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DEFINING THE RELATIONSHIP BETWEEN ANTITRUST LAW AND LABOR LAW: PROFESSIONAL SPORTS AND THE CURRENT LEGAL BATTLEGROUND

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The proper relationship of federal labor law and federal antitrust law has confounded the judiciary since the enactment of the first federal antitrust statutes. Our national labor policy encourages collective bargaining as the best means of promoting industrial peace. One of the underlying foundations of free collective bargaining is labor's capability to affect management's competitive position in the marketplace by means of strikes, boycotts, and worker organization.[1] Viewed in the context of the collective bargaining process, the national policies favoring collective bargaining create tensions with the policies favoring an unrestrained marketplace, which form the foundation of federal antitrust laws.

With varying results, courts have struggled over issues such as the merits of exempting unions from antitrust regulation, the proper extent of this labor exemption, and the degree of scrutiny to be given collective bargaining agreements. In cases involving significant labor considerations and slight antitrust implications courts have found paramount the national policies favoring collective bargaining and have granted immunity or applied a labor exemption. Conversely, in cases involving significant market restraints and only tangentially affecting labor interests courts have applied the anti-

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1. *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).

trust laws. Because no case has arisen with major labor *and* antitrust implications, the proper relationship between the fundamental national policies reflected in these laws never has been defined.

Consideration of this important issue may occur in the context of challenges to the player restraint system in the professional sports industry. Professional athletic teams are similar to other enterprises engaged in selling an entertainment package to the public. Virtually every major public policy towards business—antitrust, labor relations, taxation, race and sex discrimination—has a potentially significant application to sports. Yet, for many years professional sports were not recognized for what they were, a big business. An age of innocence contributed to a low player salary structure, to an advantageous tax treatment for team owners, and to a virtual immunity for professional sports' legal arrangements from antitrust challenges. This tolerance is vanishing quickly, however; players, Congress, courts, and the public have become restless with the existing power structure in the professional sports world. Senator Sam Ervin articulated the changed attitude in 1972, when he complained:

> [h]ow callously professional sports will deny a man his right to a livelihood because he did not wish to play for a particular team at a dictated salary, or how quickly a franchise will be shifted, thereby denying fans the opportunity to see their favorites. . . . Even if I believed the solemn predictions of the pro sports industry spokesman, and I don't, I would still oppose a system that demands lord-like control over the serf-like hired hands in order to guarantee survival of the pro teams.[2]

Despite this change in perception, the road to a reconciliation between the divergent interests represented by athletes, sports teams, the antitrust laws, and the labor laws is strewn with obstacles. New player control systems arising from collective bargaining agreements place significant market restaints on aspiring professional athletes and certainly will be challenged in court. Before considering the antitrust issues, however, courts must decide whether these collective bargaining agreements are subject to antitrust scrutiny. In discussing the latter issue, this Article examines

2. *Hearings before the Antitrust Subcomm. of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 244 (1972).

the applicability of federal antitrust law to professional sports, analyzes the development of labor exemptions and immunities and their relevance in the sports industry, and identifies the issues pertinent to a consideration of whether the current collective bargaining agreement between the National Football League Players Association (NFLPA) and the National Football League Management Council, which includes a new player restraint system, should be immune from antitrust attack.

ANTITRUST AND PROFESSIONAL SPORTS: AN OVERVIEW[3]

Until recently, very little litigation concerned the market freedom of professional athletes and the applicability of the antitrust laws to the professional sports industry. The Supreme Court in 1922 first considered these issues in regard to professional baseball. The Court concluded in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*[4] that the sport was immune from antitrust attack because baseball games were not interstate commerce[5] and "although made for money would not be called trade or commerce in the commonly accepted use of those words."[6] In 1953 the Court in *Toolson v. New York Yankees, Inc.*[7] reaffirmed baseball's exemption from the federal antitrust laws[8] on the rationale that for thirty years baseball had developed free from those laws and that any change in the status quo was within the province of Congress rather than the courts.[9] Finally, in 1972 the Court acknowledged in *Flood v. Kuhn*[10] that baseball was a business engaged in interstate

3. For an in-depth analysis of this subject, see L. SOBEL, PROFESSIONAL SPORTS AND THE LAW (1977).

4. 259 U.S. 200 (1922).

5. "The business is giving exhibitions of baseball which are purely state affairs." *Id.* at 208.

6. *Id.* at 209.

7. 346 U.S. 356 (1953) (per curiam).

8. *Id.* at 357.

9. *Id.* Moreover, the Court noted that Congress, after *Federal Baseball Club,* had declined the opportunity to amend the pertinent statutes. *Id.* Also noteworthy is that the Court decided *Toolson* subsequent to its broadening of the concept of interstate commerce. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Martin, *The Aftermath of Flood v. Kuhn: Professional Baseball's Exemption from Antitrust Regulation,* 3 W. STATE U.L. REV. 262 (1976).

10. 407 U.S. 258 (1972). Flood, an outstanding professional baseball player with 12 years experience for the St. Louis Cardinals, was traded to the Philadelphia Phillies without being consulted about nor informed of the trade until its consummation. After unsuccessfully petitioning the Commissioner of Baseball to classify him as a free agent, Flood initiated an

commerce; nevertheless, relying on *Federal Baseball Club* and *Toolson*, the Court reaffirmed the exemption of baseball's reserve system[11] from the Sherman Act.[12]

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antitrust action against organized baseball, asserting that *Toolson* and *Federal Baseball Club* should be overruled. *Id.* at 264-66.

11. Justice Blackmun's opinion for the Court in *Flood* presented a comprehensive description of baseball's former reserve system:

> The reserve system, publicly introduced into baseball contracts in 1887, . . . centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. Thus
>
> A. Rule 3 of the Major League Rules provides in part:
>
> "(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner. . . .
>
> . . . .
>
> "(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."
>
> B. Rule 9 of the Major League Rules provides in part:
>
> "(a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.
>
> . . . .
>
> "After the date of such assignment of rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club . . . ."
>
> C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.
>
> D. The Uniform Player's Contract provides in part:
>
> "4.(a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contrct."
>
> "5.(a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games

In the interim between *Federal Baseball Club* and *Flood,* the Supreme Court and its individual Justices rendered decisions subjecting professional boxing,[13] football,[14] and basketball[15] to the federal antitrust laws.[16] As a result, litigation and controversy focused

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under the conditions prescribed in the Major League Rules. . . ."

"6.(a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.

"10.(a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

"(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof."

407 U.S. at 259 n.1 (citation omitted).

12. *Id.* at 285. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Section 2 of the Act, 15 U.S.C. § 2 (1970), provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

Although baseball has remained exempt from the federal antitrust laws, this peculiar immunity ironically has not prevented upheavals in the sport's player restraint systems. Relying on arbitration, professional baseball players have achieved a degree of freedom comparable to that possessed by athletes competing in other major professional team sports. *See* Note, *Professional Sports: Restraining the League Commissioner's Prerogatives in an Era of Player Mobility,* 19 WM. & MARY L. REV. 281, 297-300 (1977). *See also* L. SOBEL, *supra* note 3, at 197-218.

13. United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955).

14. Radovich v. National Football League, 352 U.S. 445 (1957).

15. Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971).

16. Recognizing the Court's disparate treatment of the various professional sports, Justice Blackmun stated in *Flood* that baseball's exemption was an anomaly,

> an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis,* and one that has survived the Court's expanding concept of interstate commerce . . . .

on the validity of the player control mechanisms used in those sports lacking baseball's immunity. These control mechanisms were similar to professional baseball's reserve system, which as a consequence of its adoption by the nation's oldest organized professional sport, had served as a prototype for the player restraints used in other sports. Antitrust challenges to player restraints emanated from two sources: adversary leagues competing for athletes within a limited labor market and players attempting to increase their options in contract negotiations with club owners.

Professional basketball was the first sport whose player restraint system was scrutinized closely under the antitrust law. Traditionally, courts had resolved possible antitrust conflicts arising from that sport's Uniform Player Contract by holding that the National Basketball Association's (NBA) option clause,[17] which ambiguously provided that a team had the right to renew a player's prior contract for one year with substantially "the same terms" as those existing in the previous year, should be regarded as exercisable for only one year rather than in perpetuity.[18] Moreover, a player could satisfy the option clause either by playing out or by sitting out his option year.[19]

Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.

407 U.S. at 282-83 (footnotes omitted).

17. The NBA's option clause provided:

> On or before September first next following the last playing season covered by this contract and renewals and extensions thereof, the club may tender to the Player a contract for the next succeeding season . . . . If the Player fails, neglects, or omits to sign and return such contract to the Club so that the Club receives it on or before October first next succeeding, then this contract would be deemed renewed and extended for the period of one year upon the same terms and conditions in all respects as are provided herein, except that the compensation payable to the Player would be the same provided in the contract tendered to the Player pursuant to the provisions hereof, which compensation would in no event be less than 75% of the compensation payable to the Player for the last playing season covered by this contract and renewals and extensions thereof.
>
> The Club's right to renew this contract, as herein provided, and the promise of the Player not to play otherwise than for the Club and its assignees, have been taken into consideration in determining the amount of compensation payable under paragraph two hereof.

NBA Uniform Player Contract ¶ 24.

18. Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. Cuyahoga County 1961). *See* L. SOBEL, *supra* note 3, at 137-44.

19. *Compare* Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969)(basketball) *with* Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Ct. Civ. App.

In 1971, however, Spencer Haywood, a skilled basketball player, challenged the validity of certain components of the NBA's player draft and reserve clause, particularly its four-year rule[20] denying players eligibility as draftees until the graduation of their college class.[21] A federal district court in *Denver Rockets v. All-Pro Man-*

1961)(football). *See* L. SOBEL, *supra* note 3, at 145-46. Additionally, the court actually enforced basketball's one-year option clause in Washington Capital's Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969).

20. By-Laws of the National Basketball Association § 2.05 provided:

> *High School Graduate, etc.* A person who has not completed high school or who has completed high school but has not entered college shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter.

Section 6.03 provided:

> *Persons Eligible for Draft.* The following classes of persons shall be eligible for the annual draft:
>
> (a) Students in four year colleges whose classes are to be graduated during the June following the holding of the draft;
>
> (b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility;
>
> (c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility;
>
> (d) Persons who become eligible pursuant to the provisions of Section 2.05 of these By-laws.

21. Haywood was voted Rookie of the Year and Most Valuable Player of the American Basketball Association (ABA) for the 1969-70 season, following which he renegotiated his contract with the ABA's Denver Rockets. Although Denver represented that it would give Haywood a six year, $1,900,000 contract, it ultimately tendered to Haywood a standard contract providing only $394,000 in compensation. Nevertheless, Haywood signed, purportedly relying on the Denver managers' representations that the contract furnished compensation of $1,900,000, as negotiated. After learning of the inconsistency, Haywood unsuccessfully attempted to renegotiate and then voided his contract "by reason of fraudulent misrepresentations." Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1053 (C.D. Cal. 1971). Denver thereafter filed suit to force Haywood to play basketball for it through the 1975-76 season and to enjoin him from playing for any other team. Contending that his contract with Denver was rescinded, Haywood entered into a new agreement with the NBA's Seattle Supersonics. The Commissioner of the NBA, however, voided this contract, which was in violation of the four-year rule. *Id.* at 1056; *see* note 20 *supra*. Haywood counterclaimed that the NBA was engaging in an unlawful restraint of trade and sought an injunction allowing

agement, Inc.[22] concluded that the four-year rule constituted a group boycott, a concerted refusal to deal, that was a per se violation of section 1 of the Sherman Act.[23]

In determining the applicability of the per se standard, the court found that the contested action was outside the scope of the exception enunciated by the Supreme Court in *Silver v. New York Stock Exchange,*[24] within which a market restraint could be evaluated under a rule of reason standard. To qualify his actions for the extensive review provided by the *Silver* exception, the district court concluded that an antitrust defendant had to establish three factors: first, that the legislative or market structure of the particular industry mandated self-regulation; second, that the collective action was intended to accomplish an end consistent with the policy justifying self-regulation, was reasonably related to that goal, and was no more extensive than necessary; and third, that the collective group provided procedural safeguards for anyone harmed by their action.[25] The NBA's four-year rule lacked the notice and hearing provisions necessary for it to receive a rule of reason evaluation; thus, the court granted Haywood a partial summary judgment, declaring the rule a per se antitrust violation.[26]

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him to play for Seattle. 325 F. Supp. at 1054. Granting Haywood's request, the district court issued a preliminary injunction, *id.* at 1067, which subsequently was upheld by Justice Douglas, sitting as Circuit Justice. Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971). The district court also ordered that a "partial summary judgment in favor of plaintiff Haywood be granted, to the limited extent of ruling that the NBA's four-year college rule . . . is a violation . . . of the Sherman Act." 325 F. Supp. at 1066-67. *See generally* L. SOBEL, *supra* note 3, at 447-69.

22. 325 F. Supp. 1049 (C.D. Cal.), *stay vacated sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971).

23. *Id.* at 1066-67. For the pertinent text of § 1 of the Sherman Act, 15 U.S.C. § 1 (1970), see note 12 *supra.*

24. 373 U.S. 341 (1963).

25. *See* 325 F. Supp. at 1065.

26. *Id.* at 1066-67; *see* note 21 *supra.* A complete analysis of the standard under which courts should review alleged antitrust violations in situations involving professional sports is beyond the scope of this Article. The judiciary has not fully resolved this issue. As recognized by the court in *Denver Rockets,* two possible standards of review could be implemented: the rule of reason or the per se test. Under a rule of reason evaluation a court must determine whether the particular restraint of trade places an undue burden on competition. *See, e.g.,* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50 (1977); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39, 241 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). Such an analysis, which requires the court to weigh the prospective costs and benefits of the activity in question, generally necessitates extensive discovery of intricate economic data, which then is presented in a long, expensive, and elaborate trial. Relieving

A second major challenge to professional basketball's player restraint system arose in a 1975 suit by the player representatives of the fourteen NBA teams, who alleged that the NBA's college draft, its Uniform Player Contract reserve clause, and its compensation plan (analogous to the National Football League's Rozelle Rule)[27] were illegal, anticompetitive restraints. In *Robertson v. National Basketball Association*[28] the court denied the defendant NBA's motion for summary judgment and the defendant American Basketball Association's (ABA) motion to dissolve a preliminary injunction against an NBA-ABA merger granted earlier to the plaintiffs.[29] The court declined to grant summary judgment for the plaintiffs because of the uncertainty over whether the disputed control mechanisms "came into being in the context of arm's length union-employee negotiations,"[30] a fact that would determine the appropriateness of exempting the restraints from antitrust attack.[31]

Although the court in *Robertson* refused to rule on the legality of the NBA's player restraints,[32] it suggested that the player draft and perpetual reserve system violated the antitrust laws under either a per se test or rule of reason standard.[33] In discussing the restraints' possible defects under a per se standard, the court noted that they were "readily susceptible to condemnation as group boycotts based on the NBA's concerted refusal to deal,"[34] following the Supreme

courts and antitrust plaintiffs of the difficult analytical problems imposed by a rule of reason inquiry, the Supreme Court has identified several practices in businesses other than professional sports that are sufficiently anticompetitive to be deemed illegal per se. *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969) (price-fixing); Northern Pac. R.R. v. United States, 356 U.S. 1 (1958) (tie-in contracts); International Salt Co. v. United States, 332 U.S. 392 (1947) (tie-in contracts); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (group boycotts); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price-fixing). For a more detailed discussion concerning the most appropriate standard of review of alleged antitrust violations in professional sports, especially in situations involving player discipline, see Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705-17 (1977).

27. For a discussion of the Rozelle Rule, see note 64 *infra* & accompanying text.

28. 389 F. Supp. 867 (S.D.N.Y. 1975).

29. *Id.* at 880, 896. The defendants also moved to dismiss the complaint both for failure to join an indispensible party, the Players Association, and for lack of jurisdiction, contending that primary jurisdiction belonged to the National Labor Relations Board. *Id.* at 878-79.

30. *Id.* at 895.

31. *Id.*

32. 389 F. Supp. at 895-96.

33. *Id.* at 895.

34. *Id.* at 893.

