CHAPTER 9
ANTITRUST AND SPORTS: THE LABOR EXEMPTION

I. Introduction
II. Origins of the Non-Statutory Labor Exemption

Parts I and II of Chapter 9 are intended to familiarize students with the underpinnings of the statutory and non-statutory exemptions to the antitrust laws. This area of study is perhaps the most complex and difficult to grasp in the entire sports law subtext. It has been our experience that antitrust professors rely upon labor law professors to address this topic and labor law professors, in kind, in turn, rely upon antitrust professors to do the same. An informal poll yields evidence that though both labor law and antitrust textbooks contain sections devoted to the labor exemptions, professors in these areas have chosen to reserve discussion of the issues arising thereunder for "another day." Fortunately or unfortunately, due to the tremendous amount of litigation in this area in sports law, professors teaching this course have no recourse but to address this topic in some detail.

We tell our students that they should not shrink from the challenge but, rather, should welcome the opportunity to consider an area that is elusive and certainly mysterious to most commentators and jurists. Students should be made aware, however, that the labor exemption presents somewhat of a conundrum and that no amount of industry on their part or explanation on the part of their professors will yield the types of definitive results that tend to make students happy. Unfortunately, the nature of the non-statutory exemption in particular makes it almost impossible to provide any precise resolution. That is, the antitrust laws are designed to promote competition and the labor laws; at some level, are designed to suppress competition. Consequently, particularly when confronted with a restraint in the labor market area, the two pieces of legislation are at cross-purposes and an attempt to devise a workable theory in which to pigeon-hole the types of conduct that should be exempt from antitrust scrutiny is extremely difficult.

Perhaps the most difficult hurdle for courts to overcome, and for students to appreciate in terms of their analyses, is the avoidance of considering the merits of the antitrust controversy as part of the exemption analysis. With the exception of Justice Goldberg's concurring opinion approach in the Jewel Tea case (and perhaps the Supreme Court's most recent pronouncement in the Brown case, covered at the end of this chapter), almost every labor exemption analysis, to some degree, has entertained consideration of the potential impact of the restraint upon competition -- thus pursuing in one sense an evaluation of the merits of the antitrust claim. While this approach is almost irresistible, it is intellectually infirm in the sense that the merits of the controversy really should not be a subject of inquiry until the labor exemption issue has been resolved. If the conduct is exempt, then the degree to which it implicates competition or runs afoul of the purposes underlying the antitrust laws really should be no more relevant than the economic hardship visited upon an exempt employee who seeks recovery under the wage/hour laws.

Parts I and II attempt to provide an overview of both the statutory and non-statutory exemptions independent of any specific sports law application. The excerpt from the Duke Law Journal article is extremely complex and perhaps somewhat inaccessible without an actual reading of the cases discussed therein. Space limitations effectively precluded inclusion of many of these cases, and, because they really did not involve fact patterns emanating in a sports context, we chose not to include them. However, students should be encouraged to refer to the text of these opinions, or edited versions of these cases perhaps could be distributed, to enhance students' understanding of the non-statutory labor exemption issue. We do not suggest that this is
necessary to a full understanding; a detailed lecture accompanying this section will probably suffice. However, to the extent that the cursory discussion of these cases leaves the students wanting or needing more information, the simplest advice would be to recommend that students read those opinions in their entirety.

One of us has employed the following approach to set up the labor exemption chapter and to provide a working outline. The analysis takes several stages, each introduced by a question:

1) What is the statutory exemption?
2) What is the non-statutory exemption?
3) How has the non-statutory exemption generally been applied in a sports law context -- particularly with regard to labor market restraints?
4) Does the non-statutory labor exemption apply after a collective bargaining agreement has expired?
5) Does the non-statutory labor exemption apply to a course of conduct in which there has never been any agreement between the labor and non-labor group?

