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Valparaiso University

THE NATIONAL FOOTBALL LEAGUE ELIGIBILITY RULE AND ANTITRUST LAW: ILLEGAL PROCEDURE

INTRODUCTION

Professional football's eligibility rule[1] has been a longstanding tradition in the National Football League (NFL).[2] The league rule restricts participation in its player drafts to players who have attained a college degree, have used up four years of college eligibility, or have spent five years in school.[3] Various reasons have been offered for the adoption of the rule. First, it is maintained that the rule was written as an accommodation to the colleges and universities who feared that without guidelines many players would leave school without degrees.[4] The rule also accommodates the football programs of colleges and universities by enabling schools to retain athletes for participation in intercollegiate competition. Second, the rule benefits veteran professional football players by providing them an opportunity to establish seniority and job security before rookies enter the NFL.[5]

Despite its longstanding tradition and the reasons which prompted its inception, the eligibility rule currently faces criticism and attack[6] under the antitrust laws.[7] The individuals dissatisfied with the rule are college football players who have withdrawn from school early, hoping to join the professional ranks. When refused admission for failure to meet the eligibility requirement,[8] some players have threatened to retaliate by means of the legal process. In court, the player maintains that the rule constitutes an unreasonable restraint

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1. *See* NFL Constitution and By-Laws, Art. XII (1972). Though the United States Football League (USFL) implements a comparable eligibility rule, that league's practices are not considered here.

2. *See* N.Y. Times, Feb. 7, 1984, at 12, col. 1.

3. *See supra* note 1.

4. *See supra* note 2.

5. *See* SPORT, Jan., 1982, at 20, col. 2.

6. Chicago Tribune, Feb. 2, 1984, § 4, at 2, col. 1. One lawsuit challenging the legality of the NFL rule is pending in Illinois District Court (Durrell v. USFL and NFL). Moreover, former University of Georgia football player Herschel Walker at one time considered contesting the NFL rule in court. He chose not to pursue a legal battle and instead signed with the USFL's New Jersey Generals. The USFL waived its version of the eligibility rule for him. *See* Underwood, *Does Herschel Have Georgia On His Mind?*, SPORTS ILLUSTRATED, Mar. 1, 1982, at 22-25. *See also supra* note 2.

7. It is undisputed that the NFL operates in interstate commerce. It is also recognized that the business of professional football enjoys no special exemption from the antitrust laws. *See* Radovich v. National Football League, 352 U.S. 445 (1957).

8. *See supra* note 1.

on his ability to market his services.[9] Specifically, the player argues that through the rule the league has effectuated a classic group boycott.[10]

The group boycott[11] is premised upon the theory that a group of competitors have attempted to prevent another competitor from

9. The provision of the Sherman Act that is pertinent to a challenge of the eligibility rule provides in relevant 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 hereby declared to be illegal." 15 U.S.C. § 1 (1976).

10. There are two basic theories available to the player: the concerted refusal to deal and the classic boycott. Each theory compels a specific result. A classic boycott warrants application of the *per se* doctrine, which means that the activity is illegal in and of itself. Thus, there is no opportunity for further inquiry. A concerted refusal to deal, however, compels application of the Rule of Reason, which permits extensive inquiry into the justification for the activity. *See infra* notes 191-97 and accompanying text.

Spencer Haywood challenged the National Basketball Association's (NBA) eligibility rule under a classic group boycott theory. *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated*, 401 U.S. 1204 (1971). The similarity of the rules and the success of Haywood's claim suggests that a player challenging the NFL eligibility rule would pursue the same theory. It is contended, however, that the Haywood case is of limited precedential value to the football industry. Differences in both the organizational and economic frameworks of the two sports suggest that the theories must be applied with consideration given to the peculiarities of the particular sport. *See, e.g.*, Smith v. Pro Football, Inc., 420 F. Supp. 738 (D.C. Cir. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978) (recognizing that nature of the NFL required concerted refusal to deal theory, rather than boycott theory). It is too difficult to generalize about sports which have special goals, needs, and structures. For this reason, the focus of this note is limited to the case law that has developed in the football industry. For an explanation of the nature of basketball, hockey and baseball, respectively, see *Denver Rockets*, 325 F. Supp. 1049; Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Flood v. Kuhn, 407 U.S. 258 (1972). *See also* J. WEISTART AND C. LOWELL, THE LAW OF SPORTS 477 (1979) for a good analysis of the various sports. Moreover, the contention that the courts should tailor application of the tests to the special nature of the football industry gains support from baseball's special treatment. Baseball has been granted a special exemption from the antitrust laws. *Flood*, 407 U.S. 258. *See Smith*, 593 F.2d 1173 (court explained that boycott *per se* rule is not appropriate in football industry).

11. Although some writers and judges use the group boycott and the concerted refusal to deal interchangeably, the concepts are actually different. A classic boycott entails action by competing firms to inhibit the entry of potential competitors by persuading another party from not dealing with the competitor. Such a boycott constitutes a *per se* violation. With a concerted refusal to deal, however, the firms themselves refuse to deal with the individual. Also, with the latter method, the party to whom the concerted refusal is directed need not be a competitor. The concerted refusal is not a *per se* violation. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 229-32 (1977).

entering the market.[12] Application of this theory requires that the court pursue traditional antitrust analysis.[13] The problem with this approach is that the antitrust laws were enacted to regulate and prohibit business market, or commercial, restraints.[14] Under the eligibility rule, however, the league is not implementing a restriction that affects either a competitor or the commercial market.[15] The league does not compete in any economic sense with the players; rather, the league acts as the employer of the football players, who serve as employees.[16] Thus, the eligibility rule regulates competition among employees regarding wages, hours, and other terms or conditions of employment.[17] Accordingly, the rule is more properly categorized as a labor market restriction.[18]

Although the effect of a labor market restriction on price and output may be as great as that of a business market restriction, through labor policy Congress has chosen to sanction some labor market restraints.[19] Permissible labor market restrictions include hiring

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12. *See infra* notes 185-88 and accompanying text.

13. *See infra* notes 30-44 and accompanying text.

14. *See* Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945) (Court held that the electrical workers union's securing of closed shop agreements with city electrical contractors violated the antitrust laws. Court noted that such an activity restrained commercial competition, as opposed to labor market competition); *Smith*, 593 F.2d at 1178-80 (acknowledging that product market restraints are a primary concern of the antitrust laws); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980) [hereinafter cited as Leslie]. Also of concern to the courts are restraints that affect the labor policies of other employers in the industry. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965) (union-employer agreement to impose a certain wage scale on other bargaining units violated the antitrust laws).

15. *See infra* notes 52-55 and accompanying text. *See also Allen Bradley*, 325 U.S. 797 (indicating that courts should differentiate between product market and labor market restrictions); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (a combination of employees restraining competition in the sale of their services to an employer held not a violation of the antitrust laws).

16. *Smith*, 593 F.2d at 1178-80; Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976). *See also* Kempf, *The Misapplication of Antitrust Law to Professional Sports League*, 32 DEPAUL L. REV. 625 (1983).

17. "Wages, hours, and other terms or conditions of employment" are designated mandatory subjects of bargaining under the National Labor Relations Act (NLRA). The parties to a collective bargaining agreement are bound to bargain over such matters pursuant to labor law. NLRA, 29 U.S.C. § 158(d) (1976).

18. The NLRA, enacted in 1935, and the Labor Management Relations Act, enacted in 1947, established the national policy in favor of collective bargaining. Pursuant to this policy, employees may combine in an effort to obtain desirable agreements with employers regarding wages, hours, and other terms and conditions of employment. *See* D. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 382-86 (1979) [hereinafter cited as CASES AND MATERIALS].

19. Leslie, *supra* note 14, at 1184. Labor market restrictions are restraints

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halls[20] and strikes.[21] The nonstatutory labor exemption doctrine[22] was developed to enable courts to determine which restrictions are indeed sanctioned by labor policy. The restrictions that fall within the exemption are thereby granted immunity from antitrust attack.[23] Although the labor exemption doctrine should theoretically suffice as the means by which the courts determine which restrictions deserve antitrust immunity, the doctrine does not in fact fulfill its role in the sports cases.[24] Misinterpretation and extensive judicial discretion have subjected blatant labor market restraints to antitrust scrutiny.[25]

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that affect concerted actions of employees. Professor Leslie explains that through a union the workers can demand a wage rate higher than that set by the competitive market. For this demand to be successful, the union must limit competition from potential replacements. By limiting replacements available to the employer, the union then has the leverage to condition its members' continued work for the firm upon the employer's agreement to employ no worker at less than the union wage. When a union obtains such an agreement, it has monopolized the labor supply. This monopolization results in a reduction in output and employment. Nevertheless, federal labor law permits the monopolization of the labor supply. Antitrust laws, therefore, cannot prohibit a union's monopolization of employees or wage bargaining. *See* A. CARTER, THEORY OF WAGES AND EMPLOYMENT 77-94 (1959) and Leslie, *supra* note 14, at 1185-88 for a more detailed explanation of monopolization of the labor supply.

A business market restriction, on the other hand, affects firms competing for a market share and the consumer who buys the product. For example, the group boycott is characterized by one firm's inducement of a fellow competitor not to deal or have business relations with an entering competitor. Such an agreement hinders the entering competitor's ability to compete in the market. Furthermore, the boycott ultimately harms the consumer, since he is prevented from deriving the benefit that competition among firms creates. The benefit may be a better product or a lower price. *See* National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). *See also* L. SULLIVAN, *supra* note 11, at 229-57. Note that "product market," "business market," and "commercial market" refer to the same market.