Court's rationales in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[35] and *Fashion Originators' Guild of America, Inc. v. FTC.*[36] Moreover, they were "analogous to price fixing devices,"[37] which the Supreme Court had condemned in *United States v. Socony-Vacuum Oil Co.*,[38] and they could "be viewed as devices creating illegal horizontal territorial allocations and product market divisions"[39] under the Supreme Court's decision in *Burke v. Ford.*[40] Furthermore, any permissible restraints would need to survive a judicial examination concerning their reasonableness, and the essential inquiry in such a review would be whether less drastic protective measures were available. On this point Judge Carter noted:

> it is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, black-listing, boycotts and refusals to deal could be saved from Sherman Act condemnation . . . . The life of these restrictions, therefore, appears to be all but over, although their formal interment must await further developments in this case.[41]

Professional hockey's reserve system became the subject of antitrust complaints in 1971, when the World Hockey Association's (WHA) formation challenged the monopoly of the established National Hockey League (NHL). The most significant case resulting from this development was *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,[42] in which the WHA sought to

35. 359 U.S. 207 (1959).
36. 312 U.S. 457 (1941).
37. 389 F. Supp. at 893.
38. 310 U.S. 150 (1940).
39. 389 F. Supp. at 893.
40. 389 U.S. 320 (1967).
41. 389 F. Supp. at 895. The court reserved ruling on the legality of the one-year player reserve clause and the inter-team compensation plan, primarily because the NBA contended that the plan differed fundamentally from football's Rozelle Rule. *Id.* at 896. For a discussion of the Rozelle Rule, see note 64 *infra* & accompanying text. Although, on the merits, the plan probably would have been found to be equivalent to the Rozelle Rule and therefore a restraint of trade as a concerted refusal to deal, the issue never came to trial. An out of court settlement agreement provided for the elimination of the compensation rule by 1980 and its replacement by a right of first refusal, which would permit the player's current team to retain any free agent by matching the highest offer he received from another club. A team failing to exercise this right of first refusal would be entitled to compensation from the player's new team. *See* L. SOBLE, *supra* note 3, at 118.
42. 351 F. Supp. 462 (E.D. Pa. 1972).

enjoin the NHL from enforcing its reserve clause.[43] After the WHA demonstrated that, because the NHL had controlled the labor market through its reserve system for an undue period of time,[44] it had deprived competing leagues of the opportunity to procure the services of qualified professional major league hockey players,[45] Judge Higginbotham ordered:

> that the National Hockey League, . . . [is] preliminarily enjoined from further prosecuting, commencing, or threatening to commence any legal proceeding pursuant to and/or to enforce the so-called "reserve clause" . . . of the National Hockey League

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43. The reserve clause in the NHL's 1971-72 Standard Player's Contract provided:

Clause 17

"The Club agrees that it will on or before September 1st. . . . next following the season covered by this contract tender to the Player personally or by mail . . . a contract upon the same terms as this contract save as to salary.

The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement.

In March, 1972, Clause 17 was amended to provide:

"17. The Club agrees that it will on or before September 1st (August 10th, in the case of 'protected' players and those who played fifty NHL games in the preceding season) next following the season covered by this contract tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto a contract upon the same terms as this contract save as to salary. The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement, failing which, by arbitration under the Arbitration Agreement between the League and the NHL Players' Association dated March 29th, 1972."

Quoted in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 474-75 (1972). *See also* NHL Standard Player's Contract ¶ 17 (1974 Form).

44. The court concluded that the reserve clause imposed a perpetual restraint on player movement because Clause 17 of the NHL Standard Player's Contract provided that the club could renew a player's contract on the same terms as the previous contract, except as to salary. For the text of Clause 17 in both its original and amended versions, see note 43 *supra*. The NHL argued that the reserve clause was not perpetual but was enforceable only until 1975, the expiration date of the current collective bargaining agreement. Although Judge Higginbotham rejected the NHL's contention, he noted that the reserve clause, even if subject to a three year limitation, nevertheless would be unreasonable. 351 F. Supp. at 517-18.

45. Hockey, unlike basketball and football, does not rely on a yearly supply of college graduates for its player personnel; rather, the sport has a well-integrated system of minor leagues. Through agreement with these minor leagues, the NHL not only controls its players but also the minor league players. *Id.* at 478-80.

> Standard Player's Contract, against any player, coach or other person whose contract, expired on or before November 8, 1970.[46]

The NHL reserve clause thus presumably violated section 2 of the Sherman Act[47] insofar as its operation prevented the WHA and its member teams from effectively engaging in major league professional hockey. The court found a clear and substantial likelihood that, in a trial on the merits, the existence of interlocking agreements among NHL teams, the reserve clause, and agreements with affiliated minor leagues and amateur hockey associations enabling the NHL to control the availability of those organizations' athletes[48] would suffice to demonstrate the NHL's exercise of monopoly power in violation of section 2.[49] The court refrained from deciding the potential validity of the NHL's reserve system under section 1 of the Sherman Act,[50] however, because it recognized the uniqueness of professional sports and the need for some type of system to maintain league balance.[51] This recognition implicitly suggested that the court in *Philadelphia World Hockey Club* considered the rule of reason the most appropriate standard for reviewing alleged antitrust violations in the professional sports industry.

Another significant hockey case in which a district court concluded that the NHL's reserve system violated federal antitrust law

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46. *Id.* at 519.

47. 15 U.S.C. § 2 (1970). The court was uncertain whether the reserve clause violated § 1 of the Act. 351 F. Supp. at 518. For the pertinent text of §§ 1 and 2 of the Sherman Act, see note 12 *supra*.

48. *See* note 45 *supra*.

49. 351 F. Supp. at 518. The suit in *Philadelphia World Hockey Club* centered on a request for a preliminary injunction. Prior to the trial on the merits the NHL, in December, 1973, mooted the controversy by replacing its perpetual reserve clause with a one-year option clause comparable to that then in use by the National Football League (NFL). *See* note 63 *infra*. Pursuant to this new clause an athlete could play out his option by complying with his contract for its duration and then either by sitting out the next year or by playing one more year for his old team at a minimum stipulated price without signing a new contract. Upon completion of that year, the athlete became a free agent and could sign with another team. As did the NFL, the NHL adopted a compensation rule that requires a team signing a free agent to compensate the player's former club. Unlike the NFL's previous compensation rule, or Rozelle Rule, however, which provided the NFL Commissioner with the sole authority to fix compensation in situations when the two teams could not reach a mutual agreement, *see* note 64 *infra*, the present NHL compensation rule, which was first implemented in 1973, provides that an arbitrator rather than the league president will resolve disputes between clubs as to compensatory amounts. By-Laws of the National Hockey League § 9A.8.

50. *See* note 47 *supra*.

51. 351 F. Supp. at 503-12.

was *Boston Professional Hockey Association v. Cheevers.*[52] Gerry Cheevers and Derek Sanderson, members of the NHL's Boston Bruins, signed contracts to play with WHA teams after they previously had signed mandatory NHL Standard Player's Contracts containing a reserve clause.[53] Boston initiated a suit, seeking to prevent the two athletes from playing in the WHA, but Cheevers and Sanderson countered, claiming that the enforcement of their NHL contracts would violate the antitrust laws. In determining whether the NHL's use of standard player contracts actually restrained trade, the court held that, because the contracts must be considered as a part of the total integrated documents governing the relationship between hockey players and member NHL clubs, they were subject to the antitrust laws.[54] The NHL had total control over a hockey player from the time he first played in any organized league through the end of his career, an obvious and serious antitrust violation; consequently, the court enjoined enforcement of the contracts' reserve clauses.[55]

Since the merger of the National Football League (NFL) and the American Football League (AFL) the major resistance to professional football's player control system has arisen from the actions of players seeking to enhance their bargaining positions. The first of three landmark decisions concerning professional football's player control restraints[56] was *Kapp v. National Football League.*[57] Joe Kapp instituted a treble-damages antitrust action against the NFL, its Commissioner, its individual teams, and other defendants. He alleged that the provisions in the NFL's constitution and bylaws for the player draft, the tampering rule, the option clause, and the Rozelle Rule constituted a combination to refuse to deal, a per se violation of the Sherman Act.

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52. 348 F. Supp. 261 (D. Mass.), *remanded,* 472 F.2d 127 (1st Cir. 1972).

53. *See* note 43 *supra.* The NHL Standard Player's Contract also recited that because the player possessed exceptional abilities as a hockey player, the loss of which could not be compensated adequately, he agreed to permit his club to enjoin him from playing hockey for any other team. *See also* NHL Standard Player's Contract ¶ 6 (1974 Form).

54. 348 F. Supp. at 265-66.

55. *Id.* at 267. For additional hockey cases arising from disputes between the WHA and the NHL, see Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Minn. 1972).

56. The NFL's player restraint system provided the basis for the NHL's revised option clause. *See* note 49 *supra.*

57. 390 F. Supp. 73 (N.D. Cal. 1974).

Judge Sweigert's factual presentation in *Kapp* succinctly described the elaborate control mechanisms then encountered by a football player. The Washington Redskins had selected Kapp, an outstanding college quarterback, pursuant to the NFL's draft[58] and had placed him on their reserve list, thus acquiring exclusive rights to negotiate with him.[59] Effectuating this exclusive right to negotiate was the league's tampering rule, which provided severe penalties for any club that intentionally negotiated with a player on another team's reserve list.[60] A duty to bargain in good faith did not accompany a team's acquisition of the exclusive right to negotiate with a particular athlete,[61] however, and Washington never made Kapp an acceptable offer. Kapp subsequently contracted to play in the Canadian Football League (CFL), but Washington nevertheless retained its exclusive NFL rights. Thereafter, the Houston Oilers of the newly formed AFL negotiated with Kapp, and the two parties entered into a contract, which the Commissioners of both the NFL and the AFL declared invalid. Kapp eventually signed with the NFL's

58. The then relevant NFL draft rules and procedures, as set forth in the CONST. AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE art. XIV (1976), provided that a seventeen round player draft would be held once every year. Each club participating in a particular round could select one athlete in that round, and the clubs made their selections in the reverse order of their final standings from the previous year.

59. The NFL Constitution and By-Laws provide: "The selecting club shall have the exclusive right to negotiate for the services of each player selected by it in the Selection Meeting. Selected players shall be placed on the Reserve List of that club." *Id.* art. XIV, § 5.

60. The NFL's tampering rule provides:

> If a member club or any officer, shareholder, director, partner, employee, agent or representative thereof, or any person holding an interest in said club shall tamper, negotiate with, or make an offer to a player on the Active, Reserve or Selection List of another member club, then unless the offending club shall clearly prove to the Commissioner that such action was unintentional, the offending club, in addition to being subject to all other penalties provided in the Constitution and By-Laws, shall lose its selection choice in the next succeeding Selection Meeting in the same round in which the affected player was originally selected in the Selection Meeting in which he was originally chosen. If such affected player was never selected in any Selection Meeting, the Commissioner shall determine the round in which the offending club shall lose its selection choice. Additionally, if the Commissioner decided such offense was intentional, the Commissioner shall have the power to fine the offending club and may award the offended club 50% of the amount of the fine imposed by the Commissioner. In all such cases the offended club must first certify to the Commissioner that such an offense has been committed.

Id. art. IX, § 2.

61. *See* 390 F. Supp. at 76; note 59 *supra*.

Minnesota Vikings, after that club had obtained his release from the CFL and from Washington.[62]

After completing a two-year contract with Minnesota, Kapp refused to sign for the 1969 season, and the Vikings invoked his contract's option clause[63] for that year. Kapp thus became a free agent in 1970. Despite his demonstrated prowess, however, only three teams expressed any interest in signing Kapp and only one made him an offer. Kapp asserted that this disinterest was caused by the NFL's Rozelle, or "Ransom," Rule, which required a club acquiring a free agent to compensate his former team.[64] Kapp finally negotiated a lucrative contract with the New England Patriots of the NFL,[65] but only after the Patriots and Vikings had arrived at a mutually agreeable compensation package. Further complicating matters, Kapp never complied with the requirement that he sign a Standard Player's Contract with New England, and consequently, he has been prevented from playing in the NFL since 1970.[66]

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62. 390 F. Supp. at 76. To obtain Kapp's release from his contract option year in the CFL, Minnesota paid $50,000 to the CFL franchise owning the rights to Kapp. Minnesota presumably also made satisfactory arrangements with Washington, the owner of the NFL rights to Kapp. *Id.*

63. Previously, the NFL's option clause, as contained in the NFL Standard Players Contract ¶ 10, provided:

> The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in Section 1 hereof, renew this contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further term, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth in Section 3 thereof and shall be payable in installments during the football season in such further term as provided in Section 3; and (2) after such renewal this contract shall not include a further option to the Club to renew the contract. The phrase "rate of compensation" as above used shall not include bonus payments or payments of any nature whatsoever and shall be limited to the precise sum set forth in Section 3 hereof.

64. CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE art. XII, § 1 (H) (1976). If the two teams could not agree to a satisfactory compensation arrangement, the Rozelle Rule provided the Commissioner with the absolute discretionary power to award the acquiring club's players or future draft choices as compensation to the free agent's former team. *Id.*

65. This contract was not concluded until October 6, 1970, midway through the football season. The terms provided for Kapp to play the remainder of the year and the 1971 and 1972 seasons for a total compensation of $600,000. 390 F. Supp. at 77.

66. All players must sign a Standard Players Contract. CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE art. XV, § 1 (1976). The importance of this requirement is that the contract provides that a player "becomes bound by the Constitution, By-Laws, Rules and Regulations of the league." 390 F. Supp. at 77.

Based on these facts Judge Sweigert granted Kapp a partial summary judgment, concluding that the Rozelle Rule,[67] the draft rule,[68] the Standard Player's Contract, and the tampering rule[69] constituted patently unreasonable restraints of trade that violated the antitrust laws under a rule of reason inquiry.[70] The court found, however, that the option rule was not patently unreasonable and declined to determine its validity on a motion for summary judgment.[71]

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67. 390 F. Supp. at 77. In discussing the Rozelle Rule, the court noted:

> A conceivable effect of this rule would be to *perpetually* restrain a player from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States.
>
> We conclude that such a rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test . . . .

Id.

68. The court stated that "the draft rule . . . is also patently unreasonable insofar as it permits virtually *perpetual* boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with the player." *Id.*

69. The court deemed the tampering rule and the Standard Player Contract as patently unreasonable in that they were devices to enforce the other rules. *Id.*

70. For a brief discussion of the difference between the rule of reason and the per se test, see notes 24-26 *supra* & accompanying text. The court acknowledged that Kapp's factual allegations constituted a group boycott, which consistently has been regarded as a per se antitrust violation. 390 F. Supp. at 80, 87-88. *See* Note, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 BUFF. L. REV. 613 (1975); Note, *Legality of the Rozelle Rule and Related Practices in the National Football League*, 4 FORDHAM URBAN L.J. 581 (1976); Note, *The True Story of What Happens When the Big Kids Say, "It's my football, and you'll either play by my rules or you won't play at all"*, 55 NEB. L. REV. 335 (1976). The court nevertheless asserted that agreements between sports franchises within a competitive league presented significantly different policy considerations from those found in the typical antitrust controversy. According to the court, a sports league is a unique business enterprise in that its success depends on balanced competition on the athletic field; to achieve this balance, it must coordinate its efforts. Teams could not be allowed to conduct an open bidding war for players, because the economically advantaged clubs would sign the best players and would obtain a competitive superiority over the poorer teams. Such a situation would result in a loss of fan interest and support. In addition, the court found persuasive the NFL's argument that historically the executive and the legislative branches of the federal government had recognized the unique relationship between professional sports and the antitrust laws. 390 F. Supp. at 79-81 & nn. 4-5. Thus, the court concluded that "in this particular field of sports league activities the purpose of antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute *per se* test sometimes applied by the courts in other fields." *Id.* at 82.

71. 390 F. Supp. at 82-83.

Another landmark decision concerning professional football was *Mackey v. National Football League,*[72] which arose on a complaint filed by present and former professional football players challenging the validity of the Rozelle Rule. The district court held the rule to be a per se violation of section 1 of the Sherman Act,[73] reasoning that the rule and its related practices constituted "a concerted refusal to deal and a group boycott on the part of defendants."[74] The court also found the Rozelle Rule invalid under a rule of reason inquiry because it was "unreasonably broad in its application," it failed to provide the athletes with any procedural safeguards, and it was "a perpetual restriction on a player, following him throughout his career."[75]

On appeal the Court of Appeals for the Eighth Circuit held that the rule of reason was the appropriate standard of review and that the "Rozelle Rule, as enforced, unreasonably restrains trade in violation of Section 1 of the Sherman Act."[76] In its rejection of the per se test, the court reasoned that professional football was a unique business, similar to a joint venture, in which each team had a vested interest in the success of every other team; thus, "if the League [failed], no one team [could] survive."[77] The court noted:

> Although businessmen cannot wholly evade the antitrust law by characterizing their operation as a joint venture, we conclude the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different context. This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players' services.[78]

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72. 543 F.2d 606 (8th Cir. 1976), *rev'g* 407 F. Supp. 1000 (D. Minn. 1975).

73. 407 F. Supp. at 1007.

74. *Id.*

75. *Id.*

76. 543 F.2d at 622.

77. *Id.* at 619.

78. *Id.* (footnotes omitted). In support of its rationale the court cited several authorities rejecting the appropriateness of a per se standard in unique business situations: White Motor Co. v. United States, 372 U.S. 253 (1963) (vertically imposed territorial restrictions); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974) (combination of banks for joint operation of national credit card system); Elman, *"Petrified Opinions" and Competitive Realities,*66 COLUM. L. REV. 625 (1966). *See also* Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (New York Stock Exchange rules governing Exchange members).

Having decided that the alleged antitrust violations should be evaluated under a rule of reason standard, the Eighth Circuit then determined whether the Rozelle Rule was an unreasonable restraint on competition or whether it was justified by legitimate business purposes. The court initially agreed with the district court that the restraints on trade imposed by the Rozelle Rule were numerous and serious: it "significantly deter[red] clubs from negotiating with the signing free agents;"[79] it significantly deterred players from playing out their options to become free agents; it significantly hindered a player's bargaining position; it deprived players of the right to place their services for bids on the open market; it helped to maintain an artificially low salary structure; and it deterred movement in interstate commerce.[80] The court next examined the NFL's arguments for maintaining the Rozelle Rule, determining that those reasons did not justify the restraints created by the rule's imposition. The NFL asserted that without such a rule the teams offering attractive intrinsic advantages such as larger salaries, good locations, and high winning percentages would obtain the superior players and would create a harmful competitive imbalance within the league, that the rule was necessary to protect a team's investment in its players, and that without the rule the quality of competition within the league would decline because players frequently would jump from team to team and thereby destroy the teams' existing harmony and coordination.[81] The court considered the last two reasons spurious and obviously insufficient as justifications for the Rozelle Rule. It regarded a team's investment in players as an ordinary expense of doing business and found that the NFL already had confronted and managed problems of contract jumping.[82] Thus, the key issue was "whether the Rozelle Rule [was] essential to the maintenance of competitive balance, and [was] no more restrictive than necessary."[83]

In holding the Rozelle Rule unreasonable, the court indicated that it would not decide whether any compensation system designed for

79. 543 F.2d at 620.

