agreement." *Ehredt*, 90 F.3d at 241.

For another broad, though defensible, use of the *Brown* decision to exempt a multiemployer association's boycott of independent employers who entered into collective bargaining agreements with a union striking the multiemployer association, see *Sage Realty Corp. v. ISS Cleaning Serv. Group*, 936 F. Supp. 130 (S.D.N.Y. 1996).

275. 407 U.S. 258 (1972).