20. *See generally* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) (agreement whereby employers agree to hire only through union hiring halls, from which skilled workers may be excluded, held legal).

21. Strikes are permissible restrictions by virtue of the interaction of two statutes. *See* Clayton Act § 20, 29 U.S.C. § 52 (1970) (provides that actions of employees terminating employment or ceasing to perform work do not violate the law); Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (1970) (denies federal courts the power to issue injunctions against activities arising out of labor disputes). *See also* NLRA § 7, 29 U.S.C. § 157 (1976), which guarantees employees the right to participate in concerted activities such as strikes.

22. *See infra* note 99 and accompanying text.

23. *See, e.g.*, Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965). *Jewel Tea* acknowledges that restrictions intimately linked to wages, hours, and working conditions and which have been instituted through bona fide, arm's-length bargaining in a union's pursuit of its own labor policies deserve the protection of national labor policy. Therefore, such restrictions are exempt from the Sherman Act. *Id.* at 702.

24. *See infra* notes 129-43 and accompanying text.

25. *See infra* notes 129-43 and accompanying text.

The focus of this note is the operation of antitrust policy and analysis in the context of the National Football League. Of particular concern is the prospective treatment of the eligibility rule in light of judicial interpretation in both football and traditional business cases. An initial examination of the issues that arise in scrutinizing the antitrust implications of union-management activities indicates the inevitable confrontation of labor and antitrust policies. The discussion then concentrates on the nonstatutory labor exemption's function to accommodate the contrasting ideals expressed in the two polar sets of laws. An examination of the courts' interpretation and application of the exemption reveals that their approach prevents its proper functioning, contravenes established labor principles, frustrates labor policy, and ignores leading Supreme Court precedent. Moreover, the flaws and implications of the current exemption analysis, coupled with the inherent difficulties in applying traditional antitrust analysis to the football industry, require the adoption of more workable guidelines.

ANTITRUST PERSPECTIVE

The basic policy of antitrust law is to promote and preserve free and unfettered competition[26] by prohibiting improper restrictions on economic competition.[27] Pursuant to this legislative direction, courts have developed standards by which to analyze particular activities or restrictions. The resulting tests have been somewhat unclear, even in the context of traditional business situations.[28] Furthermore, the

26. *See Professional Engineers*, 435 U.S. 679; Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958).

27. *Allen Bradley*, 325 U.S. at 803-06; *Cf. Apex Hosiery*, 310 U.S. 469. Legislative history substantiates this basic policy of antitrust law. 51 CONG. REC. 13,663 (1914) (remarks of Senator Ashurst).

28. The Court noted the difficulty in applying the antitrust tests in *Professional Engineers*: "[R]estraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of contract law." 435 U.S. at 687. Justice Stevens quoted Justice Brandeis' phrase: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). *See* Note, *Maricopa County and the Problem of Per Se Characterization in Horizontal Price Fixing Cases*, 18 VAL. U.L. REV. 1006, 1033 [hereinafter cited as *Maricopa County*]. The author notes that *Professional Engineers* provides a testimonial to the lack of clarity of the tests and the courts' application of them. The author further notes that eminent antitrust authorities cannot agree as to what mode of antitrust analysis was employed. *See Maricopa County*, *Id.* at 1033 n.141, citing the following authorities: Sullivan and Wiley, *Recent Antitrust Developments: Defining the Scope of Exemption, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. REV. 265, 323 (1979) ("the Court applied the Rule of Reason rather than the *per se* rule"); Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593, 1594 (1980) (Court applied *per se* rule in *Professional Eng'rs.*).

Another set of cases has also exhibited confusion. These cases involved unions'

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tests have become even less clear as courts have applied traditional antitrust analysis to disputes arising in the sports industry.[29]

Modes of Antitrust Analysis

Critical to a court's scrutiny under the antitrust laws is whether the *per se* doctrine or the Rule of Reason ought to govern its deliberation. The Rule of Reason[30] is the more flexible mode of analysis employed by courts. The test attempts to balance an activity's tendency to enhance competition against its tendency to injure competition.[31] If, on the balance, the agreement is found to have a net anticompetitive effect, it is classified as an unreasonable restraint of trade in violation of the Sherman Act.[32] Historically, the Rule of Reason involved only the rudimentary balancing of an activity's impact on competition and permitted no consideration of the purported noncompetitive justifications for the activity.[33] Although it has been argued that the

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potential liability under the antitrust laws. From these cases developed the nonstatutory labor exemption, discussed fully later in the text. *See infra* text accompanying notes 97-100. *See also* Connell Construction Co. v. Plumbers of Steamfitters Local 100, 421 U.S. 616 (1975); *Jewel Tea*, 381 U.S. 676; *Pennington*, 381 U.S. 657; *Allen Bradley*, 325 U.S. 797; United States v. Hutcheson, 312 U.S. 219 (1941); *Apex Hosiery*, 310 U.S. 469.

29. *See Radovich*, 352 U.S. 445; Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert denied*, 441 U.S. 907 (1979); *Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

30. Justice Brandeis' statement of the Rule of Reason in *Chicago Bd. of Trade* is often cited to support use of this mode of antitrust analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade, 246 U.S. at 238.

31. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 444 U.S. 1 (1979); *Professional Engineers*, 435 U.S. at 688-91; United States v. Columbia Steel Co., 334 U.S. 495 (1948); Standard Oil v. United States, 221 U.S. 1 (1911).

32. *Professional Engineers*, 435 U.S. at 691.

33. *See Professional Engineers*, 435 U.S. at 691; L. SULLIVAN, *supra* note 11, at 229-32. This means that inquiry is limited to factors that reflect economic or competitive effects, rather than factors that suggest non-economic or social policy considerations. This view of the Rule of Reason limits inquiry to whether competition was promoted or suppressed.

rule should be limited to its historical application,[34] courts increasingly have allowed greater inquiry into the facts peculiar to the business, the history of the activity, and the reasons for the activity.[35] It is this modern, flexible inquiry that makes the Rule of Reason attractive to litigants.

The *per se* doctrine,[36] on the other hand, is the more rigid test, which reflects a court's lack of sympathy for a particular activity.[37]

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34. Professor Sullivan urges utilization of this type of Rule of Reason analysis because it is an expedited approach to an inherently time-consuming test. *See* L. SULLIVAN, *supra* note 11, at 229-32.

35. Both *Professional Engineers*, 435 U.S. at 691, and *Chicago Bd. of Trade*, 246 U.S. at 238, illustrate an acceptance of the listed factors as pertinent to Rule of Reason analysis. A more liberal view maintains that the additional factors of social policy and the interests of a particular industry also deserve consideration under a Rule of Reason inquiry. This view is referred to as the elastic Rule of Reason. The elastic rule would, therefore, enable an industry to argue that the special characteristics of a particular industry warrant anticompetitive behavior. *See Broadcast Music Inc.*, 441 U.S. 1. Under scrutiny in *Broadcast Music*, was that composers had permitted the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) to issue licenses that gave subsequent users the legal right to perform the composers' products. In effect, this allowed ASCAP and BMI to issue blanket licenses to television networks and other users. CBS alleged that the blanket license was inherently anticompetitive, because it reduced competition among composers by reducing their incentive to bargain individually with users of their products. *Id.* at 6. However, the Court rejected this contention. The Court acknowledged that without the blanket licenses, each user would have to negotiate with individual copyright owners every time a user desired to perform the owner's composition. Such a burdensome process, however, would be destructive to the industry. Moreover, the costs associated with individual negotiation and enforcement of copyright rights would also be detrimental to the industry. *Id.* at 20-22. Consequently, the Court reasoned that the agreement proved beneficial to both buyers and sellers because it created substantial economic efficiencies. *Id.* at 19-20. *Broadcast Music* exemplifies use of an elastic Rule of Reason, which gives even more credence to the peculiarities of an industry than is sometimes elucidated. Although the activity could have been characterized as a price-fixing arrangement warranting condemnation under the *per se* rule, a flexible Rule of Reason inquiry into the particular industry proved that the activity was desirable. It is contended that even this approach is consistent with the general notion underlying Rule of Reason; providing the opportunity for consideration of the peculiarities of the business. *See also* Robinson, *Recent Antitrust Developments—1979*, 80 COL. L. REV. 1, 16, 17 n.106, 18-19 (1980) (lobbying for a Rule of Reason which incorporates social concerns); *Maricopa County*, *supra* note 28, at 1013-18.

36. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry.*, 356 U.S. 1, 5 (1958). *See also Klor's, Inc.*, 359 U.S. 207 (invoking a *per se* rule for boycott practice).

37. *See, e.g.*, Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969); *Klor's, Inc.*, 359 U.S. 207; International Salt Co. v. United States, 332 U.S. 392

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The doctrine's operation illustrates its two underlying goals: avoiding burdensome litigation[38] that is unnecessary because of a court's previous experience with an activity;[39] and providing clear guidelines for businesses, thereby enabling them to conform their practices with the antitrust laws.[40] Although often viewed as a harsh test, it has been contended that the *per se* doctrine is actually a special form of Rule of Reason analysis.[41] This view relies on the notion that courts apply the *per se* rule of invalidity when previous experience with similar situations[42] reveals that the conduct is recurringly and manifestly anticompetitive.[43] The rule has therefore been labeled a judicial shortcut.[44]

Theoretically, an activity declared illegal under *per se* analysis should receive the same determination under Rule of Reason analysis.[45] This will occur if a court employs the traditional Rule of Reason analysis.[46] However, if a court applies the elastic Rule of Reason, which permits evidence of an activity's noncompetitive justifications and allows more flexible inquiries into the activity, a different result is likely to occur.[47] Because courts are increasingly applying the elastic

(1947); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 590-99.

38. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 (1972); J. WEISTART AND C. LOWELL, *supra* note 10, at 590-99.

39. "[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *Topco Associates*, 405 U.S. at 607.

40. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part I, 74 YALE L.J. 775, 832, 840-41 (1965).

41. *See Professional Engineers*, 435 U.S. at 692; Standard Oil v. United States, 221 U.S. 1 (1911); L. SULLIVAN, *supra* note 11, at 196. The *per se* rule is viewed as a special application of Rule of Reason analysis. *Per se* treatment reveals that a court can confidently predict that Rule of Reason will condemn the activity. A court's confidence in the ultimate illegality of particular restraints derives from previous judicial experience, characterized by consistent findings of antitrust violations. *See infra* notes 42-44 and accompanying text.

42. *See, e.g., Klor's, Inc.*, 359 U.S. 207 (classic boycott subject to *per se* doctrine); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements subject to *per se* doctrine); *Socony-Vacuum*, 310 U.S. 150 (price fixing subject to *per se* doctrine).

43. *See Northern Pacific Ry.*, 356 U.S. at 5.

44. *See Smith*, 593 F.2d at 1180; *But see* Continental Television Inc. v. GTE Sylvania, 433 U.S. 36, 50 n.16 (1977) (*per se* rule not to be extended solely on basis of judicial convenience and business certainty).

45. *See Standard Oil*, 221 U.S. 1; J. WEISTART AND C. LOWELL, *supra* note 10, at 604; L. SULLIVAN, *supra* note 11, at 196.

46. *See supra* note 33.

47. As explained previously, the traditional Rule of Reason basically limits inquiry to an activity's impact on competition. *See supra* note 33. When a court adopts this approach, judicial interpretation is somewhat limited and decisions are more con-

version, the decision between the *per se* doctrine and the Rule of Reason is vital to a defendant's case.[48]

Application of Antitrust Analysis to the Football Industry

In most of the recent antitrust litigation in professional football, the subject of controversy has been the various mechanisms which the NFL utilizes to control the influx of new players into the league and to limit the movement of existing professional players.[49] Typically the restraints are characterized under traditional business theories as either group boycotts or concerted refusals to deal. Litigation in these cases involves the same controversy confronted in traditional antitrust litigation: whether to use the *per se* doctrine or the Rule of Reason.[50] The unique nature of the football industry initially made

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sistent. This permits courts to indulge in predictions about outcomes of recurring situations and enables them to take advantage of the *per se* rule. Under this approach, even though a court applies a *per se* rule, a Rule of Reason analysis should produce the same holding of illegality. On the other hand, elastic Rule of Reason invites greater judicial interpretation, increasing the likelihood that outcomes vary with the particular judges and the particular facts. Thus, the flexibility in a court's scrutiny makes it more difficult to generalize about future situations. Under this approach, a *per se* holding and a Rule of Reason analysis can produce contrary results. *See supra* note 35. The consequences of the two approaches are exhibited in the following situation. Price fixing has long been recognized as an activity deserving of the application of the *per se* rule. *Socony-Vacuum*, 310 U.S. 150; United States v. Trenton Potteries, 273 U.S. 392, 398 (1927). However, in *Broadcast Music*, 441 U.S. 1, the Court decided that the blanket licenses issued by ASCAP were not *per se* illegal even though they "literally" fixed prices. It is important to note that the antitrust tests have developed and changed through the years, as evidenced in the case law, and that for purposes of this note explanation of the tests and their evolution is limited. For thorough discussions on such matters, see Taylor, *Rule of Reason Cases Since National Society of Professional Engineers*, 51 ANTITRUST L.J. 185 (1982); *Maricopa County*, *supra* note 28, at 1006. *See also supra* note 28.

48. Plaintiffs frequently argue for a *per se* label because the accompanying conclusive presumption of illegality prevents the defendant from supplying any procompetitive justification for his actions. *See, e.g., Klor's, Inc.*, 359 U.S. 207; *Northern Pacific Ry.*, 356 U.S. 1; *Socony-Vacuum*, 310 U.S. 150; *Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

49. *See, e.g., Smith*, 593 F.2d 1173 (court examined draft system, which allows the least successful clubs in the NFL to secure the best of the new talent). *Kapp*, 586 F.2d 644 (in addition to the draft, standard player contract, and Rozelle Rule, court examined the tampering rule, which granted a club with the exclusive rights to a player, thus limiting the right of other clubs to compete for the athlete's services; also subject to scrutiny was the option clause, which granted a club the right to renew a contract with a rookie for one additional year); *Mackey*, 543 F.2d 606 (court scrutinized the Rozelle Rule, which provided that any club signing a free agent must compensate the original employer).

50. *See, e.g., Smith*, 593 F.2d 1173; *Kapp*, 586 F.2d 644; *Mackey*, 543 F.2d 606.

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courts reluctant to apply the *per se* rule;[51] the individual teams that comprise the NFL are not competitive in any economic sense, as compared to businesses in the free market.[52] Rather, the clubs maintain a joint venture relationship in order to produce an entertainment product: football games and telecasts. Even though the teams compete athletically on the playing field, cooperation off of the field is necessary.[53] No NFL team would in fact benefit from forcing another team out of business.[54] Thus, the free market model applicable in other business contexts would be destructive if applied in the football industry.[55] Given the peculiar characteristics of the industry and the

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51. *See supra* note 50. *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 600.

52. *See Smith*, 593 F.2d at 1178-79; *Mackey*, 543 F.2d 606; Los Angeles Memorial Coliseum Comm'n v. NFL, 468 F. Supp. 154, 165-66 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381, 1387 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984). (Due to the uniqueness of professional football, the court refused to characterize NFL Rule 4.3, which regulates the transfer of NFL franchises, as a *per se* violation). These cases recognized and described the unique economic framework of the NFL. Contrary to popular belief, football teams do not compete for telecast and ticket revenues. In fact, the League Commissioner negotiates television contracts on behalf of all the teams. These monies are distributed equally without regard to the size of the team's local television market. *Smith*, 593 F.2d at 1179, 1199.

53. Judge Grim explained the framework of professional football three decades ago in a landmark decision upholding an NFL rule that prohibited the televising of one team's games into another team's locale when the latter team was playing at home:

> Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business. Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

54. *Id.; See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 595-96.

55. " . . . If one team goes out of business, all are endangered. This suggests that the concept of business competition may be irrelevant as applied to the relationships between members of a league." Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST L. 211, 233 (1959). *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 618.

need for cooperation among teams, courts generally believe that the league's justifications for its restraints deserve more consideration than is available under the *per se* doctrine.[56]

Unfortunately, at one time courts applied the *per se* doctrine.[57] These decisions indicate confusion among the courts regarding the interpretation of the doctrine's nature and purpose. Moreover, they also create confusion and thwart the doctrine's subsidiary goal, which is to provide clear guidelines that enable businesses to conform their practices to the antitrust laws.[58] The case of *Kapp v. National Football League*[59] is representative of this aberration. Judge Sweigert noted many reasons in support of the proposition that a *per se* test is inappropriate for league sports activities. Sweigert nevertheless concluded that the league's enforcement of the challenged practice "is so patently unreasonable that there is no genuine issue for trial."[60] Thus, after dispensing with the applicability of the doctrine in the situation,[61] he proceeded to discuss the activity as it would have been dealt with under the *per se* approach.

Decisions following *Kapp* created a different anomaly. The later courts did not determine which test was more appropriate. Instead, they declared a restraint *per se* invalid and then applied Rule of Reason analysis in the alternative.[62] Simultaneous utilization of both the *per se* doctrine and the Rule of Reason frustrates the *per se* doctrine's primary goal and inherent appeal to the judiciary. Rather than avoid burdensome and unnecessary litigation, the alternative procedure fosters it. As indicated previously, application of the *per se* rule is possible only after the courts have had considerable experience with the particular restraint. The courts' experience with a restraint permits them to determine whether or not a particular restraint partakes of an inherent anticompetitiveness that will consistently fail Rule

56. *See Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606; *Los Angeles Memorial Coliseum*, 726 F.2d at 1387.

57. *Smith*, 420 F. Supp. 738; *Mackey*, 407 F. Supp. 1000.

58. *See supra* note 40, 41 and accompanying text.

59. 390 F. Supp. 73 (N.D. Cal. 1974).

60. *Id.* at 82.

61. In *Kapp*, the plaintiff alleged that he had been boycotted by the league because he refused to sign a standard player contract. He further contended that the operation of other league rules (such as the player draft, the option clause, the Rozelle Rule, and the tampering rule) operated as unconscionable restraints upon his ability to market his services among competing employers. *Id.*

62. *See Smith*, 420 F. Supp. 738; *Mackey*, 407 F. Supp. 1000. In both of these cases, at the trial court level the judges applied the *per se* rule, but proceeded to analyze the restraint pursuant to the Rule of Reason. Naturally, the courts reasoned that the rules were likewise illegal under the latter analysis.