Through this approach, the students may then walk through the various stages of the non-statutory labor exemption as it has been applied in professional sports. Clearly the answer to the first question is found in the Introduction and the Duke Law Journal excerpt. The answer to question three involves an overview of the Mackey case and the three-pronged test employed therein. The fourth question necessitates an examination of Powell and other cases decided at the same time, with particular emphasis upon the fact that even after a collective bargaining agreement has expired the labor exemption will continue so long as a collective bargaining relationship persists. The final question involves a consideration of the Brown cases. We have intentionally included both the court of appeals decision in Brown as well as the Supreme Court decision and we have, despite considerable editing, left large portions of these cases intact. We have applied a relatively light editing touch because of the significance of Brown and the relevance of the dissenting opinions, particularly with respect to applications that may arise in the future.

As suggested above, Parts I and II speak for themselves and may be assigned and synopsized briefly before the initial discussion of Mackey or, in the alternative, an entire lecture could be devoted to the non-statutory exemption prior to any consideration of Mackey. One of us devotes an entire class to providing some history of the evolution of labor law legislation, protection of employee rights, and the development of collective bargaining, along with a brief synopsis of the Sherman Act. This introductory discussion facilitates students' understanding of the tension existing between labor legislation and the antitrust laws. It also provides insights into the inevitability of the need for some type of non-statutory exemption if the courts, in any way, are to accommodate the apparent conflict between labor and antitrust. Following this introductory discussion (however detailed the professor chooses to make it), it is then recommended that a traditional case analysis be employed to address Mackey, Powell, and Brown.

III. Application of the Labor Exemption to Professional Sports

Case: Mackey v. NFL
Primary reason for inclusion: To consider the seminal sports law case dealing with the non-statutory labor exemption and to make students aware of the three-pronged test utilized by the Eighth Circuit in Mackey -- a test that, to some degree, still exists today, even in the wake of the Brown case.

Points to emphasize:

1) This case involved a restraint in a labor market rather than the more typical product market. Thus, it rests outside of the traditional labor exemption-type issue in the sense that the "agreement" or conduct in question exclusively benefits the multi-employer group, and constitutes a provision (eventually included in the collective bargaining agreement) that the players vigorously opposed.

2) The three-prong test is crucial to the students' understanding of the Eighth Circuit's attempt to develop a workable approach using the non-statutory exemption in a sports/labor market context.

3) The third prong of Mackey, the *bona fide*, arms-length bargaining prong, has been subject to considerable controversy, with the most prevalent criticism leveled at the fact that it pursues a level of inquiry that should be irrelevant to a determination as to whether or not the subject conduct should be exempt from the antitrust laws. That is, some commentators suggest that the third prong really is an attempt to level the playing field where the respective economic strengths of the parties should control the outcome (*i.e.*, the labor laws presuppose that one party may have more strength at the bargaining table than the other party and, therefore, that inquiry should not be part of any labor exemption analysis.

Notes and Questions:

The answer to N&Q 1 is that, although most of the sports law labor exemption cases have involved labor market restraints, Mackey is certainly not limited to restraints implicating the labor market. There may be other situations in which the restraint involved may be part of a collective bargaining agreement even though it constitutes a restraint on a related product market.

N&Qs 2 through 5 are devoted primarily to the continuing validity or applicability of the "third prong." Students should be asked to consider whether the respective strengths of the negotiating parties and the development or maturity of the labor organization should have an impact on the applicability of the labor exemption. On the one hand, there is considerable support for the proposition that the utilization of the third prong may involve an analysis of issues beyond pure labor law inquiry and matters that delve into the substantive merits of the antitrust claims. On the other hand, others adopt the view that this prong is necessary to insure that the non-statutory exemption is not employed to shove a restraint down a union's throat with no recourse available under the antitrust laws. The quote from the McCort decision in N&Q 2, together with Judge Edwards' dissent addressed in N&Qs 4 and 5, join the question and should provoke some student dialogue on this question.