80. *Id.*

81. *Id.*

82. *Id.* For an in-depth discussion of the legal problems accompanying player contract jumping, see Heiner, *Post-Merger Blues: Intra-League Contract Jumping*, 18 WM. & MARY L. REV. 741 (1977).

83. 543 F.2d at 621.

use in situations involving free agent transfers would be valid. The Eighth Circuit held the particular rule invalid, however, because it affected all players, not just the superstars for whom it apparently was intended, it constituted a perpetual restriction on a player's freedom of movement, and it contained no procedural safeguards.[84]

Another antitrust challenge involving professional football, *Smith v. Pro-Football,*[85] was a treble-damages antitrust action brought by a former professional football player against the Washington Redskins and the NFL for injuries he suffered as a consequence of the restrictive nature of the NFL player draft. Smith alleged that the player draft constituted a concerted refusal to deal and a group boycott, which restricted his ability to negotiate a contract fairly reflecting his free market value and containing an adequate injury protection guarantee.[86]

The court held that the draft was per se a violation of the antitrust laws: "There is no question . . . that the restrictions composing the draft 'are naked restraints of trade with no purpose except stifling of competition.'"[87] Moreover, the court held that, even if the rule of reason test was the applicable standard of review, the player draft nevertheless would violate the antitrust laws, because the draft's selection procedure "is absolutely the most restrictive one imaginable"[88] and because the NFL had not demonstrated a correlation between an early draft position and team improvement.[89] Without deciding whether less stringent player allocation methods could satisfy even a rule of reason inquiry, the court nevertheless indicated that the NFL either might replace its current seventeen round draft with a two round draft or might allow more than one team to select a player in the draft.[90]

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84. *Id.* at 622.

85. 420 F. Supp. 738 (D.D.C. 1976). *See generally* 41 ALB. L. REV. 154 (1977).

86. An injury protection clause guarantees a player his salary for the length of his contract, even if the player becomes incapacitated.

87. 420 F. Supp. at 745. For a brief explanation of the rules previously governing the NFL player draft, see note 58 *supra.* In determining Smith's damages the court computed the difference between the amount he might have received on the open market and the amount he actually received from the Washington Redskins. The court concluded that Smith could have obtained a three-year contract providing $54,000 per year and containing an injury protection clause. The court ultimately granted the plaintiff a judgment for treble damages in the amount of $276,600 plus costs and attorneys fees. 420 F. Supp. at 748-49.

88. 420 F. Supp. at 746.

89. *Id.*

90. *Id.* at 746-47.

Antitrust confrontations also have involved traditionally non-team sports such as tennis[91] and golf.[92] In *Blalock v. Ladies Professional Golf Association*[93] official observers at the second round of the 1972 Ladies Professional Golf Association (LPGA) Tournament charged that the plaintiff, Jane Blalock, an LPGA member, had illegally moved her ball. The LPGA Executive Board voted to disqualify Blalock from the tournament, to fine her $500, and to place her on probation for the remainder of the 1972 playing season. The Board subsequently voted to suspend the plaintiff from the LPGA from June 1, 1972, until May 31, 1973. This one-year suspension, Blalock argued, constituted a group boycott and was a per se violation of the antitrust laws.

In its decision in *Blalock* the court observed that professional golf was subject to the antitrust laws. Moreover, the court stated that the legality of conduct under the Sherman Act should be evaluated under a rule of reason inquiry unless a "naked restraint of trade" rendered the per se test applicable.[94] Blalock's suspension, the purpose and effect of which was to exclude the plaintiff from the market, represented such a "naked restraint of trade." Suspending the plaintiff, concluded the court, was tantamount to excluding her from the total market of professional golf because Blalock not only would be barred from LPGA-sponsored tournaments but a provision in the LPGA Constitution also would prevent her participation in any non-LPGA-sponsored events without the LPGA executive director's approval.[95] The court also found the suspension to be an exercise of the LPGA's subjective discretion "as was evident from the fact that they had initially imposed . . . only probation and a fine, but then, without hearing from plaintiff, determined to impose the suspension."[96] The disciplinary action, observed the court, was imposed by the plaintiff's competitors who stood to benefit materially from her suspension.

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91. *See, e.g.*, Drysdale v. Florida Team Tennis, Inc., 410 F. Supp. 843 (W.D. Pa. 1976); Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241 (S.D.N.Y. 1973).

92. *See, e.g.*, Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1968); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973).

93. 359 F. Supp. 1260 (N.D. Ga. 1973).

94. *Id.* at 1263-65.

95. *Id.* at 1265.

96. *Id.*

Because the court held the LPGA's action to be illegal per se, it declined to evaluate the suspension's reasonableness.[97] The court rejected, however, the LPGA's claim that the plaintiff's exclusion from the market was a legitimate exercise of self-regulation entitled to receive a rule of reason evaluation under the Supreme Court's decision in *Silver v. New York Stock Exchange.*[98] The LPGA's reliance on *Silver* was held to be unjustified because, unlike *Silver*, in which the policies of the Securities Exchange Act provided a justification for the stock exchange to regulate its members, *Blalock* involved no statute that might be construed *in pari materia* with the antitrust laws.[99]

Two other cases are relevant in ascertaining the limits of permissible self-regulation by sports leagues: *Molinas v. National Basketball Association*[100] and *Deesen v. Professional Golfers' Association.*[101] In *Deesen* the plaintiff, who was a Professional Golfers' Association (PGA) tournament-approved player from 1952 to 1958, was prevented by injuries in 1958 from competing in the required ten tournaments per year. As a result, the PGA's national tournament committee, composed primarily of non-competitors of Deesen, terminated his status as an approved tournament player on the grounds that his playing ability was insufficient and for failure to compete in the required number of tournaments per year.[102] Deesen applied for reinstatement, but his request was denied. In a subsequent antitrust action Deesen failed to prove that the PGA rules were applied to him in a discriminatory manner or that any agreement, conspir-

97. *Id.* at 1265-66.

98. 373 U.S. 341 (1963).

99. 359 F. Supp. at 1266. For a more extensive discussion of *Blalock*, see Weistart, *supra* note 26, in which the author argues that unwarranted results would occur from a literal application of the district court's conclusion that *Silver* permits self-regulation only when it is supported by specific statutory authorization. *Id.* at 717-18 n.53. According to Professor Weistart, the crucial factor in *Blalock* was the imposition of the suspension by Blalock's competitors who might have gained from the plaintiff's removal from the sport. *Id.* at 718. Moreover, the committee imposing the suspension possessed complete discretion in its determination of the most appropriate discipline, and Blalock consequently was denied the procedural safeguards that must be exercised by private groups seeking to obtain evaluations of their self-regulatory structures under the rule of reason inquiry. *Id.* at 718-19. *See also* text accompanying notes 24-26 *supra.*

100. 190 F. Supp. 241 (S.D.N.Y. 1961).

101. 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846 (1966).

102. 358 F.2d at 168. This termination did not remove the plaintiff totally from the tournament market. *Id.* at 168-69.

acy, or combination existed to prevent him from participating in PGA tournaments or from earning a living as a professional golfer. On the evidence presented, the trial court found no violation of the Sherman Act, and the Court of Appeals for the Ninth Circuit affirmed the district court's ruling.[103] Deesen's exclusion from tournament competition, the court stated, was based on reasonable grounds:

> PGA is entitled to adopt reasonable measures for holding the tournaments to a reasonable number. It was required to treat Deesen as well as it treated others in the same category but it was not compelled to give him special treatment simply because he did not wish to accept PGA tournament entry rules and regulations.[104]

A district court reached a similar result in *Molinas,* in which the plaintiff was suspended indefinitely by the NBA Commissioner for gambling, a violation of both his contract and a league rule.[105] Molinas contended that the NBA's reserve clause was an illegal restriction on competition, that his suspension constituted an illegal refusal to deal, and that the league unlawfully prevented him from playing in exhibition games with league players. The court, however, held that the NBA had not violated federal antitrust laws,[106] because:

> A rule . . . providing for the suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league . . . . Surely, every disciplinary rule which a league may invoke, although by its nature it may involve some sort of a restraint, does not run afoul of the anti-trust laws. And, a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined.[107]

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103. *Id.* at 171-72. In addition to hearing his request for reinstatement the PGA permitted Deesen to play a number of "test" rounds of golf for review by the committee. Although Deesen agreed, his average score was such that the court found the PGA warranted in denying reinstatement. *Id.* at 168, 172.

104. *Id.* at 172 (footnote omitted).

105. 190 F. Supp. at 242.

106. *Id.* at 244.

107. *Id.* at 243-44. For a more detailed analysis of the court's holding in *Molinas* and the impact of the case on a sports league's ability to regulate the conduct of its athletes, see Weistart, *supra* note 26, at 724-27.

The determinative factors in *Molinas, Deesen,* and *Blalock* were the disciplinary and entry rules involved and the importance of these rules to the professional sport in question. Reasonable efforts at self-regulation that are applied with appropriate safeguards are permissible. However, a group of competitors will not be permitted to restrict market entry under the guise of self-regulation. In addition, no matter how pure their motive or commendable their end, actions taken pursuant to a self-regulatory scheme that fails to provide procedural safeguards will be invalidated.

THE LABOR EXEMPTION

If a collective bargaining agreement such as that entered into between the NFL and the National Football League Players Association (NFLPA) qualifies for the labor exemption to the antitrust laws, the agreement is immune from attack thereunder, regardless of its impact on competition. Congress specifically exempted certain trade union activities from the purview of the Sherman Act, thus removing the labor movement's basic organizational weapons such as the strike and the boycott from the scrutiny of the antitrust laws.[108] In addition, the Supreme Court has recognized that a proper accommodation must be made between the congressional policy favoring collective bargaining under the National Labor Relations Act and the legislative support for free competition as expressed in the Sherman Act.[109] Reconciliation of these two national policies necessitates that some collective bargaining agreements receive a limited nonstatutory exemption from antitrust sanctions.[110] Such a nonstatutory labor exemption is appropriate if the policy favoring collective bargaining is so vital under the particular circumstances as to outweigh the policy favoring free competition in business markets.[111]

Justice Marshall, dissenting in *Flood v. Kuhn,*[112] argued that baseball should not be exempt from the antitrust laws.[113] Neverthe-

108. *See* notes 121-23, 130-34, 194-97 *infra* & accompanying text.

109. *See, e.g.,* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

110. *Id.* at 622 (citing Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965)).

111. 421 U.S. at 622.

112. 407 U.S. 258 (1972).

113. *Id.* at 288 (Marshall, J., dissenting).

less, he cautioned that antitrust suits would be inappropriate to challenge every facet of baseball, specifically referring to the labor exemption as a potential obstacle to the application of the antitrust laws.[114] Justice Marshall's recognition that labor law might have important consequences in determining the applicability of antitrust legislation to professional sports enterprises has been a recurring theme in recent antitrust cases against sports teams.[115] Thus, a proper analysis of whether professional sports collective bargaining agreements qualify for the labor exemption requires an examination of the exemption both as it has been interpreted and applied by the Supreme Court in non-sports industries and as it has been applied in professional sports cases after *Flood.*

The Labor Exemption in Non-Professional Sports Cases

Although it is uncertain whether Congress initially intended that the Sherman Act be applied to labor union activity,[116] employers at the turn of the century succeeded in using the antitrust laws to attack the struggling trade union movement.[117] In *Loewe v. Lawlor,*[118] the notorious *Danbury Hatters* case, an employer instituted a treble-damages action against the officers and members of the hatters' union, alleging that the union's initiation of a nationwide secondary boycott against the firm constituted an illegal restraint of trade. In a literal interpretation of the antitrust laws, the Supreme Court, through Chief Justice Fuller, held that unions were

114. *Id.* at 293. Justice Marshall suggested that *Flood* be remanded for a thorough investigation of the applicability of the labor exemption. *Id.* at 296.

115. *See, e.g.,* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Kansas City Royals v. Major League Baseball Players' Ass'n, 532 F.2d 615 (8th Cir. 1976); Smith v. Pro-Football 420 F. Supp. 738 (D.D.C. 1976); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

116. For a complete discussion of the congressional intent underlying the Sherman Act, see E. BERMAN, LABOR AND THE SHERMAN ACT 11-54 (1930). *See also* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 5-17 (1930); Siegal, Connolly, & Walker, *The Antitrust Exemption for Labor-Magna Carta or Carte Blanche?,* 13 DUQ. L. REV. 411, 415-20 (1975); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities,* 73 YALE L.J. 14, 30-32 (1963).

117. Between 1890 and 1897, the first seven years of the Sherman Act's existence, federal courts found unions in violation of the Act 12 times but held only one business combination liable under the statute. *See* cases cited in E. BERMAN, *supra* note 116, at 3.

118. 208 U.S. 274 (1908).

susceptible to antitrust actions under the Sherman Act because "[t]he act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal."[119] With their viability threatened by this application of the Sherman Act,[120] the trade unions, whose avowed purpose was to eliminate competition from the labor market, understandably lobbied intensively for passage of the Clayton Act,[121] which was designed in part to immunize unions from the sweep of the antitrust laws. Two provisions of the Act were designed to legitimate the labor movement: section 6 declared that "[t]he labor of a human being is not a commodity or article of commerce," and that consequently the antitrust laws should not be construed to forbid labor organizations "from carrying out the legitimate objects thereof;"[122] and section 20 limited management's ability to obtain federal injunctions in labor disputes.[123]

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119. *Id.* at 301.

120. The union's membership ultimately was held responsible for treble damages exceeding $200,000, Lawlor v. Loewe, 235 U.S. 522 (1915), and the case's litigation expenses raised the total cost to over $400,000. Although the American Federation of Labor paid most of the judgment, each member of the hatters' union lost his entire life savings. *See* J. COMMONS & J. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 412 (4th ed. 1936); P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 216-18 (1964).

121. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27, 44 (1970) and 20 U.S.C. §§ 52, 53 (1970)).

122. Section 6 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under antitrust laws.

15 U.S.C. § 17 (1970).

123. Section 20 provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

Despite the broad language and clear intent of the Clayton Act to exempt labor from antitrust attack the Supreme Court narrowly defined the "legitimate" objectives of trade unions, authorizing antitrust suits against unions who pursued "unlawful" goals or employed "unlawful" means. Thus, in *Duplex Printing Press Co. v. Deering*[124] a secondary boycott implemented by a machinists' union attempting to organize the employees of a printing press manufacturer was held illegal under the Sherman Act.[125] The Court limited the Clayton Act's immunity to the activities of Duplex's immediate employees because they were the only persons proximately concerned with the labor dispute and because "Congress had in mind particular industrial controversies not a general class war."[126] In another nationwide secondary boycott case, *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association,*[127] the Court emphasized that "[a] restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."[128] As a consequence of these and numerous other decisions throughout the 1920's holding unions

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> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such persons or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which lawfully be done in the absence of such dispute by any party thereto; nor shall any of these acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1970).

124. 254 U.S. 443 (1921).

125. *Id.* at 478.

126. *Id.* at 472. In his dissenting opinion, Justice Brandeis, who was joined by Justices Holmes and Clarke, argued that the Clayton Act declared "the right of industrial combatants to push their struggle to the limits of the justification of self-interest," *id.* at 488, and reflected Congress' decision that federal judges' determinations of "what public policy in regard to the industrial struggle demands" is inappropriate. *Id.* at 485.

127. 274 U.S. 37 (1927).

128. *Id.* at 47.

liable for antitrust violations,[129] organized labor again sought relief through the political process.

Determined to overrule legislatively the Supreme Court's narrow interpretation of the Clayton Act,[130] Congress in 1932 passed the Norris-LaGuardia Act,[131] thus directing courts to construe broadly the term "labor dispute," which was defined to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relations of employer and employee."[132] Moreover, in precluding federal courts from issuing injunctions in most labor disputes,[133] the Act was in-

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129. *See* cases cited in Siegal, Connolly, & Walker, *supra* note 116, at 430-34.

130. The Senate Judiciary Committee Report stated: "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." S. REP. No. 163, 72d Cong., 1st Sess. 3 (1932).

131. Act of Mar. 23, 1932, ch. 90, §§ 1-15, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (1970)).

132. 29 U.S.C. § 113(c) (1970).

133. Sections 4 and 5 of the Norris-LaGuardia Act provide in pertinent part:

> 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> . . . .
>
> 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this title.