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of Reason analysis. In situations in which the restraints are consistently anticompetitive and deserve application of the *per se* rule, the courts save judicial time by not having to pursue a lengthly Rule of Reason analysis. Moreover, the *per se* rule gives businesses notice that the judiciary views a particular restraint as a violation of antitrust law. Utilization of both the *per se* rule and Rule of Reason, however, means that the court has employed a lengthly analysis despite application of the *per se* rule. Furthermore, when the *per se* rule is coupled with Rule of Reason analysis, businesses have no reliable indication of what the courts may do in future litigation. In fact, the procedure is likely to confuse businesses. *Mackey v. National Football League*,[63] the first case to reach an appellate court, recognized the difficulty and rejected the lower court's conclusion that a *per se* violation had occurred.[64] The appellate court explained that the unique relationship among the teams within the NFL and the courts' lack of experience with the football situations required greater inquiry into the justifications for the challenged practices.[65] The *Mackey* court had finally acknowledged that the lack of experience with restraints and issues presented by the football industry necessitated the extensive inquiry permitted by Rule of Reason analysis.[66]

Considering the unique nature of the football industry and the direction of the *per se*—Rule of Reason debate in the football cases, a court presented with the legality of the eligibility rule under the Sherman Act should adopt Rule of Reason analysis.[67] Nonetheless, balancing the procompetitive and anticompetitive effects of a rule that does not impact economic competitors is not consistent with the purpose of antitrust law.[68] The eligibility rule affects the competition of

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63. 543 F.2d 606.

64. *Id.* at 619.

65. The *Mackey* court was the first appellate court to examine the joint venture relationship among the teams in the NFL. *Id.* The *Smith* court later examined the same relationship in more detail. *Smith*, 593 F.2d at 1173.

66. *Mackey*, 543 F.2d at 619.

67. The courts in *Smith*, *Mackey*, and *Los Angeles Coliseum* have indicated that the unique composition of the football industry necessitates application of Rule of Reason analysis. *Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606; *Los Angeles Memorial Coliseum*, 468 F. Supp. 154. Pursuant to this direction, courts confronted with other NFL restraints should also apply the analysis.

68. *See supra* notes 26, 30-32 and accompanying text. Antitrust law's aim is to promote economic competition by prohibiting restraints that harm such competition; thus, it is inappropriate to apply antitrust laws to restraints that do not inhibit economic competition. This argument is developed later in the text. *See infra* notes 102-16 and accompanying text. It is contended that the eligibility rule does not injure economic competition.

employees for wages, hours, and terms or conditions of employment, which are central concerns of labor law.[69] Antitrust law is relevant only if the parties attempt to extend the influence of their collective bargaining relationship beyond the immediate concerns of the employment relationship.[70] The function of the labor exemption is to distinguish challenged activities on the basis of the type of restraint they impose.[71] Theoretically, utilization of the exemption analysis should indicate which restraints come within the purview of the antitrust laws and which are within the domain of the labor laws.[72]

LABOR EXEMPTION PERSPECTIVE

Historical Background

The labor exemption[73] represents an accommodation between antitrust policy, which favors competition,[74] and labor policy, which favors organization of employees.[75] This accommodation recognizes that union

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69. *See* WELLINGTON, LABOR AND THE LEGAL PROCESS 129-31 (1968). Professor Wellington explains that labor law recognizes that unions have a primary and substantial interest in negotiating desirable agreements pertaining to wages, hours, and terms or conditions of employment. These are matters about which unions, on behalf of their members, have a direct and immediate concern. Professor Wellington further explains that unions also have a substantial interest in the employment of new entrants because they create an impact on these areas of concern. It is contended that the eligibility rule qualifies as such a matter, since new entrants directly affect the terms and conditions of the employment of existing employees. *See also infra* notes 136-39 and accompanying text.

70. A review of the cases in which the Supreme Court has considered the application of the antitrust laws in the labor area will confirm that the Court is primarily concerned with product market effects of particular restraints (*i.e.*, when parties extend the influence of their collective bargaining relationship beyond the immediate concerns of the employment relationship). In *Allen Bradley*, 325 U.S. 797, the Court condemned the union-management scheme which operated to prevent other manufacturers from selling their products in the affected areas. Likewise, the agreements in *Pennington*, 381 U.S. 657, and *Connell*, 421 U.S. 616, were aimed at the relative competitive positions of outsiders. Moreover, in *Jewel Tea*, 381 U.S. 676, the Court explained that when a restraint does not reduce competition among business competitors, the Court will leave labor and management free to reach agreements pertaining to the immediate employment policies of the parties.

71. *See infra* notes 73-78 and accompanying text.

72. *See infra* notes 99-105 and accompanying text.

73. Clayton Act, 15 U.S.C. § 17 (1976); Clayton Act, 29 U.S.C. § 52 (1976); Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (1976) (statutory sources); *Connell*, 421 U.S. at 621-22; *Jewel Tea*, 381 U.S. 676 (nonstatutory sources).

74. *See generally Professional Engineers*, 435 U.S. 679; *Northern Pacific Ry.*, 356 U.S. 1; *See also* Jacobs and Winter, *Antitrust Principles and Collective Bargaining: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

75. The NLRA has established the national policy in favor of labor. NLRA, 29 U.S.C. §§ 151-68 (1976).

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activity, though inherently anticompetitive, is desirable.[76] Thus, the purpose served by the exemption is to identify those restrictions favored by labor policy and to immunize such restrictions from antitrust scrutiny.[77] When the exemption is operative, it provides full protection.[78]

The labor exemption was first created by statute, which asserted the general public policy in favor of collective activity by employees.[79] Section 6 of the Clayton Act states that labor unions are not combinations in restraint of trade.[80] It further states that the antitrust laws may not prevent the members of unions from effectuating the legitimate goals of the organization.[81] Because the Supreme Court's limited interpretation of the Clayton Act left many union activities vulnerable to antitrust attack,[82] Congress enacted the Norris-LaGuardia Act[83] to expand the reach of the exemption to other union activities.[84]

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76. *See Hutcheson*, 312 U.S. 219; *Apex Hosiery*, 310 U.S. 469. Unions are inherently anticompetitive because their very purpose is to eliminate competition among employees, who constitute the labor market. It is generally assumed that such labor market restraints are immunized. *See* Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 17-30 (1963); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 728-34 (1965).

77. *See Connell*, 421 U.S. at 625 (recognizing that federal "labor policy requires tolerance for the lessened business competition" which results when unions attempt to standardize wages and employment conditions).

78. The labor exemption is relevant when the restraint under scrutiny is the result of a labor-management agreement. It is raised by one of the parties, whoever is attempting to preclude antitrust attack. The exemption analysis, discussed later in the text, occupies a place in the court's attempt to ultimately determine antitrust liability. *See* text accompanying *supra* notes 98-100; J. WEISTART AND C. LOWELL, *supra* note 10, at 525; Jacobs and Winter, *supra* note 74, at 1. If the court concludes that the particular restraint passes labor exemption analysis, the restraint is wholly protected from antitrust attack.

79. Clayton Act, 15 U.S.C. § 17 (1976); 29 U.S.C. § 52 (1976).

80. 15 U.S.C. § 17 (1976).

81. 15 U.S.C. § 17 provides that "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 . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof."

82. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The Court interpreted the Clayton Act as exempting only union activities which were directed against the employees' immediate employers. Union efforts to boycott the immediate employer's products while in the hands of other dealers and other secondary activities were said to be still subject to the Sherman Act's prescription on restraints of trade. Thus, the statutes were applied in a manner which limited the types of economic power which a union could exercise in its effort to promote employee interests. *Id.*

83. 29 U.S.C. §§ 104, 105, 113 (1976).

84. Together, the Clayton Act and the Norris-LaGuardia Act specifically exempt certain union activities, such as secondary picketing and group boycotts, from

Another aspect of the exemption is nonstatutory.[85] The nonstatutory exemption reflects a further attempt by the courts to accommodate the conflicting policies of labor and antitrust law.[86] The source of the nonstatutory exemption is the strong labor policy which favors the association of employees in order to eliminate competition for wages and work conditions.[87]

Since the formulation of the nonstatutory labor exemption,[88] the growth of the labor movement has required that the exemption assume a broader function.[89] Initially, the exemption operated to protect only

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the purview of the antitrust laws. *See, e.g., Connell*, 421 U.S. at 621-22 (the activities exempted were those unilaterally undertaken by a union in furtherance of its own interests). *See Hutcheson*, 312 U.S. 219 (union actions are not subject to judicial interference "so long as the union acts in its self-interest and does not combine with non-labor groups"). *But see Apex Hosiery*, 310 U.S. 469 (the statutory exemption does not protect concerted agreements between unions and non-labor groups).

85. *See Connell*, 421 U.S. 616; *Jewel Tea*, 381 U.S. 676. The nonstatutory exemption extends to certain union-employer agreements so long as the exemption's three prong test is met. *See infra* notes 99-100 and accompanying text.

86. The Supreme Court has frequently confronted the interrelationship between the antitrust laws and the labor laws. First, the Court has noted that "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." United States v. Women's Sportswear Manufacturers Assn., 336 U.S. 460, 464 (1949). *See also Allen Bradley*, 325 U.S. at 809 (union's arrangement with those who supplied goods to or purchased products from the immediate employer violated the antitrust laws). The Court, however, has also recognized that the very nature of a collective bargaining agreement necessitates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally. *See Hutcheson*, 312 U.S. 219 (a union strike, which was instituted to express disapproval of the employer's selection of a competing union, did not violate the antitrust laws); *Pennington*, 381 U.S. 657 (attempt by union and employer to affect the costs and markets of competing employers violated antitrust laws).

87. *Connell*, 421 U.S. at 622:

> The non-statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

Id.

88. The Supreme Court developed the nonstatutory exemption in recognition that certain union-employer agreements must be accorded immunity from antitrust sanctions. *See Connell*, 421 U.S. 616; *Jewel Tea*, 381 U.S. 676. For an excellent discussion of the nonstatutory exemption, especially its operation in sports cases, see Jacobs and Winter, *supra* note 74, at 22-28; J. WEISTART AND C. LOWELL, *supra* note 10, at 524-40.