N&Q 6 raises an interesting question regarding the first prong of the Mackey test and the individuals who may be affected. This issue takes on considerable significance in the context of draft choices and other collegians who may be adversely affected by provisions in a collective bargaining agreement that could compromise their eligibility to play professional sports. Some commentators have argued that any provision that adversely affects potential draftees who are not
yet part of the collective bargaining agreement, fail to satisfy *Mackey* and thereby should not be labor exempt.

N&Q 7 introduces the next question in our multi-stage approach addressed above: the availability and scope of the labor exemption after the collective bargaining agreement has expired.

IV. Availability and Scope of the Exemption When the Collective Bargaining Agreement Expires

Case: *Powell v. NFL*

**Primary reason for inclusion:** To consider whether or not the labor exemption would be deemed to apply after a collective bargaining agreement containing the particular restraint has expired and what point in time would mark the expiration of the exemption in that eventuality.

**Points to emphasize:**

1) The *Powell* case addressed an issue that was specifically left open in footnote 18 of *Mackey*, to wit: "In view of our holding we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption." Though the Eighth Circuit eschewed any type of consideration of this question, its eventual relevance was inevitable.

2) Because of the considerable unrest surrounding the 1982 strike, and the trauma associated with player activity that threatened the playing of games, the achievement of some type of "industrial harmony" and a preoccupation with the desire to return the parties to the table is an important backdrop to this case.

3) In view of the court's eventual decision that the labor exemption would continue to exist so long as a collective bargaining relationship existed, and its absolute unwillingness to set any finite period of time for the expiration of the exemption, the foregoing point regarding the obsessive preoccupation with returning the parties to the bargaining table cannot be overstated. In evaluating the prudence of the court's approach, students should be encouraged to give considerable attention to the other potential theories, including the union consent theory (discussed in the notes that follow) and the impasse theory, which Judge Doty at the district court level adopted. It is a worthwhile exercise to have students consider the advantages and disadvantages of each of the three approaches (the union consent theory, the impasse theory, and the approach eventually adopted by the court).

4) Students should be made aware of the fact that footnote 12 on page 370 reaffirms the applicability of *Mackey*, particularly prongs 1 and 2. It also interestingly notes that the Sherman Act could be found applicable if the restraint had been proposed in a manner not consistent with good faith bargaining. There would be some who would argue that the question of whether or not the restraint involved good faith bargaining should be reserved for the labor laws and subject to sanctions under the National Labor Relations Act, rather than subjecting such conduct to scrutiny under the antitrust law notwithstanding the bad faith bargaining aspects.
5) The dissenting opinion contained in pages 372-373 should be considered in some detail because it, in some form, is revisited by dissenting opinions in the Brown case. Students should be asked to explore whether or not the non-statutory labor exemption was ever intended to apply to a restraint that the union had no desire to include in the collective bargaining agreement. In this regard, we would highly recommend consideration of a recent article by Professor Michael C. Harper of Boston University, entitled Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 WM. AND MARY L. REV. 1663 (1997).

Notes and Questions:

In N&Q 1, we call your attention to a slight typographical error in the fourth sentence, which now reads, "Any suspension prior to the exemption could frustrate …" and should read, "Any suspension of the exemption prior to impasse could frustrate …". N&Q 1 explains to students the rationale underlying the impasse theory and the union consent theory. Again, these approaches should be compared and contrasted with the approach employed by the court in Powell. As an aside, it is worthwhile to mention to students that student law review notes, which they may believe to be nothing more than an obligatory law review writing requirement, may sometimes have a profound influence upon a court or a developing body of law. Student Michael Hobel's Note in the NYU Law Review formed the predicate for Judge Doty's decision which, although not adopted by the Eighth Circuit, presents an interesting compromise approach to the exemption question in the Powell context.