Id. §§ 104-105 (1970).

tended "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer."[134] In 1935 Congress further expressed the strong policy in favor of collective bargaining and judicial restraint in labor controversies by enacting the National Labor Relations Act (NLRA).[135]

After these latter legislative efforts the Supreme Court acquiesced in the congressional mandate to shield most union activities from the purview of the Sherman Act.[136] The first case to recognize the autonomy of labor union activitiy was *United States v. Hutcheson,*[137] which arose out of an antitrust suit involving a work-jurisdiction dispute between rival unions. Although the employer had entered into agreements providing the members of one of the unions with the disputed work, the disappointed aspirant refused to arbitrate, picketed the employer, and urged its members and their friends to refrain from buying the employer's products.[138] The Court affirmed the lower court's holding that no antitrust violation arose from these facts.[139] Justice Frankfurter's majority opinion indicated that the Sherman, Clayton, and Norris-LaGuardia Acts must be considered jointly to determine the scope of the labor exemption. Justice Frankfurter acknowledged that Congress intended a liberal reading of these statutes to exclude most union activities from the purview of the Sherman Act.[140] Interpreting the directives of Congress, the Court established a standard for applying the antitrust laws to union activities:

> So long as a *union acts in its self-interest and does not combine with non-labor groups,* the licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the

134. *See* F. FRANKFURTER & N. GREENE, *supra* note 116, at 200.

135. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970)). *See* Keyserling, *The Wagner Act: Its Origin and Current Significance,* 29 GEO. WASH. L. REV. 199 (1960).

136. The Court recognized that "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." United States v. Hutcheson, 312 U.S. 219, 235-36 (1941).

137. 312 U.S. 219 (1941).

138. *Id.* at 228.

139. *Id.* at 232-33.

140. *Id.* at 231.

> selfishness or unselfishness of the end of which the particular union activities are the means.[141]

Although recognizing a broad statutory exemption for labor unions, the Court in *Hutcheson* made clear that the scope of the immunity was not absolute. For example, the exemption only protects bona fide union activities; it does not shelter those controversies in which the union acts as a proprietor or in which the employer-employee relationship has no bearing.[142] Another prerequisite to a labor group's qualification for the exemption enunciated in *Hutcheson* is that the union must act in its own self-interest.[143] Thus, if a collective bargaining agreement is merely a sham designed to afford an employer antitrust immunity, the labor exemption would be inapplicable. Finally, the statutory labor exemption would be available only if the union does not combine with nonlabor groups to achieve its aims. The last of these three limitations, the nonconspiracy proviso, is the most significant.

The leading conspiracy case is *Allen Bradley Co. v. Local 3, IBEW,*[144] in which the union was charged with conspiring with manufacturers of electrical equipment and with electrical contractors to secure a price-fixing arrangement in the New York City area. The union allegedly participated in the scheme by mounting an aggressive campaign to obtain closed-shop agreements with all the local contractors and the electrical equipment manufacturers. Under these contracts, the contractors were obligated to purchase their equipment only from local manufacturers who also had closed-shop agreements with Local 3, and the manufacturers agreed to confine their local sales to those contractors employing the Local's mem-

141. 312 U.S. at 232 (footnote omitted)(emphasis supplied).

142. P. AREEDA, ANTITRUST ANALYSIS 104 (2d ed. 1974). *See* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 733 (1965)(Goldberg, J., concurring). Thus, in Columbia River Co. v. Hinton, 315 U.S. 143 (1942), the Court denied the exemption to the Pacific Coast Fishermen's Union because the union attempted to set the price of fish to be sold to processors. *Id.* at 145-47.

143. In United States v. Women's Sportswear Ass'n, 336 U.S. 461 (1949), the contested provisions of a contract were incorporated into the agreement only after the employers' association became fearful that its actions in the industry were violating the antitrust laws. The new contract gave nothing new to the employees, and the trial court found no evidence that the union participated in formulating the contract's contested provisions. Because the union lacked the self-interest necessary to legitimize this arrangement, the labor exemption was unavailable to both the union and the employer. *Id.* at 464.

144. 325 U.S. 797 (1945).

bers. Undoubtedly, the self-interest requirement was satisfied in *Allen Bradley* inasmuch as the union's motivation was a desire to increase membership and to improve wages and working conditions.[145] Nevertheless, reasoning that "if business groups, by combining with labor unions can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves,"[146] the Court held that the employer could not invoke the union's aid in an attempt to establish a sheltered market.[147] Although the Sherman Act did not negate totally the congressional policies favoring collective bargaining, the Court refused to infer a congressional purpose "to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act."[148] Thus, *Allen Bradley* held that the same labor union activities may or may not violate the antitrust laws, depending on whether the union acts alone or in combination with business groups.[149]

Until 1965 *Hutcheson* represented the general rule regarding the statutory labor exemption, and *Allen Bradley* outlined the principal limitation to that rule. Congress resisted proposals to eliminate or circumscribe the exemption when it enacted the Taft-Hartley Act in 1947.[150] In 1965, however, two companion cases, *UMW v. Pennington*[151] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[152] afforded the Supreme Court an opportunity to review the scope of the labor exemption. The resulting decisions sparked a storm of confusion, criticism, and controversy.[153]

In *Pennington* the United Mine Workers Union and several large

145. *Id.* at 799.
146. *Id.* at 810.
147. *Id.* at 809.
148. *Id.* at 810.
149. *Id.*
150. *See* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 639-46 (Stewart, J., dissenting). *See also* Cohen, *Labor and the Antitrust Laws: A New Look at a Recurring Issue*, in LABOR LAW DEVELOPMENTS 1976, PROCEEDINGS OF TWENTY-SECOND ANNUAL INSTITUTE ON LABOR LAW 157, 161 (1976).
151. 381 U.S. 657 (1965).
152. 381 U.S. 676 (1965).
153. *See, e.g.*, Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317 (1966); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. PITT. L. REV. 705 (1972); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966).

coal producers had agreed on substantial wage increases to be imposed industry-wide. The plaintiff, a small independent coal producer, alleged that this agreement constituted a conspiracy to destroy the smaller, less efficient coal operators who could not afford to pay the uniform wage scale. In an opinion by Justice White, the Court held that if the allegations were true the labor exemption would be inapplicable.[154] Under *Allen Bradley*, "one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."[155] The Court extended the scope of *Allen Bradley*, however, to disqualify from the labor exemption any union that had "agreed with one set of employers to impose a certain wage scale on other bargaining units."[156]

Thus, *Pennington* warned that a union acts at its own peril if, as part of a collective bargaining agreement, it restricts its discretion in future negotiations outside the bargaining unit. Nevertheless, a union legitimately may pursue a policy of bargaining for uniform industry-wide wage rates, provided that the union's strategy does not reveal any collusion and conspiracy with an employer. In its description of permissible union conduct within the labor exemption, the Court stated that "a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers."[157]

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154. 381 U.S. at 663.

155. *Id.* at 665-66.

156. *Id.* at 665.

157. *Id.* at 664. Justice White emphasized that, although wages are a mandatory subject of collective bargaining, *see* NLRB v. Truck Drivers Local 449, 353 U.S. 87, 94-96 (1957), limits existed as "to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." 381 U.S. at 665.

Justice Douglas, in a concurring opinion, agreed that if, for the purpose of forcing some employers out of business, an industry-wide collective bargaining agreement established a wage scale exceeding the financial capabilities of some operators, then both the union and the conspiring employers would be guilty of antitrust violations. *Id.* at 672-73 (Douglas, J., concurring). In addition, Douglas argued that "an industry-wide agreement containing those features is prima facie evidence of a violation," *id.* at 673, and noted:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in

In *Jewel Tea* an employer brought an antitrust action against several unions, alleging that a restricted marketing hours provision in a collective bargaining contract constituted an illegal restraint of trade.[158] Justice White, in an opinion joined by Chief Justice Warren and Justice Brennan,[159] observed that the findings of the district court presented a case "stripped of any claim of a union-employer conspiracy."[160] Nevertheless, Justice White refused to adhere rigidly to the implication in *Allen Bradley* that an arrangement secured by a union acting unilaterally and without any purpose of aiding and abetting an employer's anticompetitive practices would receive antitrust immunity automatically:[161] "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement."[162] Rather, a determination of the labor exemption's availability, according to Justice White, required the Court to accommodate the Sherman Act's coverage with the policies of the national labor laws[163] and, consequently, to decide:

> a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 673 note (quoting Interstate Circuit v. United States, 306 U.S. 208, 227 (1939) (citations omitted)).

158. 381 U.S. at 680-81. The controversy in *Jewel Tea* arose during the negotiation of a new contract when the unions rejected proposals by a multi-employer group for the elimination of existing contract restrictions on marketing hours that forbade the sale of fresh meat before 9 a.m. and after 6 p.m. in both service and self-service markets. The unions ultimately prevailed in retaining the provision in a contract accepted by the Jewel Tea Company only under the threat of a strike. After signing the agreement, Jewel Tea brought an action against the unions, alleging that the marketing hours restriction was an illegal restraint of trade.

159. The Court issued no opinion. In addition to Justice White's opinion, Justice Goldberg wrote a separate concurring opinion in which Justices Harlan and Stewart joined. Justice Douglas, joined by Justices Black and Clark, dissented. Six Justices agreed that the unions' activities qualified for an exemption from the antitrust laws but disagreed on the rationale for that result.

160. *Id.* at 688. *But see id.* at 737 (Douglas, J., dissenting): "In saying that there was no conspiracy, the District Court failed to give any weight to the collective bargaining agreement itself as evidence of a conspiracy . . . . This Court makes the same mistake." Justice Douglas would have found a conspiracy and denied the labor exemption. *Id.*

161. *Id.* *See* text accompanying notes 148-49 *supra.*

162. 381 U.S. at 689. Justice White considered the issue of whether the collective bargaining agreement qualified for the labor exemption, although, on the merits, the absence of a conspiracy might have barred a finding that the restricted hours provision constituted a violation of the antitrust laws. *Id.* at 688-89.

163. *Id.* at 689. Justice Powell later characterized as the "nonstatutory" exemption this need to balance the national labor policy promoting collective bargaining with the coverage of the Sherman Act. *See* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975).

> whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[164]

Justice White considered the "crucial determinant" in this regard to be the "relative impact [of the agreement] on the product market and the interests of union members."[165] Although the restricted marketing hours provision's effect on competition was "apparent and real," it also was an "immediate and direct" concern of the union members.[166] In weighing these respective interests, Justice White concluded that the "national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."[167] Thus, if the union's interests are intimately related to the collective bargaining process, then its unilateral conduct would be exempt from antitrust liability, especially when the resulting collective bargaining agreement, although affecting the employer's ability to compete, does not create a naked restraint of trade.

In an opinion applicable to both cases, Justice Goldberg, who was joined by Justices Harlan and Stewart, concurred in the results of *Jewel Tea* and *Pennington* but dissented from the Court's opinion in *Pennington.*[168] He believed that Justice White's opinions in both *Pennington* and *Jewel Tea* represented a "refusal by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in collective bargaining."[169] Rejecting Justice White's balancing approach in *Jewel Tea,* Justice Goldberg argued that any collective bargaining activity concerning mandatory subjects of bargaining should qualify for the labor exemption.[170]

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164. 381 U.S. at 689-90.
165. *Id.* at 690 n.5.
166. *Id.* at 691.
167. *Id.*
168. *Id.* at 697 (Goldberg, J., concurring & dissenting).
169. *Id.*
170. *Id.* at 710. In contrast to Justice Goldberg's absolutist approach, Justice White asserted: "Employers and unions are required to bargain about wages, hours and working

Thus, he concluded that to require unions and employers to bargain seriously over wages, hours, and other terms and conditions of employment and to allow unions to strike over such issues if no satisfactory agreement was forthcoming, but to subject both parties to possible antitrust penalties if they reached an agreement, was illogical and absurd.[171]

Although *Pennington* and *Jewel Tea* clearly demonstrated that the parameters of the labor exemption had shifted, the scope of the new dimensions remained uncertain. In appropriate circumstances lower courts apparently were directed to weigh the broad congressional policy in favor of collective bargaining against the equally strong policy in favor of free competition. Unfortunately, the courts were not provided with criteria for determining whether the interests of the union members were "immediate and direct" or whether the effect of market restrictions was more than "apparent and real." Without clearer guidance, one commentator noted, the conflict between the Sherman Act and the legislation favoring collective bargaining is "so irreconciliable that, apart from subordinating one to the other, the regulatory distinctions must be largely arbitrary. There are no general principles by which these policies can be harmonized."[172]

Thus, in some situations, efforts to reconcile these two sometimes incompatible policies are futile. Either the antitrust laws are applicable in all their force or they are inapplicable; semi-violation of the Sherman Act is impossible. Antitrust treble-damages suits stand in stark contrast to the NLRA's remedial philosophy, which seeks to equalize rather than to penalize. The national labor policy deters one party to a collective bargaining agreement from annihilating the other, thereby facilitating the collective bargaining process between employers and unions.

Several commentators have objected to any renewed involvement of the courts in the surveillance of union activity and collective bargaining agreements.[173] The expressed fear is that the courts will

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conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689. Both Justices agreed that the restricted marketing hours provision concerned a mandatory subject of bargaining. *Id.* at 691; *Id.* at 727 (Goldberg, J., concurring & dissenting).

171. *Id.* at 711-12 (Goldberg, J., concurring & dissenting).

172. *See* Winter, *supra* note 116, at 16-17.

173. *See, e.g.*, DiCola, *supra* note 153, at 747, who states: "Neither White nor Brennan asked what is submitted to be the real question—whether the courts should be in the business

have "neither the aptitude nor the criteria for reaching sound decisions,"[174] and critics doubt whether the courts are capable of effectively and objectively balancing labor interests against market restraints. Notwithstanding the question of competence, judicial scrutiny of the effect of union activities on the competitive product market clearly creates a tension with the non-activist, non-interventionist, neutral role espoused by the Supreme Court in *Hutcheson.*[175]

The confusion engendered by *Pennington* and *Jewel Tea* was accentuated by the disparate views adopted by the Justices in the two cases. *American Federation of Musicians v. Carroll*[176] afforded the Court an opportunity to harmonize these differing opinions, but the case's resolution ultimately failed to dispel the fears of critics who insisted that no workable formula had been devised.[177] In *Carroll* four orchestra leaders alleged that the musicians' union bylaws concerning "club-date" engagements constituted antitrust violations in that their purpose and effect was to require the setting of minimum prices to be charged by orchestra leaders.[178] The Court avoided an endorsement of either Justice White's "intimately related" test or the "mandatory subject of collective bargaining" rationale of Justice Goldberg.[179] Instead, it held that the orchestra leaders were both a labor group and a party to a labor dispute, thus bringing the union's practices firmly within the statutory labor exemption as construed in *Hutcheson.*[180] The Court concluded that the union acted in its own self-interest[181] and that the price floors were a proper union method "for coping with the job and wage competition of

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of balancing labor interests against market restraints . . . . This, after all, is what §§ 6 and 20 of the Clayton Act, the Norris-LaGuardia Act and the NLRA are all about."

174. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis,* 104 U. PA. L. REV. 252, 269 (1955).

175. 312 U.S. at 231-32; *see* text accompanying notes 140-41 *supra.*

176. 391 U.S. 99 (1968).

177. *See* DiCola, *supra* note 153, at 753, who states:

> *Jewel Tea*-type cases of 1965-72 vintage indicate little adherence to Justice White's "intimately related" test in the lower courts. Justice Goldberg's view in *Jewel Tea* seems to have gained acceptance, if only by default. Only in *Carroll* did the court of appeals appear to have balanced labor interest with product market restraint and, in that case, the Supreme Court reversed.

178. 391 U.S. at 104.

179. *Id.* at 110-11.

180. *Id.* at 106.

181. *Id.* at 107.

the leaders to protect the wage scales of musicians."[182]

The 1975 decision in *Connell Construction Co. v. Plumbers Local 100*[183] is the most recent and perhaps the most important Supreme Court case to examine the labor exemption. *Connell* resulted from a building trade union's efforts to organize employees of the mechanical subcontractors in the Dallas area. A primary tactic in the union's campaign was the picketing of general contractors to compel them to agree to deal only with subcontractors who were parties to the union's current collective bargaining agreement.[184] The union had no intention to represent the employees of the general contractor that it picketed.[185] Connell, one of the general contractors, reluctantly capitulated to the union's pressure and signed the subcontracting agreement under protest. Shortly thereafter, Connell, although alleging no union conspiracy,[186] instituted a suit to enjoin enforcement of the subcontracting agreement, asserting that it was an illegal restraint of competition under federal and state law.[187]

The Supreme Court agreed with the union that the risk of conflict with federal labor law preempted state antitrust laws[188] but held that the union's actions did not qualify for the labor exemption.[189] Justice Powell, writing for the Court,[190] attempted to clarify Justice White's opinions in *Pennington* and *Jewel Tea* pertaining to the labor exemption and, in the process, broadly extended the implications of those decisions. Although emphasizing that the broad statu-

182. *Id.* at 109. Justice White dissented on the ground that the use of a price list in situations in which leaders did not actually perform should not qualify for the labor exemption. *Id.* at 117. He argued that a proper weighing of the competing policy considerations would result in a finding that the union's interest in preventing downward pressure on wages was an insufficient justification for allowing the union to engage in price-fixing. *Id.* at 119. Justice White hoped that the majority's rationale would be limited to the special employment circumstances and problems of the music industry. *Id.*

183. 421 U.S. 616 (1975).

184. *Id.* at 618-19.

185. *Id.* at 619.

186. *Id.* at 625 n.2.

187. *Id.* at 620-21.

188. *Id.* at 635.