89. In the first stages of the labor movement, the focus was on the union and its important role. Eventually, labor laws developed a concern for the overall collective bargaining process. *See* J. WEISTART AND C. LOWELL, *supra* note 10, at 527; CASES AND MATERIALS, *supra* note 18, at 1-26.

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the union and certain types of its activities, particularly strikes and boycotts.[90] Thus, a union typically invoked the exemption to protect demands and agreements made at the bargaining table from attack by employers and outsiders.[91] Increasingly, courts realized that the doctrine actually protects the institution of collective bargaining,[92] rather than a particular party to the agreement. This philosophy expanded the doctrine's reach and enabled both employers and unions to invoke the exemption. Thus, employers also use the exemption to preclude attack by employees disgruntled with the final collective bargaining agreement.[93]

Operation in Football Cases

In the sports area, the broader view of the nonstatutory labor exemption is especially pertinent. Cases typically involve a situation in which the league, comparable to an employer in a traditional business scenario, invokes the labor exemption in an attempt to insulate itself from antitrust attack.[94] Courts have permitted the league to raise the exemption, in recognition of the doctrine's underlying goal to protect the collective bargaining process.[95] Again, when it is

90. *See generally Hutcheson*, 312 U.S. 219; *Apex Hosiery*, 310 U.S. 469.

91. *See, e.g., Connell*, 421 U.S. 616 (the union, whose members performed subcontracting work, alleged that its agreement with general contractors that they would hire only subcontractors belonging to the union was protected from antitrust scrutiny); *Pennington*, 381 U.S. 657 (union alleged that the union-employer agreement aimed at another employer group was exempt from antitrust sanctions); *Jewel Tea*, 381 U.S 676 (meat cutters union urged that the bargaining agreement between itself and the various meat retailers deserved protection from the antitrust laws).

92. *See generally Pennington*, 381 U.S. at 697-735 (Goldberg, J., dissenting in part); *Jewel Tea*, 381 U.S. 729-30 (opinion of Justice Goldberg) (Justice Goldberg stated that in the case of mandatory subjects of bargaining, such topics should always prompt the pre-eminence of labor law).

93. *See, e.g.*, Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (1974):

> We reject Scooper Dooper's contention that the labor exemption is unavailable to employers. Such a proposition would undermine the vitality of the exemption by discouraging bargaining on the part of management. To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption.

Id. at 847 n.14.

94. *See, e.g., Kapp*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (NFL argued that attack of the league's draft system, Rozelle Rule, and standard player contract was precluded by the labor exemption); *Mackey*, 543 F.2d 606 (NFL argued that labor exemption protected the Rozelle Rule from antitrust scrutiny); *Smith*, 420 F. Supp. 733 (NFL urged the court to apply the protection of the labor exemption to the draft system).

95. *See supra* note 94. "Since the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to

operative, the exemption accords complete immunity from antitrust attack, rendering further inquiry into the economic justifications for the restraint unnecessary.[96]

Nonstatutory labor exemption analysis progresses from two fundamental questions. The first question is whether the parties reached an agreement about the particular rule, which they embodied in a formal agreement.[97] The second, and more important, question is whether federal labor policy deserves pre-eminence over federal antitrust policy, given the circumstances of the particular case.[98] To answer these questions, the courts invoke the nonstatutory labor exemption's three prong test: 1) does the particular rule primarily affect only the parties to the agreement, 2) is the rule a mandatory subject of collective bargaining, and 3) is the rule the product of bona fide, arm's length negotiation.[99] If these three points are answered in the affirmative, the exemption is operative and labor policy deserves pre-eminence over antitrust policy.[100] The particular restraint is thereby immune from antitrust attack. This analysis reflects that the courts' primary concern is with external or product market effects of particular restraints.[101] Under the test, if a restraint does not primarily affect only the immediate parties and if it is not a mandatory subject of bargaining, there is a great likelihood that the restraint affects the product market.[102] In such a case, a full blown antitrust analysis is required to determine if the restraint produces actual anticompetitive effects.[103] However, in a situation in which the restraint does not possess those defects, antitrust analysis is not required. Thus, the

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agreements, the benefits of the exemption logically extend to both parties to the agreement." *Mackey*, 543 F.2d at 612.

96. *See supra* note 78.

97. *See Mackey*, 543 F.2d at 612. The nonstatutory labor exemption is relevant in the first place because the restraint under scrutiny is included in a union-employer agreement. *Id.*

98. *Id.* at 613 (citing *Connell*, 421 U.S. 616; *Jewel Tea*, 381 U.S. 676; *Pennington*, 381 U.S. 657).

99. *See Mackey*, 543 F.2d at 611-16; *Smith*, 420 F. Supp. at 741-44; *Kapp*, 390 F. Supp. at 86-87. For an application of the labor exemption in other sports, see *Robertson*, 556 F.2d 682; *Philadelphia World Hockey Club*, 351 F. Supp. 462.

100. *See supra* note 99.

101. *See supra* notes 14 and 70.

102. *See Connell*, 421 U.S. 616 (union's demand that general contractors hire only subcontractors who belong to the union condemned for extending the influence of the agreement beyond the immediate parties); *Pennington*, 381 U.S. 657 (union's wage-scale agreement with an employer group other than its immediate employer condemned for being outside immediate employment-related concerns).

103. *See supra* notes 30-44 and accompanying text.

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test is tailored for sifting out cases that do not deserve antitrust scrutiny[104] by virtue of the fact that they do not promote the types of activities about which the Sherman Act is concerned.[105]

The leading Supreme Court cases, which were developed in the context of traditional business situations,[106] further confirm that the judiciary is concerned primarily with union-employer restraints that affect the product market.[107] These cases consistently distinguish between the product market and the labor market effects of particular restraints.[108] *United Mine Workers v. Pennington*[109] and *Allen Bradley Co. v. Electrical Workers Local 3*[110] are representative of the types of impacts which concern the Court. In *Pennington*, the mine workers union entered into an agreement with a multi-employer bargaining unit comprised of large coal companies.[111] Under the agreement, the union abandoned its previous rejection of the employer unit's attempt to mechanize the industry in exchange for higher wages and other benefits.[112] Additionally, the union agreed to negotiate the same wage scale from the smaller coal companies to insure that the large companies were not disadvantaged by paying higher wages.[113] The Court condemned the agreement for its attempt to affect the costs and markets of companies not parties to the agreement;[114] therein existed the defect.

The Court likewise condemned the arrangement in *Allen Bradley* as violative of antitrust law.[115] There, contractors and manufacturers

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104. *See* Leslie, *supra* note 14, at 1223-24. Leslie indicates that the nonstatutory labor exemption searches for *potential* restraints on competition, while substantive antitrust analysis (*i.e., per se* and Rule of Reason) identifies *actual* restraints on commercial competition.

105. *See supra* notes 14 and 15.

106. *Connell*, 421 U.S. 616 (construction industry); *Jewel Tea*, 381 U.S. 676 (meat industry); *Pennington*, 381 U.S. 657 (coal industry); *Allen Bradley*, 325 U.S. 797 (electrical industry); *Hutcheson*, 312 U.S. 219 (construction industry); *Apex Hosiery*, 310 U.S. 469 (industry involved in production of goods).

107. *See supra* note 70.

108. *See supra* note 70.

109. 381 U.S. 657 (1965).

110. 325 U.S. 797 (1945).

111. *Pennington*, 381 U.S. 657.

112. *Id.*

113. *Id.*

114. *Pennington*, 381 U.S. at 666: "[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry."

115. *Allen Bradley*, 325 U.S. at 809.

monopolized all the business in New York City, barred all other businessmen from the area, and charged the public prices far above a competitive level.[116] Specifically, the manufacturers of the electrical equipment agreed to sell their product only to contractors who employed union members.[117] In return, the contractors agreed to buy the equipment only from manufacturers who also employed union members.[118] Through this arrangement, the three groups boycotted non-participating contractors and manufacturers.[119] The Court agreed with a non-participating manufacturer who challenged the activity, that the group's activity had restrained commercial competition.[120]

The football cases do not involve the situations present in cases such as *Allen Bradley* or *Pennington*.[121] The complaining party is not a business entity or a consumer, as he is in the leading cases. Rather, the complaining party in football litigation is an existing or potential employee who alleges that he has been injured by a particular restraint.[122] In *Mackey v. National Football League*,[123] sixteen former and existing players alleged that the league's Rozelle Rule[124] constituted an unreasonable restraint on their ability to freely seek employment. In applying the three prong nonstatutory labor exemption test,[125] the court observed that the rule primarily affected only the immediate parties since there was no impact upon competing leagues or others outside the unit.[126] Moreover, the Rozelle Rule qualified as a mandatory subject of bargaining[127] because it constituted

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116. *Id.* at 800-01.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 801.
121. *See supra* note 49.
122. Football players are the employees of their respective teams. *See, e.g., Smith*, 593 F.2d 1173 (existing player brought suit); *Kapp*, 586 F.2d 644 (existing player brought suit); *Mackey*, 543 F.2d 606 (existing player brought suit). An action challenging the eligibility rule would be initiated by a potential employee.
123. 543 F.2d 606 (1976).
124. The Rozelle Rule was named after football Commissioner Pete Rozelle, due to the power vested in him to settle compensation disputes. Under the Rozelle Rule, a team acquiring a player who had turned free agent must compensate the free agent's former team. Compensation was in the form of cash, player contracts, or draft choices. *See* Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285, 288-89 (1977).
125. *See supra* note 99 and accompanying text.
126. *Mackey*, 543 F.2d at 615.
127. NLRA, 29 U.S.C. § 158(d) (1976) defines a mandatory subject as "wages, hours, and other terms and conditions of employment."