N&Q 2 requires students to consider an approach adopted by Judge Debevoise in the Bridgeman case. One criticism of the test is that it really does not provide any finite period for the end of the labor exemption and, in fact, may encourage unions to emphatically refuse to consider an employer proposal so as to resolve any doubts as to whether or not the matter is a subject for further negotiations. Again, students should be asked to argue in support of this approach (for example, by emphasizing that the criticism of the approach -- i.e., it could encourage a union's outright refusal to consider a certain proposal -- is countered by the fact that the labor laws (Section 8(b)(3)) could be invoked to preclude a union's bad faith bargaining in this regard. Students should also be asked to consider whether something as subjective as expression that a particular provision would not be accepted is a valid determinate given the fact that a great amount of puffing and outright denials are part of the posturing process attend all collective bargaining.

N&Qs 3 and 4 speak for themselves. They involve a revisitation of the Mackey three-prong test and provide an elaborate factual synopsis of the circumstances leading to and stemming from the Powell decision. Because the authors of this casebook were intimately involved in the filing of unfair labor practice charges on behalf of the Philadelphia Eagles subsequent to the negotiation of the current collective bargaining agreement, anyone reviewing this manual is invited to contact us for further "fly on the wall" discussion of these events.

N&Q 5 asks students to consider whether or not the Powell decision resulted in the adoption of the most prudent approach. While the end result may have been precisely what the Eighth Circuit desired, again students should be asked to consider whether the court could have predicted the path leading to the eventual result.

N&Q 6 simply sets the stage for consideration of the Brown case both at the court of appeals and Supreme Court level.

V. The Non-Statutory Labor Exemption and Its Outer Limits
**Case:** *Brown v. Pro-Football, Inc.* (D.C. Circuit)

**Primary reason for inclusion:** To familiarize students with the D.C. Circuit's emphasis upon the significance of multi-employer bargaining in the professional sports context and to make students aware of Judge Edwards' cavalier assessment that players seeking the benefits of collective bargaining recognize the Hobson's choice of availing themselves of the labor laws to the possible exclusion of an antitrust remedy.

**Points to emphasize:**

1) The dispute arising in this case involved a decision by the league that had never before been incorporated into any collective bargaining agreement and had never been subject to any type of mutual understanding between the clubs and the players' collective bargaining representative. In this sense, it represented a unique and potentially protracted application of the labor exemption.

2) The court made great weight of the importance of multi-employer bargaining in the overall collective bargaining scheme and stresses its significance in terms of the maintenance of industrial peace and stability.

3) On page 385, Judge Edwards' pivotal statement made it clear that players in a labor market restraint context will find little solace in the antitrust laws: "In our view, the non-statutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act." This sentiment echoed the thoughts articulated earlier by Judge Winter in the *Wood* case. At the time, Judge Winter's comments were not surprising given the fact that he had co-authored an extensive law review article expressing a preference for the labor laws over the antitrust laws and also espousing a view that showed no reluctance to visit this Hobson's choice upon the players. Coming from Judge Edwards, this further enunciation of a principle that essentially forces professional athletes to choose between labor and antitrust as a means of recourse is extremely significant.

4) Judge Wald's vigorous dissent framed the issue that would eventually be heard by the Supreme Court. Judge Wald suggested that Judge Edwards' opinion virtually precludes application of the antitrust laws to labor market restraints. Judge Wald, at page 391, emphasizes that nothing in prevailing precedent governing the non-statutory exemption would support the notion that labor market restraints are beyond the reach of the antitrust laws -- certainly not to the degree that the majority would insulate such conduct. The penultimate paragraph on page 391 amply articulates Judge Wald's concerns regarding the breadth of the majority's opinion. Further, in Judge Wald's dissent, her differentiation of terms versus tactics is crucial because it undercuts the majority's assumption that elimination of the labor exemption in the context of the subject case would virtually preclude any multi-employer bargaining strategy that even potentially implicates the antitrust laws. Judge Wald correctly pointed out that there is a chasm of difference between the tactics employed in collective bargaining (and the strategies that are discussed as part of a multi-employer bargaining scheme) and the unilateral implementation of terms against a union's will -- which, had they been imposed in the absence of any collective bargaining representative, would clearly have run afoul of the antitrust laws.
5) Judge Wald clearly concluded that the critical issue still may be when the labor exemption ends in the face of a provision that had previously been incorporated into a collective bargaining agreement. She plainly would not apply the labor exemption in a situation where the parties had never agreed to such terms.