189. *Id.* at 626. Furthermore, the Court rejected Local 100's contention that the subcontracting agreement it obtained from Connell was permissible under the construction industry proviso of § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1970), 421 U.S. at 626, and held that, at least for § 8(e) violations, the employer's remedies included those provided by the antitrust laws and the NLRA. *Id.* at 634-35.

190. Justice Powell was joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist. Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented. Justice Douglas also wrote a separate dissent.

tory exemption examined in *Hutcheson* did not extend to "concerted action or agreements *between* unions and nonlabor parties,"[191] the Court explicitly recognized that its prior decisions had extended a nonstatutory labor exemption for certain labor-management combinations or agreements.[192] Accordingly, the Court determined that:

> 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.[193]

The scope of the statutory exemption is much greater than the limited nonstatutory exemption created by the courts. The statutory exemption is designed to shelter the basic organizational weapons of unions—the strike, picketing, and boycotts—from antitrust attack. The availability of this exemption is not dependent upon a balancing of antitrust and labor law policies;[194] rather, it is an absolute congressional grant of protection for these enumerated union activities.[195] Provided the alleged restraint flows from an activity countenanced by the Clayton Act or the Norris-LaGuardia Act, the union is not subject to antitrust sanctions.[196]

The paradox of the statutory labor exemption is that Congress legitimized the means of organizing, but it did not explicitly exempt from the purview of the Sherman Act the product of successful union activity, the collective bargaining agreement. Whatever protection the judiciary affords collective bargaining agreements must be extrapolated from the congressional policy in favor of collective bargaining. Congress' general preference for collective bargaining, however, coexists with the strong policy expressed in the antitrust statutes of maintaining and protecting a competitive marketplace. Thus, although the statutory exemption permits unions to establish unilaterally some market restraints, the courts will scrutinize carefully similar restraints adopted through union-employer agreements

191. 421 U.S. at 622 (emphasis supplied).
192. *Id.*
193. *Id.*
194. *See id.* at 621-22. *See also* American Federation of Musicians v. Carroll, 391 U.S. 99 (1968).
195. 421 U.S. at 621-22.
196. *Id.* at 622-23.

to determine whether the latter schemes qualify for the nonstatutory labor exemption.[197]

In *Connell* Local 100's goal was to achieve higher wages and better working conditions for its members through the organization of as many subcontractors as possible.[198] Instead of employing means that were statutorily exempt from antitrust attack, however, the union entered into an agreement with Connell, a nonlabor party. The Court, consequently, analyzed the eligibility of this agreement for the nonstatutory labor exemption by determining whether its anticompetitive effects were justified by the national labor policy. The Court concluded that the union's subcontracting agreement with Connell was a direct restraint on competition inasmuch as it indiscriminately excluded some subcontractors from the market simply because they were nonunion.[199] Although the union was pursuing legitimate goals, its methods failed to qualify for the labor exemption because "[l]abor policy clearly does not require . . . that a union have freedom to impose direct restraints on competition among those who employ its members."[200] The agreement created market restraints that contravened the fundamental policies of the Sherman Act, but its furtherance of the national labor policies was negligible, because Local 100 claimed no interest in organizing the employees of the contractor that it picketed.[201] The Court did not determine whether a more immediate and direct union interest could have led to the validation of Local 100's coercive action against Connell: "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement."[202]

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197. *Id.* at 623, 625.

198. *Id.*

199. *Id.* at 623. The Court stated:

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625.

200. *Id.* at 622.

201. *Id.* at 625-26.

202. *Id.* In his dissent, Justice Stewart reviewed the legislative history of both the Taft-Hartley Act of 1947 and the Landrum-Griffin Amendments of 1959, concluding that Congress did not intend agreements such as that between Local 100 and Connell to be the subject of antitrust complaints. *Id.* at 639, 654. Justice Stewart argued that, if the agreement violated

In contrast to the split decision in *Jewel Tea, Connell* represents the view of a majority of the Court.[203] *Connell* has been criticized for placing federal courts in the role of overseers of collective bargaining agreements, in direct contravention of Congressional intent as expressed in the labor laws,[204] for ignoring important policy considerations supporting union action,[205] and for exaggerating the scope of the marketing restraints involved in the particular case.[206] Conversely, some commentators have applauded *Connell,* stating that the stricter nonstatutory exemption test recognized by the Court comports with precedent and preserves Sherman Act policies.[207]

An analysis of *Connell* in the context of the decisions preceding it permits a partial delineation of the scope of labor's antitrust exemption. Initially, if a union acts unilaterally and in its own self-interest, and does not combine with a nonlabor group, it is entitled to the statutory labor exemption. When this union activity results in a union-employer agreement, however, the court will scrutinize the agreement according to the following criteria: first, the labor exemption is inapplicable unless a bona fide union seeks to assert it in furtherance of the union members' self-interests; second, providing the union meets this first criteria, it may not combine with nonlabor groups in a conspiracy to impose market restraints; third,

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§ 8(e) of the NLRA, 29 U.S.C. § 158(e) (1970), Connell's remedies were provided exclusively by the labor laws. 421 U.S. at 655.

203. *See* note 159 *supra* & accompanying text. The creation of this consensus was not viewed positively by some commentators who believed that the decision in *Connell* further dismantled union protection. *See, e.g.,* Christensen, *The Supreme Court's Labor Law Decisions, October 1974 Term—Past, Prologue, and the Potomac Parallax,* in LABOR LAW DEVELOPMENTS 1976, PROCEEDINGS OF TWENTY-SECOND ANNUAL INSTITUTE ON LAW 33, 39 (1976), who states:

> From the standpoint of legal analysis, the only favorable word that can be stated about this decision is, indeed, that it indicates we now have a narrowly divided Court with a majority "rationale" which can be defended or attacked. This is some improvement on the anarchy which attended the prior split of the Court into three groups of three justices, each group unable to obtain a consensus, other than a bare result of the case at hand.

204. *See* Cohen, *supra* note 150, at 186; Comment, *Labor's Exemption From Federal Antitrust Law: The Diminishing Protection for Union Activity,* 28 U. FLA. L. REV. 620, 635 (1976).

205. *See* Note, *Diminution of Labor's Immunity Under Antitrust Law,* 21 LOY. L. REV. 980, 993 (1976).

206. *See* Cohen, *supra* note 150, at 171-73.

207. *See, e.g.,* Janofsky & Hay, *Connell—Consistent with Past, Indicative of the Future,* in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-NINTH ANNUAL CONFERENCE ON LABOR 3 (1976).

a union may not restrict its discretion in future negotiations outside the present bargaining unit; fourth, when a union pursues its self-interest by entering into an agreement with a nonlabor party that is alleged to restrain trade, a court must evaluate the agreement by weighing the relevant competing policy considerations inherent in the Sherman Act and the NLRA. Relative to this fourth criterion, *Jewel Tea* suggests that the Supreme Court will tip the scales in favor of labor if the labor policies are strong and the antitrust ramifications are comparatively weak. *Connell,* however, clearly demonstrates that the Court will not apply the labor exemption in situations when an agreement that affects labor considerations only minimally creates a direct restraint on competition that contravenes the fundamental policies of the Sherman Act.

The Court has not yet determined how it would resolve a situation presenting equally strong labor and antitrust policy considerations. Challenges to the player restraint system in the professional sports industry may present the forum for the resolution of this issue.

The Labor Exemption and Professional Sports Cases

The statutory exemption, designed to protect labor's traditional organizational weapons such as the strike, the picket line, and the secondary boycott from antitrust sanctions, is supplemented by a limited nonstatutory exemption that protects unions from antitrust liability if their organizational activity culminates in a collective bargaining agreement with the employer.[208] Employers have attempted to extend this nonstatutory exemption by reasoning that its underpinning is the national policy in favor of collective bargaining and that, consequently, an employer should receive a derivative exemption from suit whenever the union would enjoy immunity.[209] Especially in the professional sports industry, team owners consistently have sought to wrap themselves in the mantel of the labor exemption in their attempts to achieve antitrust immunity.[210] Several courts have acknowledged that a sports league may qualify for antitrust immunity if an employer-owner can establish that the collective bargaining agreement in question is the product of bona

208. *See* notes 191-207 *supra* & accompanying text.

209. *See* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 26-27 (1971).

210. *See* note 220-85 *infra* & accompanying text.

fide collective bargaining.[211] The owners, however, generally have been unsuccessful in meeting this burden of proof.

Flood v. Kuhn[212] was the first case in which professional sports team owners raised the labor exemption as a defense. The owners argued that even if baseball's special exemption from the antitrust laws[213] was discontinued, the labor exemption nevertheless would immunize the reserve clause from antitrust attack. The owners insisted that they qualified for the labor exemption because the reserve clause was a mandatory subject of bargaining and an integral part of a collective bargaining agreement negotiated between the Major League Players Association and the league.[214]

Although the majority opinion in *Flood* failed to discuss the labor exemption issue,[215] Justice Marshall suggested in his dissent that the exemption might be relevant in the context of professional sports.[216] Flood argued that the labor exemption was inappropriate because the owners thrust the reserve clause on the players and never permitted it to be an issue of serious collective bargaining.[217] Furthermore, Flood insisted that the types of antitrust violations against which labor and management could be immunized were limited.[218] Although the Court rejected Justice Marshall's suggestion that *Flood* be remanded to clarify these issues,[219] subsequent cases have provided insight into their possible resolution.

Five months after *Flood* Judge Higgenbotham in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*[220] addressed several of the issues raised by Justice Marshall. The court rejected the NHL's claimed entitlement to a labor exemption based

211. *See* Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976); Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976); Robertson v. National Basketball League, 389 F. Supp. 867, 895 (S.D.N.Y. 1975). *But see* Kapp v. National Football League, 390 F. Supp. 73, 86 (N.D. Cal. 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 500 (E.D. Pa. 1972).

212. 407 U.S. 258 (1972).

213. *See* notes 4-12 *supra* & accompanying text.

214. 407 U.S. at 283.

215. *Id.*

216. *Id.* at 293-94 (Marshall, J., dissenting). In his opinion, Justice Marshall cited cases involving union-management agreements detrimental to management's competitors; he recognized, however, that these cases possibly were distinguishable from the situation in *Flood*, in which the reserve system allegedly was injurious to labor. *Id.* at 294.

217. *Id.* at 295.

218. *Id.* at 295-96.

219. *Id.* at 296.

220. 351 F. Supp. 462 (E.D. Pa. 1972).

on the existence of a collective bargaining relationship with the National Hockey League Players Association,[221] noting that historically the labor exemption had been granted only to unions acting in their own self-interest.[222] The NHL presented no evidence showing that the Players Association had endeavored to create or retain the reserve clause;[223] to the contrary, the court was persuaded that:

> The evidence establishes the Players' Association's persistent opposition to the present form of reserve system. The reserve clause, in fact, was more than a sturdy teenager when the Players' Association was born. The reserve clause was fathered by the NHL, and the Players' Association has repeatedly sought to exclude it in its present form.[224]

Concluding that the reserve clause was not the product of good faith, arm's-length bargaining between the employer and the union, the court held that the NHL could not claim the labor exemption.[225]

Considering the issue further, the court reasoned:

> [E]ven if, *arguendo,* there had been substantial arm's-length collective bargaining by the National Hockey League and the Players' Association to revise the perpetual option provision of the reserve clause . . ., those negotiations would not shield the National Hockey League from liability in a suit by outside competitors who sought access to players under the control of the National Hockey League.[226]

Although the court did not express clearly its rationale for this important conclusion, Judge Higgenbotham apparently assumed that any union participation in the formulation of a modified reserve clause would constitute a conspiracy between the union and the

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221. *Id.* at 496.
222. *Id.* at 498.
223. *Id.* at 499.
224. *Id.* at 498.
225. *Id.* at 499-500.
226. *Id.* at 499. In reaching this conclusion, the court stated:

> A stronger argument might be made by a newly-formed league that a collective agreement between an established league and players' union which, for example, permitted suits for injunction against players who attempted to "jump" leagues, was designed to prevent the new league from gaining access to the best players and to consign it permanently to second class status. This claim is similar to the one which succeeded in Allen Bradley: a union-employer combination to exclude entry by newcomers.

Id. at 499 (quoting Jacobs & Winter, *supra* note 209, at 28). The court's analysis understandably was persuasive in a case involving the newly-formed World Hockey Association.

employer to exclude new entrants from the industry.[227] The court insisted that the "NHL can do no more than could the employers and union in *Allen Bradley.*"[228] The assumption was unjustifiedly broad. For example, although a one year option clause would impose a barrier to new entrants, the Players Association could bargain for such a rule for the self-interested reasons of maintaining competitive balance and stability within the industry. In that event, the policy favoring collective bargaining presumably would outweigh that promoting free competition, and the rule should be sustained. The court's conclusive presumption that the resulting agreement would constitute an illegal combination is reminiscent of Justice Douglas' concurrence in *Pennington,*[229] a view never accepted by a majority of the Supreme Court. *Jewel Tea* and *Connell* suggest that the imposition by a union acting in its own self-interest of a contract condition with anticompetitive effects would require a court to balance the conflicting policies underlying the NLRA and the Sherman Act.[230] A court's conclusive presumption of a conspiracy would ignore the tribunal's duty to balance the relevant legislative policies.

In *Kapp v. National Football League*[231] the court circumvented the issues of Kapp's standing to initiate suit[232] and of the labor exemption's application by observing that Kapp signed his contract before the NFLPA had negotiated a collective bargaining agreement with the league. Moreover, because Kapp was pressured out of the league prior to the agreement's acceptance, he was not bound by its provisions.[233] *Kapp* demonstrates that whatever antitrust immunity an employer achieves by entering into a collective bargaining agreement, the immunity will extend only to employees who were members of the bargaining unit sometime during the agreement's exist-

227. 351 F. Supp. at 499-500.

228. *Id.* at 500. For a discussion of *Allen Bradley*, see text accompanying notes 144-49 *supra.*

229. *See* note 157 *supra.*

230. *See* 421 U.S. at 621-22; 381 U.S. at 689.

231. 390 F. Supp. 73 (N.D. Cal. 1974). For a discussion of the facts and the antitrust issues in *Kapp*, see notes 57-71 *supra* & accompanying text.

232. Courts consistently have permitted individual players to contest player restraint provisions, although these provisions appear in collective bargaining agreements. Allowing individual athletes to contest the legality of collective bargaining agreements in situations in which a players' association is the duly authorized bargaining agent, however, poses certain dangers. *See* text accompanying note 237 *infra.*

233. 390 F. Supp. at 86.

ence.[234] Thus, one commentator has suggested that, "because no new collective bargaining agreement was entered into when the 1970-1974 agreement expired, it seems that no 'labor exemption' defense may be successfully asserted by the NFL to antitrust claims that may be made against it arising out of actions taken after January 31, 1974."[235]

After the court had determined that the collective bargaining agreement did not pertain to Kapp, it further asserted that if the NFL Standard Players Contract requirements had been accepted through collective bargaining and had been applicable to Kapp:

> there would still remain the question, well put by [Justice] Marshall . . . in *Flood*, . . . as to what are "the limits to the antitrust violations to which labor and management can agree." We are of the opinion that, however broad may be the exemption from antitrust laws of collective bargaining agreements dealing with wages, hours and other conditions of employment, that exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of public policy long before and entirely apart from the antitrust laws.[236]

Such an individual right to contract as that accepted by the court in *Kapp* would deprive the NFLPA of its bargaining leverage. A union has a legitimate interest in presenting a united front in its confrontations with management and a concomitant interest in avoiding the dissipation of its strength by restricting the rights of subgroups within the unit from pursuing their individual goals separately. A union's authority clearly will be undermined if individual union members may avoid the collective bargaining agreement's terms.[237]

A union in a particular sport might agree to a modified player restraint system if the team owners offer equivalent concessions. Also, a players association might conclude that industry stability is in its self-interest and that some form of a player restraint system

234. *See id.* at 85.

235. *See* L. SOBEL, *supra* note 3, at 318.

236. 390 F. Supp. at 86.

237. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Organ., 420 U.S. 50 (1975); Jacobs & Winter, *supra* note 209, at 27.

is necessary to achieve this stability. The player restraint issue has served as a significant impetus in bringing players unions and professional sports leagues together. The leagues consider a player restraint system to be essential for the economic vitality of the industry. Irrespective of whether a players association shares the owners' conviction that such a mechanism induces competitive balance, which in turn leads to increased fan interest and profits, it realizes that the player restraint issue is its strongest bargaining chip in negotiations with team owners. By restricting the scope of legitimate collective bargaining, however, *Kapp* might weaken the unions' newly-acquired position and increase the likelihood of unmanageable labor strife in the sports industry.[238]

Even if a negotiated player restraint system is illegal on public policy grounds, as suggested by the court in *Kapp,* its vulnerability to antitrust attack is not a necessary result. If a contract violates public policy, a court may declare it void; moreover, if the contract were to run afoul of the NLRA, it would become a nullity and unenforceable. The antitrust statutes, however, contain harsh penalties designed to deter parties from engaging in anticompetitive conduct. The denial of the labor exemption on broad public policy grounds, consequently, not only would multiply the number of collective bargaining agreements susceptible to antitrust sanctions but also could encourage frivolous suits designed to harass the parties to such agreements.

The rise of new leagues inevitably creates pressures for the owners of both the old and new leagues to merge to eliminate expensive bidding wars.[239] When the NBA and the ABA were reported to be

238. *See* 4 FORDHAM URB. L.J. 581, 595 (1976).