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a condition of employment.[128] The results of the first and second prongs of the exemption analysis indicate that the restraint primarily affected the labor market, not the product market.[129] Hence, the rule seemingly did not deserve antitrust scrutiny.[130] The court held otherwise, however, upon determining that the rule failed the third prong of the test. The court maintained that the rule was not the product of bona fide, arm's length negotiation.

Application of the nonstatutory labor exemption analysis to the eligibility rule[131] discloses that this rule likewise does not possess the characteristics of a product market restraint. First, the eligibility rule is a condition of employment and consequently a mandatory subject,[132] because incoming employees affect the terms and conditions of the employment of existing employees.[133] Second, the rule does not affect outsiders under the meaning ascribed by Supreme Court precedent.[134] The third party here is not a business competitor or a consumer as in *Allen Bradley* and *Pennington*;[135] instead, he is a potential employee. Pursuant to established labor principles, a union may control outsiders' access to employment opportunities within the relevant bargaining

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128. *Mackey*, 543 F.2d at 615. The Rule constituted a condition of employment because by restricting a player's movement from one team to another, it depressed player salaries.

129. *See supra* notes 70 and 102 and accompanying text. The NFL has in fact maintained that restraints on player mobility actually benefit consumers (*i.e.*, the fans) who buy the product (*i.e.*, the game) that is produced. By equalizing the playing strengths among various league teams, the rules create more interesting athletic events. The NFL further argues that elimination of the player restraints may prevent the product from being offered altogether. The basis of this argument is that a league with teams which continually dominate the games will not attract the fans. This, then, would result in a loss of revenues and would endanger the financial stability of the league. *See* H. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 31-39 (1973); Canes, *The Social Benefits of Restrictions on Team Quality, Government and the Sports Business*, 81 (R. Noll ed. 1974).

130. Antitrust law is primarily concerned with product market, or commercial, restraints. *See supra* notes 14, 15, 70.

131. *See supra* notes 1-3 and accompanying text.

132. *See supra* note 127.

133. *See* WELLINGTON, *supra* note 69, at 129-31. New employees (players) will compete for jobs and wages with existing employees. The union has a substantial interest in eliminating competition of this sort because it undermines job security. *See also* C. MORRIS, THE DEVELOPING LABOR LAWS 726-56 (1971).

134. J. WEISTART AND C. LOWELL, *supra* note 10, at 553-55. The authors suggest that despite an effect upon individuals who are not members of the bargaining unit, the player restraints which control new entrants do not share the defects present in *Allen Bradley* and *Pennington*. *See supra* notes 110-114 and accompanying text. *See also Connell*, 421 U.S. 616.

135. *See supra* notes 109-120 and accompanying text.

unit.[136] Thus, although the eligibility rule limits potential employees' access to employers,[137] it does not inhibit the primary concern of antitrust law: commercial competition.[138] The rule instead encompasses individuals and issues controlled by labor law.[139]

Despite the fact that a player restraint passes the first and second prongs of the exemption analysis, as heretofore exemplified with both the Rozelle Rule[140] and the eligibility rule,[141] the courts' existing interpretation of the third prong enables them to wield results they deem desirable.[142] In considering the existence of bona fide arm's length negotiation between the parties, the courts typically have required something more than bargaining.[143] They require evidence of extensive negotiations in which demands and proposals ultimately produce a final agreement about the restraint.[144] They refuse to exempt terms which are the result of acquiescence to the status quo.[145] This approach to the third prong vests courts with the broad, indiscriminate power to deny operation of the exemption and to subject labor market restraints such as the eligibility rule to antitrust scrutiny.

The courts' manipulation of the third prong of the nonstatutory labor exemption analysis, through their strict insistence upon intensive, arm's length bargaining, suggests that the courts are concerned with more than ascertaining potential restraints on commercial competition. First, the courts' approach suggests that they employ the

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136. The view recognizes that a direct and unavoidable relationship exists between the hiring of new people and the conditions under which existing employees work. *See Teamsters*, 365 U.S. 667 (hiring halls, which base access to work on an employee's duration in the trade and willingness to abide by hiring hall rules, are permitted even though they restrain the ability of some employees to freely choose their employers). *See also* C. MORRIS, *supra* note 133, at 712-15; Meltzer, *supra* note 76, at 724-26.

137. The eligibility rule only limits access; it does not preclude access. A potential player may gain employment upon fulfilling the requirements. Moreover, even though the superstar college football player claims to be disadvantaged by the rule, one of the basic precepts of labor law is that the individual relinquishes his self-interest in exchange for the benefits derived from collective action. *See infra* note 162 and accompanying text.

138. *See supra* notes 14, 15, 70 and accompanying text.

139. Labor law is concerned with the organization of employees and the collective bargaining process. *See supra* notes 18 and 75.

140. *See supra* text accompanying notes 123-128.

141. *See supra* text accompanying notes 131-138.

142. *See, e.g., Mackey*, 543 F.2d 606; *Smith*, 420 F. Supp. 738; *Kapp*, 390 F. Supp. 73. *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 582-84.

143. *See, e.g., Mackey*, 543 F.2d 606; *Smith*, 420 F. Supp. 738; *Kapp*, 390 F. Supp. 73.

144. *See supra* note 143.

145. *See supra* note 143.

antitrust laws to pressure the football industry into improving and developing its collective bargaining process.[146] Apparently the courts hope that a denial of labor exemption immunity will force the NFL to address and solve the problems perceived by the courts, so that the league can obtain antitrust immunity in future litigation. Second, courts apparently use the antitrust laws to shift bargaining power from one faction to another.[147] This shift naturally occurs when a court declares that the labor exemption is inoperative and subsequently holds that the particular restraint violates the antitrust laws. Labeling the restraint a violation permits the players, through the National Football League Players Association (NFLPA), to control the general outcome of negotiations about the restraints.[148] Failure of the parties to reach a satisfactory accommodation eliminates the particular restraint from the collective bargaining agreement.[149] Conversely, had the restraint not been declared illegal, the parties' failure to reach a compromise would have resulted in the restraint's continued existence.[150] The courts have thus interpreted the labor exemption doctrine in a sufficiently indefinite manner and thereby provided a flexible framework through which to steer the football industry in the direction they believe is desirable.

Promoting more effective collective bargaining is a desirable goal. However, the method heretofore utilized by the courts in their at-

146. The recent origin of collective bargaining and the unique nature of labor-management relations in the football industry have complicated the courts' third prong analysis. The National Football League Players Association (NFLPA) was not established until the late 1960s. This seems to disturb the courts. *See* Soar v. NFLPA, 438 F. Supp. 337 (D.R.I. 1975), *aff'd*, 550 F.2d 1287 (1st Cir. 1977) (described development of the NFLPA). Moreover, the NFLPA is comprised of all the players in the league and negotiates with the National Football League Management Council (NFLMC), the representative of all the team owners in the league. *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 793-98.

147. For a discussion of the process of shifting bargaining power from one faction to another, see J. WEISTART AND C. LOWELL, *supra* note 10, at 587-88.

148. *Id.* at 559 n. 482. The authors indicate that a previous court decision declaring the Rozelle Rule violative of antitrust law impeded the 1975 NFL labor contract negotiations. The NFLPA maintained that it could not consent to the Rozelle Rule because the rule was illegal.

149. This assertion must be qualified. The employer does have the power to invoke the theory of impasse bargaining. Under this theory, the employer can unilaterally impose conditions proposed at the bargaining table if negotiations on the issue reach an impasse. There are, however, many pragmatic reasons why an employer might not choose to invoke the impasse theory. For example, the employer may want to avoid antagonizing the union. *See* J. WEISTART AND C. LOWELL, *supra* note 10, at 587 n.627. *See generally* C. MORRIS, *supra* note 133, at 330-31; Comment, *Impasse in Collective Bargaining*, 44 TEXAS L. REV. 769 (1966).

150. J. WEISTART AND C. LOWELL, *supra* note 10, at 587.

tempt to effectuate that aim offends the framework which Congress established. Moreover, such an approach permits courts to subject labor market restraints to an unnecessary antitrust analysis.[151]

RAMIFICATIONS OF EXISTING PROCEDURES

The courts' current approach to examining the existence of collective bargaining between parties[152] when they pursue the third prong of nonstatutory labor exemption analysis triggers the frustration of a myriad of established policies. First, the courts' practice of evaluating the content of the negotiations between the league and the NFLPA undermines the basic principles of labor law policy.[153] This practice also circumvents the social policy which Congress chose to promote through the implementation of those principles.[154] These defects then operate to prevent the nonstatutory exemption from properly accommodating antitrust and labor policies,[155] which results in the improper application of antitrust law to situations which were never intended to come within the purview of the Sherman Act.[156] Ultimately, the inappropriate application of antitrust principles generates additional problems.[157]

Effects on Labor Policy

Three principles of labor law are particularly important. The basic principle is freedom of contract in the union-employer bargaining relationship.[158] This tenet means that the parties are essentially free to determine the content of their agreement;[159] they are under no legal obligation to satisfy any external standards of reasonableness or appropriateness.[160] The second principle of labor law is that each party

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151. In light of prior textual discussions, such a result is contrary to antitrust policy. *See, e.g., supra* notes 14-15 and accompanying text.

152. *See supra* notes 142-45 and accompanying text.

153. *See infra* notes 158-71 and accompanying text.