Notes and Questions:

N&Q 1 forces students to consider the origins of the non-statutory exemption a device that emanated from the statutory exemption which insulated exclusively union conduct. Students should be encouraged to consider whether or not independent multi-employer conduct that is imposed upon the union due to the largesse of the labor laws in terms of post-impasse implementation should rest under the protective umbrella of the exemption -- even assuming that good faith, albeit tough, bargaining, is utilized.

N&Q 2 asks whether employees should be presented with the choice of having a collective bargaining representative or individually availing themselves of the antitrust laws. Certainly, it is arguable that this choice will effectively encourage employees to seek decertification rather than induce more meaningful collective bargaining as Judge Edwards and others would hope. This factor is especially compelling given the fact that availing oneself of the labor laws, which employees will have little choice about if they have chosen a collective bargaining representative, will afford a relief that pales in comparison to treble damages afforded under the antitrust laws. That is, alleging bad faith collective bargaining, in most instances, will result in a bargaining order requiring the offending employer to return to the table to bargain in good faith. It may become readily apparent to players who have been victimized by labor market restraints in the past that the benefits of unionization are outweighed by the ability to secure more meaningful relief through the auspices of the antitrust courts.

N&Q 3 poses the question as to whether or not Judge Edwards' opinion, while certainly stricter and more limiting in terms of availing players of antitrust relief, is purer and more intellectually honest in terms of a traditional exemption approach. That is, while Judge Edwards' harsh, cut and dried analysis may, in certain circumstances, deprive worthy plaintiffs of forum under the antitrust laws, it eliminates the thorny problem confronting many jurists in the past regarding the inevitable entwining of labor and antitrust issues at the exemption stage where consideration of the antitrust merits theoretically would be inappropriate.

N&Qs 4 and 5 require students to revisit the question of multi-employer bargaining and its hallowed place in labor relations. At the conclusion of N&Q 5, students are asked to assess whether the fear articulated by Judge Winter is real. If so, students should be asked to contemplate whether there are alternatives that would preserve multi-employer bargaining while at the same time open the door for recourse to the antitrust laws where appropriate. A useful starting point to stimulate this discussion may be found in Michael Harper's law review article Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 WM. AND MARY L. REV. 1663 (1997), alluded to earlier.

The question posed at the conclusion of N&Q 6 reiterates the very same question posed with regard to the developments that ensued following the Powell decision in which the Eighth Circuit stated that the labor exemption would continue so long as the collective bargaining relationship existed. Again, the result was several years of labor peace through a multi-year collective bargaining agreement. However, it is unlikely that the court in either event would have contemplated that the path would be so tortuous.
N&Q 7 speaks for itself, and provides the entry into consideration of the Supreme Court's decision in Brown v. Pro-Football, Inc.

**Case:** Brown v. Pro-Football, Inc. (Supreme Court)

**Primary reason for inclusion:** To provide some finality to the labor exemption issue, particularly judicial precedent that seems to have expanded the non-statutory exemption far beyond any confines that may have been anticipated in its earliest stages.

**Points to emphasize:**

1) Justice Breyer's majority opinion echoed Justice Edwards' theme regarding the importance of multi-employer negotiations in the overall scheme of collective bargaining. Of particular significance is the court's acknowledgment on page 401 that the NLRB and judicial decisions reinforce the notion that a multi-employer bargaining group may unilaterally implement mandatory subjects of bargaining terms subsequent to an impasse.