239. *See* Noll, *The U.S. Team Sports Industry: An Introduction,* in GOVERNMENT AND THE SPORTS BUSINESS 6 (R. Noll ed. 1974), who states:

> During periods of interleague competition, the agreements not to compete within a league cease to be effective in preventing competitive bidding for players. When a new league is formed, the following sequence of events normally occurs. First, the financial strength of the new enterprise is tested during several years of increasingly intense competition for players, which causes player salaries to rise substantially. Eventually, the new league proves that its financial backing is adequate to survive the competition—and to cause financial losses to the established league. The second phase is then entered, during which the leagues negotiate a merger. To the fans, a merger means an interleague championship playoff and, in all sports but baseball, interleague play during the regular season. To the owners, a merger brings about an agreement among all teams in the sport to limit the competition for players. Thus, the reserve and option clauses, with their limited efficacy during interleague competition, become secure again through mutual agreement.

near agreement on a merger in the spring of 1970, the NBA Players' Association filed suit, claiming that NBA player restraints violated the antitrust laws and that the proposed merger also constituted an antitrust violation in that it was an anticompetitive agreement in restraint of trade. In denying the NBA's motion for summary judgment, the court in *Robertson v. National Basketball Association*[240] rejected the NBA's contentions that the plaintiffs lacked standing to challenge the various player restraints[241] and that the labor exemption protected the league from antitrust attack.[242] The NBA argued that the players were precluded from seeking, through antitrust litigation, the right to negotiate freely with any team of their choice.[243] This goal, according to the NBA, conflicted with the NLRA's "commitment to a bargaining system which 'of necessity subordinates the interests of an individual employee to the collective interests of all employees.' "[244] Judge Carter rejected this argument that members of a bargaining unit lacked standing to bring antitrust suits against their employers:

> Section 4 of the Clayton Act . . . grants standing for antitrust suits to any "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Courts have consistently allowed plaintiffs to sue their employers for alleged antitrust violations of the nature here asserted.[245]

The NBA also contended that the suit was barred by the labor exemption.[246] In dismissing this assertion, Judge Carter emphasized

240. 389 F. Supp. 867 (S.D.N.Y. 1975).

241. *Id.* at 882-84.

242. *Id.* at 884-90.

243. *Id.* at 881.

244. *Id.* at 882 (quoting Vaca v. Sipes, 386 U.S. 171, 182 (1967)).

245. 389 F. Supp. at 882. The court relied on the following non-sports cases: Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926) (Seamen's Union member challenged use of employment registry); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967) (book salesman sued former employer and another publisher for refusal to hire); Cordova v. Bochet Co., 321 F. Supp. 600 (S.D.N.Y. 1970)(stockbroker sued firms that unilaterally had agreed to reduce commissions paid). In addition, the court cited numerous sports cases in which standing had been extended to player-plaintiffs. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971).

246. 389 F. Supp. at 882.

that the labor exemption was created for the benefit of unions,[247] thus supporting the rationale that the exemption's purpose was to immunize certain union practices that would be illegal if conducted by businessmen.[248] The court acknowledged:

> the possibility of a circumscribed exemption for employers, which might arise derivately, and become effective when employers are sued by third parties for the activities of unions, [but] the protection of the exemption is afforded only to employers who have acted jointly with the labor organization in connection with or in preparation for collective bargaining negotiations.[249]

Moreover, the court considered and rejected a proposed test that the NBA claimed should be used to determine when the exemption is available to employers. The NBA had urged that:

> "[t]he test for applicability of the labor exemption which emerges from *Jewel Tea* and *Pennington,* is twofold: 1) Are the challenged practices directed against non-parties to the relationship; if they are not, then 2) are they mandatory subjects of collective bargaining? If the answer to No. 1 is no, and to No. 2 yes, the practices are immune. . . ."[250]

Judge Carter found no support for this test in prior decisions[251] and held that the question of whether the practices relate to mandatory subjects of collective bargaining[252] was irrelevant.[253] Instead, he insisted that " '[m]andatory subjects of collective bargaining' do not carry talismanic immunity from the antitrust laws."[254] The court nevertheless concluded that the NBA's player restraint system was not a mandatory subject of bargaining.[255]

Judge Carter endorsed the Second Circuit's decision in *Intercontinental Container Transport Corp. v. New York Shipping*

247. *Id.* at 885.
248. *Id.*
249. *Id.* at 886.
250. *Id.* (quoting from the NBA Memorandum, at 28).
251. 389 F. Supp. at 887-88.
252. Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970), requires "the employer and the representatives of the employees to confer in good faith with respect to wages, hours, and other terms and conditions of employment." Thus, these matters are considered to be mandatory subjects of collective bargaining. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
253. 389 F. Supp. at 889.
254. *Id.* at 888.
255. *Id.* at 889.

Association,[256] which provided a two-part test for determining the applicability of the labor exemption: "(1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers."[257] The court in *Robertson* stressed that the critical issue in ascertaining whether player restraints could qualify for the labor exemption was whether they were the product of bona fide collective bargaining,[258] acknowledging that, "conceivably, if the restrictions were part of the union policy deemed by the Players Association to be in the players' best interest, they could be exempt from the reach of the antitrust laws."[259]

The test adopted in *Robertson* for determining whether an agreement is protected by the labor exemption is consistent with *Connell*. Both cases clearly require that to qualify for the labor exemption a union must act in its self-interest in an area of proper union concern and must not combine with nonlabor groups in a conspiracy to impose market restraints. Even when these prerequisites are satisfied, however, if an agreement is alleged to restrain trade, *Connell* expressly mandates and *Robertson* impliedly directs a court to

256. 426 F.2d 884 (2d Cir. 1970).

257. *Id.* at 887. In *Intercontinental* a warehouse company asserted that the General Cargo Agreement between the Longshoremen's Union and the New York Shipping Association violated the antitrust laws. Pursuant to the agreement the union acquiesced to the association's shift to containerization in return for concessions designed to preserve certain work practices that allegedly prevented the warehouse company from competing with the association. The court found this agreement protected by the labor exemption because it was in the self-interest of the union and because, "far from aiding and abetting a violation of the Sherman Act by a group of business men, the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands." *Id.* at 886-88.

258. 389 F. Supp. at 895. The court, however, declined to decide this factual question because it was ruling only on a motion for summary judgment.

259. *Id.* Although the court could conceive of a possible collective bargaining agreement that would qualify for the antitrust exemption, it considered such an eventuality highly unlikely:

> I must confess that it is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, blacklisting, boycotts and refusals to deal could be saved from Sherman Act condemnation, even if defendants were able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players Association. Plaintiffs, on their part, have vigorously asserted that no collective bargaining ever took place as to any of these restraints, and that certainly they are not the kind of matter which a union would consider, seek or obtain as being in its own best interest and that of its members. The life of these restrictions, therefore, appears to be all but over, although their formal interment must await further developments in this case.

Id.

weigh the relevant competing policy considerations reflected in the Sherman Act and in the NLRA.[260]

Another important aspect of the holding in *Robertson* was the court's determination that the question of whether the contested portions of an agreement concerned mandatory subjects of collective bargaining was an irrelevant consideration when determining the applicability of the labor exemption in any particular situation. This conclusion conflicts with decisions involving professional football, however, which have held that a necessary but insufficient prerequisite to the labor exemption is that the contested restraint relate to a mandatory subject of collective bargaining.[261]

In *Smith v. Pro-Football*[262] the NFL asserted the labor exemption to avoid the plaintiff's antitrust challenge and attempted to establish that the retroactive effect of mandatory subjects of collective bargaining prior to their embodiment in a contract supported the exemption. The court found this argument totally unsupported by precedent and in contravention of the fundamental policy considerations on which the labor exemption was premised.[263] The court enunciated a firm rule: "[A] scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the labor exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest."[264] Because the plaintiff had signed his contract prior to the ratification of the initial NFL-NFLPA collective bargaining agreement, the court would not bind the player to the terms of that agreement. In addition, the league could not claim that the agreement related back to cover the plaintiff because the challenged draft occurred in January, 1968, before the NFLPA had become the exclusive bargaining agent for purposes of determining the availability of the labor exemption.[265]

Although the decision revolved on this timing issue, the court discussed additional factors that the NFL would need to prove to

260. *See* notes 183-207 *supra* & accompanying text.

261. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974). *But see* UMW v. Pennington, 381 U.S. 657, 665 (1965).

262. 420 F. Supp. 738 (D.D.C. 1976). For an additional discussion of *Smith*, see notes 85-90 *supra* & accompanying text.

263. 420 F. Supp. at 742.

264. *Id.*

265. *Id.*

immunize both itself and the draft from antitrust attack. To qualify for the labor exemption, according to the court, the challenged restraint must involve a mandatory subject of collective bargaining, it must be the product of genuine, arm's-length negotiation, and it must not be "thrust upon" a weak players union by the owners.[266] If these conditions were satisfied, the agreement then would be examined to ascertain: (1) whether it was the type of unilateral, noncollusive action protected by the statutory labor exemption; (2) whether it was the type of illegal conspiracy to restrain trade condemned by *Allen Bradley*; or (3) whether it was a combination between labor and management that would need to be evaluated for its relative impact on the product market and the interests of union members in the context of the national labor and antitrust policies.[267]

The court recognized that disputes concerning the draft would involve issues not encountered by previous decisions. Prior cases had involved restraints inimical to the employers' competitors. The draft, however, worked to the detriment of "potential employees, persons neither party to the agreement nor members of a union which is party to the agreement."[268] The court nevertheless was persuaded that an agreement embodying a college draft could be within the scope of the labor exemption.[269] Although admitting that the antitrust laws were concerned with restraints on the labor market, the court believed that "such protection is somewhat less central to the objectives of the antitrust laws" and concluded that those laws were concerned primarily with preventing restraints on the product market.[270] By contrast, the court determined that a central purpose of the labor laws is to allow unions to negotiate bargains in their best interests with respect to mandatory subjects of collective bargaining. Thus, by completing the type of balancing test required by *Connell* and by Justice White's opinion in *Jewel Tea,* the court, in dictum, determined that, in a situation involving the college draft, the labor policies deserved preeminence over the antitrust policies.[271]

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266. *Id.* at 743.
267. *Id.*
268. *Id.*
269. *Id.* at 744.
270. *Id.*
271. *Id.*

The labor exemption defense again was raised and rejected in *Mackey v. National Football League,*[272] an action challenging the Rozelle Rule. On the basis of an extensive record the district court held that the "exemption extends only to labor or union activities, and not to the activities of employers."[273] Even if the labor exemption could apply derivatively to management in some instances, the court would not have sanctioned such an extension under the facts presented in *Mackey.*[274] The court was persuaded that the product in professional football for antitrust purposes consists of the players and that the Rozelle Rule operated as a direct restraint on competition in this product market. In addition, the union did not consider the Rozelle Rule to be in its self-interest. The court determined that the Rozelle Rule was a nonmandatory subject of bargaining.[275] No bona fide collective bargaining had occurred with respect to the Rozelle Rule in either of the two collective bargaining agreements in question. Because the owners refused to bargain seriously on the issue and because the union was too weak to compel such negotiations, the item could not legitimately qualify for the labor exemption.[276] The court emphasized that the league could not achieve freedom from antitrust liability "simply because of the emergence of collective bargaining with the union in 1968 and the union's inability to date to achieve the elimination of the Rozelle Rule through the collective bargaining process."[277]

On appeal, the Eighth Circuit agreed that the labor exemption was inapplicable but rested its conclusion on much narrower grounds.[278] The court's discussion of the labor exemption is particularly significant because it was the first appellate court to consider this issue in the context of professional sports after the Supreme Court's decision in *Connell.*

The appellate court reversed the district court's holding that only employee groups, and not employers, are entitled to the labor ex-

272. 407 F. Supp. 1000 (D. Minn. 1975), *rev'd on other grounds,* 543 F.2d 606 (8th Cir. 1976).

273. *Id.* at 1008.

274. *Id.*

275. *Id.* at 1009.

276. *Id.*

277. *Id.* at 1010.

278. 543 F.2d at 616. The court of appeals reasoned that the mere continued presence of the Rozelle Rule in the initial collective bargaining agreements between the NFL and the NFLPA did not establish that the rule was a product of bona fide bargaining. *Id.* at 611-16.

emption. According to the court, the benefits of the exemption logically must extend to both parties to the agreement; otherwise, the exemption's underlying purpose of fostering collective bargaining would be vitiated.[279] In determining whether the nonstatutory labor exemption could be claimed by the NFL, the court recognized a necessity to accommodate the relevant federal labor and federal antitrust law policies. The court undertook a three-part analysis:

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship . . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[280]

Applying this test, the court determined that the Rozelle Rule's alleged restraint on trade would affect only the parties to the agreement for which the exemption was sought and that the rule was a mandatory subject of collective bargaining. Regarding the final criterion, however, the court concluded that the Rozelle Rule was not the product of bona fide, arm's-length negotiation.[281]

Thus, although concurring with the district court's holding that the bona fide collective bargaining requirement had not been satisfied, the court of appeals disagreed with the lower court's holding that the Rozelle Rule was a nonmandatory subject of bargaining.[282] Federal labor law is the logical benchmark for determining what qualifies as a mandatory subject of collective bargaining. The district court's readiness to label a contract provision as a nonmandatory subject on the basis of its illegality under the Sherman Act was improper. The Eighth Circuit insisted that the "labor exemption presupposes a violation of the antitrust laws. To hold that a subject relating to wages, hours and working conditions becomes nonmandatory by virtue of its illegality under the antitrust laws obviates the

279. *Id.* at 612.
280. *Id.* at 614 (citations and footnotes omitted).
281. *Id.* at 614-15.
282. *Id.* at 615.

labor exemption."[283]

Although other decisions suggested that an agreement containing a player restraint comparable to the Rozelle Rule might never qualify for the labor exemption, the Eighth Circuit in *Mackey* indicated that the rule might qualify for the exemption under appropriate circumstances:[284]

> [S]ince the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to inter-team compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the non-statutory labor exemption.
>
> It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interest than are the courts.[285]

The court, by negative implication, held that if the restraint on trade does not affect primarily only the parties to the collective bargaining relationship, then the labor exemption would be inappropriate. By contrast, in his decision in *Robertson,* Judge Carter determined that an inquiry into whether the alleged market restraints were directed at the agreement's parties would obscure the most critical inquiry, which was whether the controverted practices were in the union's own interest. A restraint's effect on nonparties to a collective bargaining agreement certainly is a relevant consideration, but this factor is not invariably dispositive. For instance, in *Connell* the Court left unanswered the question of whether the labor exemption would be available to a collective bargaining agreement containing a clause prohibiting the employer from subcontracting work that normally is performed by members of the bargaining unit. Whether such a provision, in preserving work opportunities, primarily affects the parties to the agreement or whether the clause primarily operates to prevent outside subcontractors from bidding competitively on bargaining unit work is debatable. Such clauses are common in collective bargaining agreements and thus create an

283. *Id.*
284. *Id.* at 623.
285. *Id.*

instance in which "labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions."[286]

In *Mackey* the court concluded that, before the labor exemption can attach, the agreement's provision sought to be exempted must concern a mandatory subject of collective bargaining. The significance that should be attributed to mandatory subjects of bargaining when determining the applicability of the labor exemption was a point of contention between Justices White and Goldberg in their respective opinions in *Jewel Tea* and *Pennington.* Justice Goldberg argued that all provisions of negotiated contracts relating to mandatory subjects of bargaining should be immune from antitrust suit.[287] Moreover, he stated that he did not "believe that Congress intended that activity involving all nonmandatory subjects of bargaining be similarly exempt."[288] Although provisions concerning nonmandatory subjects of collective bargaining clearly would not qualify for an automatic exemption, Justice Goldberg did not assert that such provisions could never qualify for the labor exemption. In contrast, Justice White in *Jewel Tea* expressed "serious doubt" that a union or an employer could invoke the labor exemption if the challenged agreement concerned a nonmandatory subject of bargaining.[289] Furthermore, Justice White disagreed that collective bargaining agreements involving mandatory subjects of collective bargaining necessarily were exempt from the purview of the antitrust laws.[290] In *Connell* the Court largely ignored the question of mandatory subjects of collective bargaining. Thus, the Supreme Court has not resolved the issue of whether the labor exemption is available only to those contested contract provisions resulting from negotiations over mandatory subjects of collective bargaining.

Any requirement that agreements qualifying for the labor exemption must concern a mandatory subject of collective bargaining is unwise. In *Robertson* the court regarded that fact as largely irrelevant in its analysis of the NBA's labor exemption argument. The proper focus, rather, should be whether the negotiated agreement concerns matters intimately related to legitimate union goals. This

286. 421 U.S. at 622.

287. *See* notes 168-71 *supra* & accompanying text.

288. 381 U.S. at 732.

289. 381 U.S. at 689.

290. *See* UMW v. Pennington, 381 U.S. at 664-65; Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. at 689; notes 157, 170 *supra.*

approach would be prudent particularly in professional sports, an area in which the NLRB has not delineated precisely which union demands will be considered as mandatory subjects of collective bargaining.