154. *See infra* notes 173-75 and accompanying text.

155. The proper accommodation of the policies would distinguish product and labor market effects. *See supra* notes 99-105 and accompanying text.

156. Under the first and second prongs of exemption analysis, the Rozelle Rule and the eligibility rule exemplify such situations. *See supra* notes 123-38 and accompanying text. Other player restraints also exact the same conclusion under the two prongs of the analysis. *See, e.g., Smith*, 420 F. Supp. 738.

157. *See infra* notes 189-212 and accompanying text.

158. *See generally* WELLINGTON, *supra* note 69, at 49-125; Jacobs and Winter, *supra* note 74, at 10-13; J. WEISTART AND C. LOWELL, *supra* note 10, at 559-62.

159. *But see* WELLINGTON, *supra* note 69, at 49-90 (the parties, however, are denied the right to decline to bargain); CASES AND MATERIALS, *supra* note 18, at 367-90.

160. *See* WELLINGTON, *supra* note 69, at 56-59.

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has an obligation to bargain in good faith about issues pertaining to wages, hours, and other terms or conditions of employment.[161] These are matters about which a union has a direct and immediate interest in light of its goal to improve employment security for present employees. The third principle is that the individual employee loses his freedom to deal with the employer in exchange for the strength derived from collective action.[162]

The courts' substantive review of the football industry's bargaining process during their exemption analysis, to determine whether the NFLPA has received enough concessions,[163] violates these three labor law precepts. First, judicial intervention frustrates the parties' rights to contract free from the imposition of outside standards.[164] Outside intervention only complicates matters because the courts' lack of familiarity with and sensitivity to the competing interests of the parties renders them particularly unqualified to review the substance of the collective bargaining agreements.[165] The parties themselves and the established labor law mechanisms are better equipped for this task.[166] Next, by intervening to shift bargaining power from the league to the NFLPA,[167] the courts have distorted the second principle. That principle requires only that the parties bargain in good faith[168] about

161. *See* NLRA, 29 U.S.C. § 158(d) (1976). The Act also makes the failure by either party to bargain in good faith an unfair labor practice. 29 U.S.C. §§ 158(a)(5) (employer), 158(b)(3) (union) (1976).

162. The consequence of collective action is that the individual's desires are subject to the will of the majority. This principle, although subversive of individual freedom, is essential to the federal labor policy of encouraging unionism. *See* C. MORRIS, *supra* note 133, at 304-07; Jacobs and Winter, *supra* note 74, at 7-10.

163. *See, e.g., Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

164. *See generally* WELLINGTON, *supra* note 69, at 52-56 (outside influences create disruption). *See also* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488-90 (1952) (because there is no absolute standard for determining what constitutes reasonable contract terms, courts would only complicate the bargaining process); Jacobs and Winter, *supra* note 74, at 1.

165. *See generally* WELLINGTON, *supra* note 69, at 52-56; Jacobs and Winter, *supra* note 74, at 1; J. WEISTART AND C. LOWELL, *supra* note 10, at 559-60.

166. Possible remedies under labor law are: unfair labor practice for failure to bargain in good faith [NLRA, 29 U.S.C. §§ 158(a)(5) (employer), 158(b)(3) (union) (1976)]; breach of union's duty of fair representation; [Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944)]. There will be no survey of the numerous issues and remedies that could arise in this area. Such a discussion is beyond the scope of this note. *See generally* C. MORRIS, *supra* note 133, at 63-149; 18B T. KHEEL, LABOR LAW, ch. 10 (1973).

167. *See supra* notes 147-50 and accompanying text.

168. Good faith bargaining involves a willingness to enter into negotiations with an open and fair mind and with a sincere desire to find a basis of agreement. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941). *See generally* J. WEISTART AND C. LOWELL, *supra* note 10, at 803-06.

mandatory subjects. So long as the parties have satisfied the good faith standard, no statutory provision or other legislative expression justifies judicial interference.[169] Courts should not, pursuant to labor policies, interfere to adjust the relative bargaining positions of the parties or to assist a weak union.[170] Finally, the courts' approach eventually affects the third principle. Contrary to the notion expressed in the third tenet, the NFLPA is precluded from achieving the greatest interest for the majority of the employees because the courts' intervention permits an individual to circumvent the desires of the majority.[171] These desires are eluded by the substantive review and condemnation of the parties' agreement.

In addition to violating the fundamental tenets of labor law,[172] the courts' approach further undermines the social policy sought to be achieved through the observance and implementation of those prescribed principles. The social policy that underlies the design of the labor laws is finality in collective bargaining.[173] Not only is finality a desirable policy which warrants encouragement, it is also the specific policy mandated by Congress in its establishment of federal labor law.[174] Finality is founded upon the belief that for collective bargaining and the labor laws to work, the parties must have confidence in the system.[175] To achieve this confidence, the parties must be assured that their final agreement will receive some deference. Congress has chosen freedom of contract and non-intervention as the means to in-

169. *See* Jabobs and Winter, *supra* note 74, at 7-13.

170. *See* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952) ("The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953). *See also* WELLINGTON, *supra* note 69, at 57-60; J. WEISTART AND C. LOWELL, *supra* note 10, at 585-90.

171. This circumvention would transpire when agreements made for the benefit of the majority operate as restrictions upon an individual. The NFL standard player contract exemplifies such an agreement. Although the standard contract benefits the majority of the players, who are of average talent, it restrains a player with extraordinary talent. The superstar most likely could have negotiated an agreement more favorable for himself. However, such a result is generally viewed as an unavoidable ramification of the collective bargaining institution. *See supra* note 162.

172. *See supra* notes 157-62 and accompanying text.

173. J. WEISTART AND C. LOWELL, *supra* note 10, at 561. *See Connell*, 421 U.S. at 622; *Pennington*, 381 U.S. at 664.

174. *Cf.* United parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring) (Stewart acknowledged the national interests in stable bargaining relationships and finality of private settlements). The entire body of federal statutory labor law also supports this proposition. *See* National Labor Relations Act, 29 U.S.C. §§ 151-69 (1976); Labor-Management Relations Act, 29 U.S.C. §§ 141-97 (1976); Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976).

175. *See generally* J. WEISTART AND C. LOWELL, *supra* note 10, at 560-61.

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still this confidence.[176] However, the courts' practice of manipulating review of the parties' negotiations, which results in a denial of labor exemption protection and consequent scrutiny under the antitrust laws,[177] undermines the goal of granting finality to the parties' agreement.[178] The rationale is that one party is less likely to accept the bargained-for result if the other party has access to judicial review of the agreement's substantive terms.[179] Such a result destroys the collective bargaining process, since the parties are unlikely to undertake a lengthy process that offers no security.

Effects on Antitrust Principles

The courts' frustration of labor law principles and social policy ultimately prevents the exemption from properly ascertaining those restraints which do not warrant antitrust scrutiny.[180] Thus, the courts' denial of labor exemption protection, through the manipulation of the third prong,[181] culminates in an antitrust examination of a restraint that is a mandatory subject and primarily affects only the immediate parties.[182] Moreover, application of antitrust law to these labor market restraints exposes problems inherent in the application of antitrust law to the football industy.[183] These problems emerge because: 1) in light of the economic reality of the football industry,[184] application of business practice theories to the NFL contravenes the very nature of the theories;[185] 2) the courts do not accurately apply the business

176. *Id.* at 556-61. *See supra* notes 158-60 and accompanying text.

177. *See supra* notes 142-45 and accompanying text.

178. J. WEISTART AND C. LOWELL, *supra* note 10, at 561.

179. *See Pennington*, 381 U.S. at 711-12 (Goldberg, J., dissenting in part) (Goldberg explained that requiring parties to negotiate and reach an agreement about matters that are open to antitrust penalties "stultif[ies]" the collective bargaining process).

180. Antitrust scrutiny is appropriate for those restraints which affect the product market. Because the player restraints (such as the Rozelle Rule or the eligibility rule) affect the labor market, they do not share the defects which prompted the courts' application of antitrust law in *Allen Bradley* and *Pennington*. *See supra* notes 106-35 and accompanying text.

181. *See supra* notes 142-45 and accompanying text.

182. Both the Rozelle Rule and the eligibility rule constitute mandatory subjects. Moreover, they both affect primarily the immediate parties. *See supra* notes 125-36 and accompanying text.

183. *See infra* notes 189-224 and accompanying text.

184. The economic reality is that the NFL constitutes a joint venture. Courts have recognized this fact. *See* Larry v. Muko, Inc. v. Southwestern P.A., etc., 670 F.2d 421, 429 n.11 (3d Cir. 1982); *Smith*, 593 F.2d at 1179; *Mackey*, 543 F.2d at 619. *See also supra* notes 52-54. *But see Los Angeles Memorial Coliseum*, 726 F.2d at 1387-90.

185. The practices which the courts apply in the football cases are the group boycott and the concerted refusal to deal. *See infra* notes 188-204 and accompanying text.

practice theories or the modes of antitrust analysis;[186] and 3) the application of antitrust law to labor market restraints yields distorted results.[187]

A fundamental problem develops during the course of antitrust analysis in football cases when the courts attempt to classify a restraint as a group boycott or as a concerted refusal to deal.[188] Complications arise when courts use the terms interchangeably,[189] because the two theories represent distinct practices and compel the use of different tests.[190] The boycott or, more properly the classic boycott, is an exclusionary practice by which competitors at one level attempt to insulate themselves from competition from non-group members who seek to compete at the level, by appealing to a third party not to deal with the non-member.[191] This type of practice properly warrants application of the *per se* doctrine;[192] consequently, courts refuse to entertain evidence of the activity's reasonableness.[193] A *per se* approach is justified with the classic boycott because such an activity always threatens competition, seldom offers any benefit, and often can be achieved in less restrictive ways.[194]

As with the group boycott, the concerted refusal to deal serves as a means by which a group can exclude an individual. Conversely, under the concerted refusal to deal, the group itself excludes the individual and the targeted individual is not necessarily a competitor of the group.[195] Many concerted refusals to deal lack the distinguishing characteristics which invite application of the *per se* doctrine; one cannot generalize that they always or almost always do substantial harm to competition.[196] Some concerted refusals may be harmful to competi-

186. *See infra* notes 205-11 and accompanying text.