2) On page 402, Justice Breyer asked rhetorically what multi-employers are to do once impasse is reached if the antitrust laws were to be applicable to conduct that arguably involves mandatory subjects of bargaining. It apparently never occurred to the court (and indeed it is a somewhat radical notion) that although an employer in a labor context may unilaterally implement terms subsequent to impasse and the unilateral implementation of such terms in a multi-employer bargaining sense may survive scrutiny under the labor laws, such conduct, however, absent agreement by the union, may potentially implicate Sherman 1 because it does involve a combination that may unreasonably restrain trade.

3) The court was unclear as to whether or not a pre-impasse unilateral change, which clearly would involve a violation of Section 8(a)(5) of the NLRA, is de facto beyond the scope of the labor exemption. While the court did speak consistently in terms of post-impasse changes, its slavish deference to labor law as the problem-solver in matters involving mandatory subjects of bargaining may suggest that the only remedy in an 8(a)(5) context for activities engaged in by a multi-employer bargaining group may be the relief provided by the labor laws. The court apparently contemplated this possibility by suggesting that its holding was not intended to insulate every joint employer's imposition of terms. Yet, pre-impasse changes were not specifically itemized in the exemplars of conduct that may be beyond the exemption's reach.

4) Justice Stevens' dissent is noteworthy in several respects. First, both Judge Edwards and Justice Breyer found it useful to rely upon Justice Goldberg's concurring opinion in Jewel Tea, particularly with respect to Justice Goldberg's focus upon the nature of the restraint in question (i.e., whether it was a mandatory subject of bargaining) and his disregard for the potential antitrust consequences in developing his exemption analysis. Justice Stevens, in dissent, made it very clear that the facts presented in Jewel Tea, as well as Pennington, did not parallel the Brown facts in any fashion. Justice Goldberg at various points, both as a litigant and as a jurist, made it clear that he did not intend by his Jewel Tea concurrence, to insulate "hard core, anti-competitive activity by employers acting alone." In this regard, Justice Stevens analogized a post-impasse unilateral implementation by a league of mandatory bargaining terms to be functionally tantamount to a group of employers acting alone.
5) Further, Justice Stevens categorically rejecting the notion that employees seeking the representation of a collective bargaining agent surrender recourse to the antitrust laws to remedy various labor market restraints. He made it clear that prior precedents "do not justify the conclusion that employees have no recourse other than the Labor Board when employers collectively undertake anti-competitive action. In fact, they contradict it."

6) Without explicitly saying so, Stevens has embraced, to some small degree, portions of the union consent theory because he emphasized the significance of the "agreement" component of the labor exemption. It does not appear further that there is any doubt in his mind that the Mackey test, at least in some form, survives, even in the face of the majority's broad expansion of the exemption.

Notes and Questions:

N&Qs 1 and 2 visit Justice Breyer's majority and pose the question as to whether the prospect of the labor exemption not applying to the instant case could compromise multi-employer bargaining and the industrial stability that it has engendered. Certainly, the amount of antitrust litigation could increase to some degree if the exemption were not applied in this situation. However, because the task of establishing either a per se violation or a violation under the Rule of Reason is so onerous, it is unlikely that the removal of the exemption in contexts such as Brown would visit a spate of antitrust litigation upon the courts. Moreover, whether or not this type of "slippery slope" could eventuate is irrelevant to a determination as to how the non-statutory exemption should be applied. Perhaps, the question is deserving of further congressional action in terms of clarification of what is now called the "non-statutory" exemption. In any event, it seems as though the omnipresent love affair with multi-employer bargaining is working to close the door to the antitrust courts to many types of restraints that arguably would violate the antitrust laws were it not for the coincidental benefit of a collective bargaining relationship.

In N&Q 3, students are simply asked to assess the merits of Justice Stevens' dissenting opinion regarding the narrowly circumscribed scope he gave Justice Goldberg's concurrence in Jewel Tea. As students contemplate this question, they should be reminded that Justice Goldberg had for years been viewed as an ally of organized labor, and was, in fact, Secretary of Labor in the Kennedy administration. His judicial predilections certainly were not those that, one would expect, would support the league's virtually unilateral imposition of terms that has characterized the reserve systems and similar anticompetitive mechanisms in professional sports.