THE NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT

In the context of these numerous judicial decisions and after three years of labor controversy that had failed to produce a collective bargaining agreement,[291] the NFL and the NFLPA on February 16, 1977, entered into a tentative agreement.[292] Subsequent to its endorsement by the player representatives, the players, and the owners, the five-year agreement was approved by Judge Larson,[293] whose jurisdiction had arisen from the controversy in *Mackey*.[294] The agreement in essence contains the following features:

1. a modified draft consisting of twelve rounds rather than seventeen, as in the previous draft.[295]

2. a right of first refusal/compensation system that modifies the Rozelle Rule. Pursuant to its right of first refusal, a free agent's original team may retain the player if it matches the offer he desires to accept from a new club. If the first team fails to exercise its right of first refusal, the free agent and the acquiring club will be deemed to have entered into a binding agreement, and the athlete's original club may qualify to receive one or more of the new club's draft choices as compensation. This new compensation system has eliminated the discretion held by the Commissioner under the Rozelle Rule to award compensation when the two teams could not reach a satisfactory agreement. Under the new plan, the draft choices that the acquiring team must surrender are based on the free agent's salary with his new club and on the number of years of credited service he has earned under the NFL's retirement plan. The more

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291. During these three years of conflict the NFL and NFLPA had no valid collective bargaining agreement, and professional football was the object of two preseason player strikes, numerous law suits, and much animosity. Wash. Post, Feb. 18, 1977, at D1, col. 4.

292. N.Y. Times, March 6, 1977, § 5, at 7, col. 1.

293. The court granted preliminary approval on March 5, 1977, and final approval on August 1, 1977.

294. For a discussion of *Mackey*, see notes 72-83, 272-85 *supra* & accompanying text.

295. Collective Bargaining Agreement between National Football League Players Association & National Football League Management Council art. XIII (1977) [hereinafter cited as Football Collective Bargaining Agreement]. *See also* N.Y. Times, March 6, 1977, § 5, at 7, col. 3. For a description of the modified draft, see text accompanying note 308 *infra*.

years of credited service a free agent has earned, the larger a salary he must be offered before his previous employer becomes entitled to receive compensation. Subject to this limitation, a team signing a free agent for $50,000 to $65,000 per year must surrender a third round draft choice; it must provide a second round draft choice for a salary of $65,000 to $75,000, a first round choice for a salary of $75,000 to $125,000, a first and a second choice for a salary of $125,000 to $200,000, and two first choices for salaries over $200,000.[296]

3. an agency shop provision and a union dues check off provision, both essential to the survival of the NFLPA, which had experienced significant financial trouble because of loss of membership.[297]

4. a resolution of several minor "freedom issues" for the players.[298]

5. an increase in minimum salaries, pre-season pay for veterans, and post-season playoff compensation.

6. a provision prohibiting the inclusion of option clauses in the contracts of athletes who have played four or more years in the NFL, unless such a clause has been negotiated individually by the player and his club. Moreover, whenever a player's contract contains an option clause, the option-year salary must be at least 110% of the athlete's previous year's salary.[299]

7. greatly augmented pension payments.

8. a no strike clause that will be in effect for the duration of the agreement.

9. authority for the owners to increase the regular season schedule from fourteen to sixteen games.[300]

10. a monetary settlement of $13,675,000 in a class action dispute arising from the controversy in *Mackey*.[301]

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296. *See* Football Collective Bargaining Agreement, *supra* note 295, art. XV.

297. Football Collective Bargaining Agreement, *supra* note 295, art. IV, §§ 1-2. *See* N.Y. Times, March 6, 1977, § 5, at 7, col. 2. All players who entered the NFL after February 1, 1974, must pay union dues regardless of whether they are members of the NFLPA. Football Collective Bargaining Agreement, *supra* note 295, art. IV, § 1.

298. N.Y. Times, March 6, 1977, § 5, at 7, col. 2. For example, the agreement allows players to have telephones in their rooms during training camp and removes arbitrary grooming codes. Football Collective Bargaining Agreement, *supra* note 295, art. V, § 2; art. XXI, § 7.

299. *See* Football Collective Bargaining Agreement, *supra* note 295, art. XIV, §§ 1, 3.

300. *See* Football Collective Bargaining Agreement, *supra* note 295, art. XXI, § 5: art. XXII, § 7; art. XXXII, § 2; N.Y. Times, March 6, 1977, § 5, at 7, col. 3.

301. *See* Football Collective Bargaining Agreement, *supra* note 295, app. D; N.Y. Times, Feb. 26, 1977, at 15, col. 4.

This Article will now discuss the relevant factors to be considered in a determination of whether the NFL-NFLPA agreement, or a similar collective bargaining agreement containing the above provisions, should qualify for the labor exemption from the antitrust laws.

THE LABOR EXEMPTION AND THE NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT

Despite the volume of litigation concerning player restraints in professional sports, courts generally have avoided a thorough analysis of the labor exemption issue in this context on the rationale that reserve clauses and other player restraints have not been the product of bona fide collective bargaining. Although collective bargaining arguably could reduce the tensions created between the antitrust and the labor laws, an astute commentator, Professor Winter, suggested the inconclusiveness of any such general thesis some years ago.[302] Nevertheless, Theodore Kheel, a prominent labor attorney and counsel for the NFL, stated recently that "antitrust is over for keeps in professional sports on the reserve systems. We are now in collective bargaining."[303] Moreover, several sports cases have suggested that, if the players and the leagues engaged in genuine bargaining, the resulting agreement might qualify for the labor exemption.

Connell and the cases it embraces, however, make precarious at best predictions concerning the triumph of labor law over antitrust law in professional sports. The Supreme Court has identified two types of labor exemptions: statutory and nonstatutory. The statutory exemption is inapplicable to collective bargaining agreements between the players and the various leagues because it does not extend protection when a union joins with a nonlabor party in a negotiated contract that creates market restraints. Nevertheless, the Supreme Court has recognized that the national labor policy of encouraging collective bargaining requires that some union-employer agreements qualify for a limited nonstatutory exemption. In such circumstances the following threshold requirements must be present: (1) the collective bargaining agreement must be the prod-

302. *See* Winter, *supra* note 116.

303. *See* Kheel, *Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg?*, 45 ANTITRUST L.J. 290, 314 (1977).

uct of bona fide collective bargaining; (2) the union may not enter into the agreement as part of a union-employer conspiracy to impose market restraints; and (3) the contract must not restrict the union's bargaining options in its dealings with those who are not parties to the agreement. Moreover, *Connell* clearly demonstrates that, prior to resolving finally the applicability of the nonstatutory labor exemption, courts must balance or accommodate the national labor policies with those underlying the antitrust laws.

The requirement of bona fide collective bargaining has been the chief obstacle encountered by professional sports leagues in their prior attempts to invoke the nonstatutory labor exemption. Before the players had formed unions, the leagues already had developed a firmly entrenched system of player restraints. Team owners refused to negotiate seriously over changes in these player restraints, asserting that the restrictions were essential to the continued existence of the industry.[304] Frustrated at the bargaining table and apparently too weak to take effective strike action, the players turned to the courts in an attempt to have the restraints declared illegal. As already discussed, courts uniformly rejected the labor exemption defense to these antitrust suits and held that the owners unilaterally had imposed the restraints on the players. Thus, in the recent NFL-NFLPA negotiations, the Players Association was able to engage for the first time in serious collective bargaining over player restraints. The apparent success of the players in their antitrust suits, however, must not be exaggerated. During the negotiations, the NFLPA was hampered by the effects of an unsuccessful strike in 1974, which had demonstrated the difficulty of attaining player solidarity amidst inadequate finances and dissension among veterans, rookies, and superstars. Despite the existence of factors limiting the NFLPA's strength, *Mackey, Kapp,* and *Smith* afforded the union its first opportunity to engage in realistic collective bargaining, and the NFL-NFLPA agreement consequently should qualify as a product of bona fide collective bargaining.

The second threshold requirement is that a union and an employer may not conspire to impose market restraints through collective bargaining. This rule is not violated when a reluctant employer submits to union pressure and grants terms or conditions of employment that also have an incidental anticompetitive effect. If a union

304. *Id.* at 307-08.

exercises its powers in an attempt to further the interests of an employer who actively seeks to impose a market restraint, however, both the union and the employer are susceptible to antitrust suit. Moreover, under *Allen Bradley,* a union conspiring with an employer to impose market restraints may be subject to antitrust liability even when it undeniably is acting to further its own self-interest. In the NFL-NFLPA collective bargaining agreement the Players Association accepted a modified form of the player restraint system that the club owners consistently have maintained was vital for the industry. The NFLPA obtained modifications to the traditional restraints, however, only after engaging in strenuous collective bargaining with a reluctant management, a factor that immediately distinguishes the NFL-NFLPA agreement from the conspiracy in *Allen Bradley.* On balance, then, the NFLPA and the NFL did not adopt a common conspiratorial design to impose market restraints; rather, each party engaged in bona fide collective bargaining to reach the settlement most conducive to its respective interests.

The third threshold requirement for qualification for the labor exemption presently is irrelevant in the context of professional football. The players association enjoys a collective bargaining relationship only with the NFL, and therefore, no possibility exists that the union could contravene the Supreme Court's decision in *Pennington* by restricting its bargaining options with nonlabor groups other than the NFL.

Of the three threshold requirements, the NFL-NFLPA agreement is most susceptible to attack under the *Allen Bradley* nonconspiracy qualification. As previously discussed, however, such an attack should not be successful. Moreover, the agreement is remarkable in that it does not patently infringe any of the three restrictions. Thus, for the first time, courts may analyze, according to the balancing test used in *Connell,* the labor exemption's availability for a bona fide, collectively bargained, modified player restraint system.

Any attempt to apply *Connell,* however, is fraught with dangers, particularly in the context of professional sports. Initially, the employer-employee relationship in professional sports cannot be compared easily with similar relationships existing in other industries. For example, labor customarily has argued for an expansive intepretation of the labor exemption; employers typically have insisted that a broad application of antitrust law is necessary to curb

union excesses. In the sports cases, ironically, the owner-employers and the player-employees have reversed their traditional approaches to the labor exemption. *Connell* was the Supreme Court's most hostile treatment of the labor exemption, and focusing on the decision's strong language, commentators have indicated that it will become the leading case in a new strict and narrow interpretation of the nonstatutory exemption.[305] Arguably, however, *Connell* can be limited to its facts.[306] The union-nonlabor agreement in that case was pernicious in that the union had no interest in organizing Connell's employees and was content to force the company to deal with subcontractors having collective bargaining agreements with the union. Under these extreme circumstances, only a narrow majority of the Justices joined Justice Powell's opinion for the Court.[307] The recent NFL-NFLPA contract clearly is distinguishable from the situation in *Connell* in that the signatories to the agreement have a collective bargaining relationship with one another, and the Court expressly left open the possibility that a contract resulting from such circumstances could qualify for the labor exemption. Thus, although often overlooked by commentators and the lower federal courts, the question remains as to what weight the presence of a collective bargaining relationship should be given.

Assuming that the Court would extend *Connell* to cover the NFL-NFLPA agreement, caution should be exercised. As previously noted, the non-statutory exemption seeks to accommodate and balance the conflicting policies of the national labor laws with those of the antitrust laws. In its analyses the Court has favored the policy involving important ramifications in the particular case. Unfortunately, the Court has not yet confronted a situation in which the labor law and the antitrust law considerations both were significant. Consequently, its decisions in *Connell* and the other labor exemption cases provide little guidance to lower courts that must decide whether antitrust law or labor law will prevail in a situation when the collective bargaining process is fostered by an agreement imposing direct market restraints. Despite this confusion, to qualify for

305. *See* notes 203-07 *supra* & accompanying text.

306. *Connell* involved a particularly aggressive organizing technique, top-down organizing, in the construction industry, which historically has been given atypical treatment by the Supreme Court; presumably in deference to the importance of the industry in the national economic policy. For a discussion of *Connell*, see notes 183-203 *supra* & accompanying text.

307. *See* note 190 *supra*.

the labor exemption, the NFL, having satisfied the three threshold requirements, still must satisfy *Connell's* balancing test, although its application and ultimate resolution are essentially speculative matters. The difficulty of applying *Connell* can be demonstrated by examining whether the two most important aspects of the NFL-NFLPA agreement, the modified player draft and the compensation plan, would qualify for the labor exemption.

A. The Player Draft

The modified player draft provides for a twelve round selection procedure and requires that a club offer a contract with a minimum salary, a "required tender," to any of its draftees with whom it desires to preserve its exclusive right of negotiation. These provisions are likely to become an immediate source of controversy among potential professional athletes who are subject to the draft. Obviously, the owners succeeded in maintaining the draft virtually intact, inasmuch as the reduced number of rounds extends full bargaining power only to those marginal athletes who are not among the 336 players selected. The agreement alters the effect of the draft, however, in several ways. To preserve its exclusive right to negotiate with one of its draftees, a club must make a required tender to the athlete on or before June 7 in the year of the draft. A required tender must contain one of four separate minimum salary terms: a $20,000 salary for one year; a $30,000 average annual salary for two years; a $40,000 average annual salary for three years; or a $50,000 average annual salary for four years. If the team fails to make a required tender, the drafted player becomes a free agent on June 8. If, however, the player receives a required tender but refuses to sign a contract during the year following the draft, he becomes eligible to be drafted by any NFL club in the subsequent draft. If the player again refuses to sign a contract within one year with the club that selects him in the subsequent draft, he becomes a free agent at the end of that year and may negotiate with any team.[308]

One problem with this system is that the draft restricts the bargaining flexibility and power of individuals who are not yet a part of the bargaining unit.[309] College superstars are the persons injured

308. Football Collective Bargaining Agreement, *supra* note 295, art. XIII, §§ 2-7.

309. *Id.* Preamble. The Preamble of the agreement states: "[T]he NFLPA is recognized by the Management Council as the sole and exclusive bargaining representative of present *and future* professional football players employed by the clubs . . . ." (emphasis supplied).

most by the provisions restricting their right to bargain with more than one team. These disgruntled amateurs may question whether they should be bound by a collective bargaining agreement negotiated by a players union whose members possess vested interests arguably conflicting with those of the drafted players. During the NFL-NFLPA negotiations, the common feeling was that "[t]he players wanted a college draft, too. They feared that with unrestricted bidding a few players would get the world and the rest would have to take what was left."[310] If the clubs were required to pay large salaries to the young stars, they arguably would have fewer resources with which to compensate the established players and unheralded rookies. Thus, limiting the bargaining power of these future professional athletes presumably was in the interest of both the teams and the NFLPA. An analysis of the propriety of the collective bargaining provision relating to the player draft requires both an inquiry into the union's duty of fair representation to the amateurs seeking pro status through the draft and an application of *Connell's* balancing approach to the competing policy interests involved.

1. *The Duty of Fair Representation*[311]

In construing the federal labor law, which authorizes a union receiving a majority vote from those employees within the bargaining unit to serve as the exclusive bargaining agent for the entire unit,[312] the Supreme Court in *Steele v. Louisville & Nashville Railroad*[313] acknowledged the doctrine of fair representation. Under

310. Smith, *Three Years War*, N.Y. Times, Feb. 20, 1977, § 5, at 3, col. 6.

311. A comprehensive analysis of the duty of fair representation is beyond the scope of this Article. For a more extensive discussion of this issue, see R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING ch. XXX (1976); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK L. REV. 1096 (1974); Lehmann, *The Union's Duty of Fair Representation—Steele and its Successors*, 30 FED. B.J. 280 (1971); Comment, *Union's Duty of Fair Representation Held to be Breached by Negligent Failure to Act on Behalf of Members*, 44 FORDHAM L. REV. 1062 (1976).

312. *See* NLRA § 9(a), 29 U.S.C. § 159(a) (1970). Section 9(a) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

313. 323 U.S. 192 (1944).

this doctrine, unions, as exclusive bargaining agents, have the obligation to represent fairly, adequately, and impartially the interests of all members of the bargaining unit, not merely union members:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.[314]

Although the extent of the duty of fair representation is unclear, the Supreme Court held in *Vaca v. Sipes*[315] that this duty is violated when the union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith."[316] Rather than resolving the duty of fair representation question, however, *Vaca* prompted additional controversy.[317]

The ultimate resolution of the duty of fair representation issue probably will not affect an analysis of the NFL's modified player draft. A union's fair representation duty generally is limited to both union and nonunion employees who are members of the bargaining unit and normally does not extend to outside parties.[318] Drafted athletes are not employees of the bargaining unit represented by the

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314. *Id.* at 202. *Steele* involved an interpretation of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970). Nevertheless, the NLRA also imposes a duty of fair representation on the union. *See, e.g.*, Vaca v. Sipes, 306 U.S. 171 (1967); Syres v. Oil Workers Local 23, 350 U.S. 892 (1955) (per curiam); R. GORMAN, *supra* note 311, at 695-98; Flynn & Higgins, *supra* note 311, at 1101-02.

315. 386 U.S. 171 (1967).

316. *Id.* at 190.

317. *Compare* Local 313, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) *and* Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971), *with* DeArroys v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) *and* Ruzicks v. General Motors Corp., 336 F.2d 824 (6th Cir. 1975). *See* authorities cited at note 311 *supra*. The authorities are divided over whether a union violates its duty of fair representation in instances in which its conduct is merely negligent or perfunctory.

318. *See, e.g.*, NLRA § 9(a), 29 U.S.C. § 159(a) (1970); Vaca v. Sipes, 386 U.S. at 377; Gray v. Heat & Frost Insulators, Local 51, 416 F.2d 313 (6th Cir. 1969); Schick v. NLRB, 409 F.2d 395 (7th Cir. 1969); NLRB v. Whiting Milk Corp., 342 F.2d 8 (1st Cir. 1965); Turley v. Hall's Motor Transit Co., 296 F. Supp. 1183 (M.D. Pa. 1969); R. GORMAN, *supra* note 311, at 706-07; Flynn & Higgins, *supra* note 311, at 1123-31.

NFLPA and arguably are not members of the protected class.[319] This rule, however, is not without exception. In *Jones v. Trans World Airlines, Inc.*[320] the Court of Appeals for the Second Circuit stated:

> True, there is language in cases . . . to the effect that a union does not commit an unfair labor practice when it discriminates against *employees* outside of its collective bargaining unit. Despite this language, it is clear that a union may conduct itself in a manner so arbitrary or malicious vis-a-vis an outside group that it exceeds the limit imposed by the duty of fair representation.[321]

The key word in the court's statement is "employees." In both *Jones* and *Brotherhood of Railroad Trainmen v. Howard,*[322] a Supreme Court decision cited by the Second Circuit in *Jones,* the controversies involved unions that, through their collective bargaining agreements with the employers, attempted to eliminate or curtail the opportunities of nonunion employees who, under different job classifications, performed functions similar to those of the union members. In *Howard* the Supreme Court refused to shelter a union that represented white railroad brakemen in its attempts to have black train porters dismissed. A union, out of racial motive, cannot eliminate the jobs of nonunion, nonbargaining unit employees.[323] Moreover, in *Jones* the Second Circuit extended this rationale, holding that a union could not discriminate capriciously against nonbargaining unit employees whose duties were identical to those of workers within the bargaining unit, whatever the motivating factor.[324]

No decisions have extended the union's duty of fair representation to circumstances that are analogous to the NFLPA's relationship with college draftees. A union's duty of fair representation has been extended properly to all members of the bargaining unit, and, in some instances, to other employees of the employer; however, it normally does not cover other outside parties. This conclusion is not designed to suggest that the players unions and the sports leagues are immune from antitrust actions that may be brought by drafted

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319. *See* Gray v. Heat & Frost Insulators Local 51, 416 F.2d 313, 316 (6th Cir. 1969).

320. 495 F.2d 790 (2d Cir. 1974).

321. *Id.* at 796 (emphasis supplied). The court in *Jones* nevertheless ultimately concluded that the plaintiff nonunion employees were members of the union's bargaining unit. *Id.* at 797.

322. 343 U.S. 768 (1952).

323. *Id.* at 773-75.

324. 495 F.2d at 797-99.

individuals. A determination of the susceptibility of leagues and players unions to antitrust attack requires an analysis of the effects of the collective bargaining provisions concerning the modified player draft.

2. The Connell Balancing Test

One serious question presented by the modified draft is whether the imposition of market restrictions on potential professional football players is tantamount to a conspiracy between the union and the club owners. Professional sports, like any business, has finite economic resources, and the established players have a vested interest in restricting the bargaining power of the rookies. By limiting the negotiating strength of those athletes selected in the player draft, the established players have enhanced their opportunities to achieve their own salary demands. Also hoping to restrict the bargaining powers of the rookies are club owners, especially those with problems, such as inordinately limited financial resources or undesirable team locations that diminish their abilities to attract quality ballplayers in an open market. Some owners might believe that in a completely free market they could not compete with clubs located in cities offering either considerable promotional opportunities or climates hospitable to the outdoor game of football.

Thus, the modified draft may be vulnerable to antitrust suit on the ground that it is a conspiracy between a union and an employer to impose market restraints. Moreover, under *Allen Bradley* the NFLPA could not avoid any liability arising from such an allegation by proving that it was acting in its self-interest.[325] The NFLPA and the NFL may attempt to defend the agreement by arguing that the conspiracy prohibition is inapplicable; the NFLPA conspired with a nonlabor group to restrict the marketability of another labor group rather than to affect an industrial competitor. No direct precedents have applied *Hutcheson's* nonconspiracy proviso to a conspiracy against another labor group. In *Pennington* the Court pertinently stated:

> a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed *with one set of employers to impose a certain wage scale on other bargaining units. One group*

325. *See* text accompanying notes 144-49 *supra.*

> *of employers may not conspire to eliminate competitors from the industry* and the union is liable with the employers if it becomes a party to the conspiracy.[326]

Moreover, in *American Federation of Musicians v. Carroll*[327] the Court granted the labor exemption to the union although the dispute was between labor groups.[328]

Whether a court would accept this defense, however, is doubtful. In contrast with the NFLPA's actions, the union in *Carroll* did not combine with a nonlabor group but merely unilaterally implemented its own bylaws. Similarly, in deciding in *Pennington* and *Hutcheson* that a union could not combine with one nonlabor group to harm another nonlabor group, the Supreme Court may not have intended to imply that the union could conspire with the same nonlabor group to impose unfair restrictions on another labor group. Even assuming that the Supreme Court did anticipate this result, a plausible argument could be made that the player draft provision was the product of an illegal conspiracy, in that the NFLPA has combined with a nonlabor group, the NFL, to benefit the particular team that drafted the individual player. Thus, the agreement effectively eliminates competitor teams from the market for a particular athlete who has been drafted by another club.[329]

The defense that the draft only restricts another labor group also is suspect because, in the unique circumstances of professional sports, the players are not merely the labor market but also constitute the industry's product in many important respects. In most industries consumers are not interested in the activities of particular employees; instead they are concerned only with the tangible results of those activities. In professional sports, however, the public's interest transcends a desire to learn the outcome of a particular contest and encompasses a predilection for following the performances of individual athletes. Thus, in the sports industry the athletes as individuals and as a team are the message, the product sold.

Although no clear defense is available to the NFLPA and the NFL against the charge of conspiracy, such an allegation is difficult to

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326. 381 U.S. at 665-66.

327. 391 U.S. 99 (1968).

328. *See* notes 176-82 *supra* & accompanying text.

329. For a discussion of whether a club injured by the operation of a sport's player restraint system could maintain an antitrust action against its league, see Note, *Professional Sports: Restraining the League Commissioner's Prerogatives in an Era of Player Mobility*, 19 WM. & MARY L. REV. 281, 311-16 (1977).

sustain.[330] The plaintiff cannot meet his burden of proof merely by demonstrating that the interests of the union and the employer favored the imposition of market restraints.[331] *Allen Bradley* involved an unusual situation in that the union willingly participated in a scheme to exclude competitors from a substantial market. In contrast, the NFLPA forced a reluctant NFL to accept a modified draft plan that was less restrictive than its predecessor. Moreover, a union's participation in the regulation of entry opportunities for newcomers is commonplace: the widespread use in some industries of union hiring halls or union-run apprenticeship programs arguably has the same restrictive effect as does the maintenance of the NFL's player draft.[332] As a result, allegations of conspiracy would be difficult to sustain.

If the modified draft is not overturned on a conspiracy theory, a court must still balance the draft's antitrust considerations against its labor law ramifications. The impact of the draft on the bargaining ability of potential professional athletes is considerable. The reduction from seventeen to twelve rounds has freed from the draft only those players who are not particularly attractive to the owners. Because very few late round picks ever make the team, the reduced number of rounds has had very little practical effect in increasing the opportunities of college athletes. More importantly, those players who would gain the most from the draft's dissolution, the college stars, still are subjected to it.

On the other hand, the draft no longer provides a team the exclusive bargaining rights to a drafted athlete in perpetuity. A player may be prevented, however, from freely negotiating for as many as two years. This is a significant restraint, especially because the athlete is deprived of bargaining opportunities during two of the best and potentially most lucrative years of his exceedingly short career. Most athletes subject to the draft have reached their present degree of fitness and skill after four years of apprenticeship on a major college team, which also brought them valuable exposure in the national media. A player who refuses to accept a mediocre offer and who sits out from competition during the two years he is subject

330. *See, e.g.*, Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); United States v. Chas. Pfizer & Co., 367 F. Supp. 91 (S.D.N.Y. 1973).

331. *See, e.g.*, Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

332. *See generally* Smith v. Pro-Football, 420 F. Supp. at 743; P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 436 (1964).

to the draft would not only have difficulty in maintaining his athletic skills but also would be denied the valuable publicity he received as a college star.

Thus the player draft undeniably restrains potential professional athletes from freely bargaining in terms of salary or location. As previously noted, this restriction affects both the labor market and the product market because of the sports industry's unique nature. Moreover, the means of enforcing the draft, the group boycott, is a device traditionally disdained by the courts.[333] In *Connell* the agreement between Connell and the union prevented the contractor from hiring subcontractors of his choosing, which prompted the Supreme Court to declare that "[l]abor policy clearly does not require . . . that a union have freedom to impose direct restraints on competition among those who employ its members."[334] The district court in *Smith v. Pro-Football,* however, concluded that the protection of potential players is "less central" to the objectives of the antitrust laws than is the mandate to prevent product market restrictions.[335] Such a conclusion ignores that both the union and the NFL agreed to a modified draft lodging considerable power with the owners to restrict the bargaining abilities of potential players and thereby to control both the labor market and the product market. The draft, even as modified, is inescapably a serious market intrusion on the part of the NFL and the NFLPA. Although the arrangement may not be the "absolutely . . . most restrictive . . . imaginable,"[336] it certainly is not the most reasonable.

In *Connell* the market restrictions were serious and offered no important countervailing consideratons advancing the national labor policy. The NFL-NFLPA agreement, however, involves definite counterbalancing labor law considerations. This contract is unique in that it presents the first instance in which professional football's labor and management have engaged in bona fide collective bargaining concerning the player restraints traditionally used in the industry. Although the NFLPA has yet to demonstrate the membership solidarity required to make it a formidable adversary

333. *See, e.g.,* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); United States v. General Motors Corp., 384 U.S. 207 (1959); note 26 *supra.*

334. 421 U.S. at 622.

335. *See* text accompanying notes 269-71 *supra.*

336. 420 F. Supp. at 74.

during negotiations, the litigation strategy pursued so successfully by professional athletes has forced the NFL to bargain seriously about the league's player restraint mechanisms. Moreover, having surrendered much of its traditional authority over players, the league understandably insisted that, in addition to a no strike or lockout clause, the agreement also contain a "no suit" clause:

> [T]he NFLPA agrees that it will not sue, nor support financially or administratively, any suit against the NFL or any club with respect to any aspect of the NFL rules, including without limitation, the Standard Player Contract, the NFL Player Contract, the NFL Constitution and Bylaws, the college draft, the option clause, the right of first refusal or compensation, the waiver system, the trading of players, tampering, and the maintenance of certain reserve lists.[337]

The league also made clear that if the class action settlement was disapproved by the court or if either the modified draft or the right of first refusal/compensation system was enjoined, either party could terminate the agreement on written notice.[338]

Thus, the new contract attempts to provide peace in an industry plagued by labor turmoil during the past decade. The contract represents a significant departure from a paternalistic labor relationship marked by the league's refusal to engage in serious collective bargaining to a more mature arrangement in which representatives of labor have an actual voice in the terms and conditions of their employment. As the court in *Smith* recognized, the negotiation of a draft provision is central to the NFLPA's purpose of forging the groundwork for bona fide collective bargaining, and the union must have flexibility in arriving at the best agreement it can obtain.[339] Clearly, the subject matter of the draft provides the NFLPA with one of its stronger bargaining points, and unions should have the freedom to use this leverage to further its members' self-interests. In the context of the entire contract, then, the draft provisions appear intimately related to the furtherance of the national labor policy of collective bargaining.

The resulting dilemma requiring balancing involves a restraint on the market for new talent in the sports industry, enforced by a group

337. Football Collective Bargaining Agreement, *supra* note 295, art. III, § 2.
338. *Id.* art. XXXVI, § 3.
339. *See* text accompanying notes 270-71 *supra.*

boycott that was negotiated by parties whose interests conflict with those of the athletes who will be injured by the draft's operation. Nevertheless, the modified draft also appears to be a term and condition of employment for which the parties bargained at arm's length in an attempt to create labor peace. The inevitable conclusion is that the draft concerns the fundamental interests and policies of both the antitrust and the labor laws. As noted, however, the Supreme Court has not decided a case involving strong antitrust and strong labor law considerations; therefore *Connell* and the other labor exemption decisions do not provide the guidance necessary for a complete analysis of the draft. The uncertainty of the *Connell* balancing test assures that the applicability of the labor exemption to the modified player draft is an issue that can be resolved without speculation only after the Supreme Court further delineates the scope of the nonstatutory exemption.

B. Right of First Refusal or Compensation: The Successor to the Rozelle Rule

Among football's player control mechanisms, the Rozelle Rule aroused particular resentment.[340] The players contended that the NFL's one year reserve clause was meaningless as long as its surrogate, the Rozelle Rule, existed. They insisted that the Commissioner's power to determine compensation served as an effective deterrent against teams signing free agents, because a team owner could not predict the "ransom" he would have to pay for a particular player. The collective bargaining agreement's compensation provisions remove the uncertainty and arbitrariness inherent in the Rozelle Rule, but, as with the modified draft plan, the successor compensation system also imposes severe restraints on an individual athlete's freedom to bargain with other teams. According to the new agreement, the amount of predetermined compensation for an established star who is able to command a "qualifying offer" of $200,000 or more, consists of the acquiring club's own first round selection choices, or better first round choices it might have obtained by assignment from other NFL clubs, in the next two college drafts.[341] Ultimately, the compensation plan seriously may inhibit teams from bidding for the services of free agents. The possible

340. *See* notes 64-83 *supra* & accompanying text.

341. Football Collective Bargaining Agreement, *supra* note 295, art. XV, § 12.

chilling effect of the predetermined compensation system may be illustrated by the reported reaction of one head football coach:

> Teams will turn their backs on expensive free agents because of the new pre-determined compensation . . . "I know this. The teams that needed [a particular free agent player] the most before the agreement . . . were not interested in that kind of [compensaton package].
>
> "I felt prior to the agreement that there was very little chance of him [the particular football player] coming back here. Now that there is an agreement, I think we'll be able to sign him."[342]

Apparently, the Rozelle Rule in a modified form is incorporated into the collective bargaining agreement. The uncertainty created by the Commissioner's compensation power has been replaced by the certainty of an exorbitant price that must be paid by any club hoping to acquire the talents of a highly regarded athlete.[343] Although this limitation may not be as severe in restricting the free movement of players as was the Rozelle Rule, it nevertheless constitutes a significant market restraint inhibiting teams from bidding for the highly paid and presumably most talented athletes.

Inasmuch as the Rozelle Rule consistently had been viewed with disfavor by the courts, the NFLPA's rationale for its agreement to include a similar compensation provision in the new collective bargaining agreement appears perplexing. The established players may have a vested interest in retaining a modified draft, but the benefits they receive from the maintenance of a compensation system are unclear. The NFLPA might have concluded that an unrestrained market is beneficial only to the superstars who already enjoy high salaries, or it might have recognized the validity of the owners' persistent claims that some form of player restraint system is essential to the NFL's economic well-being. The most plausible explanation, however, for the union's acceptance of this provision is that it made the sacrifice to achieve other concessions from the owners. The NFLPA needed a collective bargaining agreement to preserve its existence; as reported in the *New York Times:*

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342. Philadelphia Inquirer, March 3, 1977, § C, at 1, col. 1.

343. If a club does not possess the draft choices necessary to provide the required compensation, it may not acquire the free agent. Football Collective Barganing Agreement, *supra* note 295, art. XV, § 12. This prohibition further restricts the movement of free agents.

> The Union, which seemed about to go under during the long impasse, has survived. "You have no idea how close we were to going out of business," a source close to the situation observed. "Our membership was down to about only 300. We'd lost a strike. There was no dues checkoff." The new contract provides the checkoff and more importantly an agency shop.[344]

When viewed in the stark terms of the union's survival, labor law considerations are present in the NFL-NFLPA contract. As noted in the discussion of the draft, the NFLPA is embarking on the creation of a bona fide collective bargaining relationship. In the context of the remainder of the contract, the compensation provision appears to have been accepted as part of the bargaining process, during which the league and the players forged a mutually acceptable agreement.

Thus, as with the draft, the compensation system creates a situation involving important labor and antitrust law considerations. The Court, however, has yet to indicate which of these public policies should predominate in such circumstances.

CONCLUSION

Both the Sherman Act and the National Labor Relations Act were enacted amidst a concern for the abuses of big business. Although the sports industry at first glance appears to be an unlikely arena in which to resolve the clash between the conflicting policies underlying these measures, it nevertheless may be the first forum in which *Connell's* balancing requirements are applied to determine whether a market restraint that is implemented through a collective bargaining agreement and that presents important labor law considerations should qualify for the labor exemption from the antitrust laws. Unfortunately, the decision in *Connell* provides little guidance as to the ultimate resolution of this situation. Moreover, any predictions concerning the appropriate balance of these two fundamental national policies would be speculative in the absence of a Supreme Court decision addressing the issue. The modified player restraint system contained in the NFL-NFLPA agreement exposes the deficiencies of *Connell,* in that neither the union nor management knows whether the contract, which was negotiated after three years of

344. N.Y. Times, March 6, 1977, § 5, at 7, col. 2.

strenuous collective bargaining, is subject to nullification in an antitrust suit. Hopefully, for the welfare of the entire labor-management community and not merely for the sports industry, the Supreme Court will seize upon an early opportunity to define *Connell's* requirements.