N&Qs 4, 5 and 6 ask students to consider what the practical consequences of the Brown decision will be. Although no one can definitively predict the results, it certainly is possible that the Brown court will have its wish in that players will seek the bargaining table with greater zeal and both parties will make greater attempts to resolve issues through labor law mechanisms. However, it is also possible, particularly as players become more secure in terms of their ability to negotiate their own contracts, that professional athletes will seek decertification so as to open the door for their own individual litigation and the eventual demise of all reserve systems in sports. This prospect is extremely troubling for sports leagues because most litigation surrounding reserve systems and similar restrictions have resulted in findings that such restraints are unreasonable and not justified by league protestations that free agency and the like will compromise league competitiveness and viability. The extremely disconcerting aspect of Brown, however, involves situations where decertification certainly would not result, and, likewise, where the antitrust laws would be precluded. That is, in many instances, the particular restraint may only affect a small number of bargaining unit personnel; yet, they may involve a number large enough to make a justiciable claim under the antitrust laws. In these situations, the views of this small group will be subsumed by the larger group in a way certainly beyond contemplation of typical "one for all,
all for one” raison d'etre that characterizes collective bargaining. Does Brown virtually preclude any relief for those disaffected employees? Students should be asked to contrast this potential hardship with the adverse affects that a contrary decision in Brown could have had upon multi-employer bargaining.

N&Q 7 is really provided as a small mini-examination question that will force students to consider the Brown case's impact on the labor exemption question and the continuing viability of Mackey. As you walk students through potential answers (and there are no definitive resolutions of these questions), students should be apprised of the fact that some commentators think Mackey has limited viability in the face of the Brown decision. However, we believe that such a contention is somewhat cavalier, particularly given specific language in the Brown case that would suggest that many of the Mackey factors, if not all, still exist in some form. In this regard, students should have their attention drawn to page 406, where the majority opinion finds relevant that conduct as part of collective bargaining negotiations was related to the lawful operation of the bargaining process, involved a mandatory subject of bargaining, and only concerned the parties to the collective bargaining relationship. Certainly two of the three Mackey criteria are embraced by the court’s general language and, depending upon how one would construe the terms "lawful operation of the bargaining process," could effectively include all three phases of Mackey. In this sense, the critical impact of Brown would not be to dilute the three-prong test but, rather, would be to apply it in the context of situations where there had been no agreement and there was no agreement in effect.

In N&Q 8, the students are asked to revisit the question as to whether or not the labor law legitimacy of a post-impasse unilateral implementation by a multi-employer bargaining group a fortiori suggests that such conduct should be exempt from antitrust scrutiny. To suggest that all such activity is exempt perhaps may raise the bar in terms of antitrust availability far beyond anything the Sherman Act contemplated. Again, for a useful and extremely thoughtful approach to this question, see Michael C. Harper, Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 WM. AND MARY L. REV. 1663 (1997).

N&Q 9 poses the question raised in the Points to emphasize regarding the absolute scope of the majority's opinion. Certainly if an impasse is not found, then the multi-employer group will be in violation of 8(a)(5) of the NLRA. Under those circumstances, what would be the continuing viability of the exemption? The court simply does not resolve this question to full satisfaction, and leaves the impression that perhaps the labor laws may be the only effective redress. If so, it would invite all multi-employer groups, in the context of labor market restraints embracing mandatory subjects of bargaining, to adopt the most hard-nosed bargaining tactics recognizing full well that the most serious impact will be a cease and desist order for violating Section 8(a)(5) of the Act. Of course, other circumstances could result, such as a finding of an unfair labor practice strike if employees engaged in a work stoppage in protest of the bargaining tactics. Yet, again, these consequences are attenuated and by no means provide the employees with the immediate type of satisfaction and relief that would be available under the antitrust laws.