187. Distorted results transpire because two competing policies—antitrust and labor—are directly confronting each other. *See infra* notes 219-25 and accompanying text.

188. *See, e.g., Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

189. *See, e.g., Smith*, 420 F. Supp. 738; *Mackey*, 407 F. Supp. 1000; *Denver Rockets*, 325 F. Supp. 1049. *See generally* L. SULLIVAN, *supra* note 11, at 256-59.

190. *See infra* notes 192-202 and accompanying text.

191. Note that an important aspect of this concept is the effort of competitors to exclude horizontal competitors. *See Smith*, 593 F.2d at 1180 (citing L. SULLIVAN, *supra* note 11, at 231-32). *See also supra* note 11.

192. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (invoking boycott *per se* rule where retailers induced manufacturers not to sell to competing retailers); Fashion Originators' Guild v. F.T.C., 312 U.S. 457 (1941) (invoking boycott *per se* rule where manufacturers induced retailers not to buy from competing manufacturers).

193. *See supra* notes 36-44 and accompanying text.

194. L. SULLIVAN, *supra* note 11, at 240-41; *see supra* note 186.

195. L. SULLIVAN, *supra* note 11, at 229-41.

196. *See* Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977) (finding no *per se* illegal activity in association's refusal to register plain-

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tion; however, others may not.[197] Vertical restrictions,[198] for example, are widely used in the free market and have been supported for their economic utility.[199] Because concerted refusals are not designed to drive out competitors, but to achieve some other goal,[200] they do not possess the inherent defects to which the *per se* rule was meant to apply.[201] These concerted activities are better analyzed under the Rule of Reason.[202] The failure of some courts, however, to distinguish between the classic boycott and the concerted refusal fosters distorted results.[203] The use of the single concept "boycott" to cover agreements so varied in nature results in the misapplication of the *per se* and Rule of Reason tests.[204]

The concern, therefore, is that in dealing with the eligibility rule courts will fail to delineate the proper application of the *per se* doctrine and Rule of Reason analysis. There is merit to this concern, because courts have previously misapplied the concepts in litigation

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tiff's horse, in accordance with its regulation: "[i]n an industry which necessarily requires some interdependence and cooperation, the *per se* rule should not be applied indiscriminately"); L. SULLIVAN, *supra* note 11, at 256.

197. L. SULLIVAN, *supra* note 11, at 256.

198. Vertical restrictions involve situations in which, for example, firms at one horizontal level impose restrictions upon firms at other horizontal levels, from which the first firm buys or to which it sells. Such an activity is not designed to drive out competitors; thus, the *per se* rule is not appropriate. *See, e.g., GTE Sylvania*, 433 U.S. 36 (vertical restraint imposed upon T.V. retailer by T.V. manufacturer not illegal *per se*).

199. *Id.* at 57-58.

200. *Id.* See also E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) (finding no *per se* illegal group boycott in airlines' refusal to list tour operator where tour operator was not competitor of airlines and there was no intent to exclude him from market); Worthen Bank & Trust Co. v. National Bank-Americard, Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) ("group boycott" label, with consequent finding of *per se* illegality, properly restricted to (1) horizontal combinations to exclude competitors; (2) vertical combinations to exclude competitors; (3) combinations designed to influence trade practices of boycott victims).

201. *See supra* note 36.

202. *See GTE Sylvania*, 433 U.S. at 57-58; *Worthen Bank and Trust Co*, 485 F.2d at 124-25; *McQuade Tours*, 467 F.2d at 187-88; L. SULLIVAN, *supra* note 11, at 232.

203. A result contemplated is a court's determination that a restraint is a *per se* illegal boycott when in fact the restraint does not possess the elements which characterize a boycott. *See, e.g., Smith*, 420 F. Supp. 738; *Mackey*, 407 F. Supp. 1000. The appellate courts did correct the district courts' errors. *See Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

204. *See, e.g.*, United States v. First National Pictures, Inc., 282 U.S. 44 (1930). Professor Sullivan notes that this case has been improperly categorized as a boycott decision. The categorization is inaccurate because the facts did not involve an effort to inhibit entry. L. SULLIVAN, *supra* note 11, at 257.

involving the football industry. In *Smith v. Pro Football, Inc.*,[205] the trial court declared that the draft,[206] as a group boycott, constituted a *per se* violation of the antitrust laws.[207] The appellate court recognized the error in the trial court's analysis[208] and clarified the confusion by distinguishing between a classic group boycott and other concerted refusals to deal.[209] The court noted that two factors distinguish the NFL activity from the classic group boycott.[210] First, the NFL teams are not competitors in any economic sense.[211] Second, the NFL teams did not combine to exclude competitors or potential competitors from their level of the market.[212] Rather, the individuals against whom the restraint was directed were potential employees of the league.

The *Smith* court seemingly resolved the classic boycott, concerted refusal to deal dichotomy in the football controversies.[213] Accordingly,

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205. 420 F. Supp. 738, *modified*, 593 F.2d 1173.

206. The draft is the NFL's player selection system by which the negotiating rights to graduating football players are allocated each year among the NFL teams in inverse order of the teams' standings. Once a team drafts a player, its right to contract with him is exclusive and perpetual. *See Smith*, 420 F. Supp. at 744-45. *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 257, 504-05; Pierce, *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L. REV. 566, 602 (1958).

207. *Smith*, 420 F. Supp. at 744. The draft is an "outright, undisguised refusal to deal [which] constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a *per se* violation of the antitrust laws." *Id.*

208. *Smith*, 593 F.2d 1173.

209. *Id.* at 1178-80.

210. *Id.* at 1178-79.

211. *Id.* The characteristics of the NFL substantiate that the NFL teams are not economically competitive. For example, visiting teams receive forty percent of gate receipts. *See* NFL Constitution and By-Laws, Art. XII, § 19.1 (1976 and Supp. 1982). If the football games, hypothetically, lost their appeal to fans, due to the economic failure of a few teams, the adverse consequences would be felt league-wide. Ticket sales and television revenues, shared among the teams, would threaten the existence of them all. Thus, it would be irrational for the NFL teams to even attempt to compete economically to drive one another out of business. The importance of the economic interdependence of league members is reflected in the statement of the NFL Raiders' owner Al Davis. He stated that the Buffalo Bills' owner had invested extensively in the Raiders throughout the 1960s to help maintain the team financially because "[h]e wanted to promote his franchise, the Buffalo Bills . . . He needed opponents on the field." *See* Kempf, *supra* note 16, at 630-32 (citing to Second Liability Record, Vol. 25, at 5347).

212. A football player is not a competitor of the NFL teams. Rather, he is a competitor of the teams' employees, with whom he competes for employment. The NFL's competitor, although not relevant in this situation, is the USFL.

213. The same situation had occurred with the *Mackey* trial and appellate courts. The trial court found that the player restraint was a group boycott and thereby constituted a *per se* violation of antitrust law. The appellate court corrected the lower court's decision by determining that the activity constituted a concerted refusal to

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a court reviewing the eligibility rule should recognize that application of the classic boycott theory[214] to the eligibility rule is inappropriate. The eligibility rule, like the draft, is implemented by the NFL and pertains to new entrants. The NFL teams are not economic competitors among themselves and the college players are not competitors of the teams in the league.[215] Because the eligibility rule constitutes concerted action other than a classic group boycott, the Rule of Reason test ought to govern. The complexity and uncertainty of the issues involved with the antitrust laws,[216] however, offers little assurance that future courts will properly apply the two theories.[217]

Even assuming that a court properly administers the boycott and concerted refusal to deal theories and concludes that the Rule of Reason is the more appropriate test, another problem remains. This problem adheres because Rule of Reason analysis, despite its tolerance of exhaustive inquiries into the purported justifications for a restraint, enhances the paradox which application of antitrust law to labor market restraints instigates.[218] Distorted results ensue because Rule of Reason analysis, by definition, prohibits agreements that do not produce net competitive efficiencies.[219] Concededly, the eligibility rule produces a net anticompetitive effect because the very purpose of the rule is to limit competition among employees for employment, by delaying the entry of college football players into the league.[220] Thus, a court examining the eligibility rule under the Rule of Reason is likely to conclude that the rule operates to restrain competition in violation

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deal, rather than a group boycott. With this determination, the court then examined the player restraint pursuant to Rule of Reason analysis and ultimately held that the restraint violated antitrust law. *Mackey*, 543 F.2d 606. *See supra* text accompanying notes 63-66.

214. *See supra* notes 191-94 and accompanying text.

215. *See supra* notes 210-12 and accompanying text. *See also supra* notes 51-54 and accompanying text.

216. *See generally* L. SULLIVAN, *supra* note 10, at 259.

217. In fact, U.S. District Judge Laughlin Walters, sitting in Los Angeles, has ruled that the USFL eligibility rule, which is similar to the NFL eligibility rule, constitutes a "group boycott." Boris v. USFL, CV 83 4980 (1984). Although the NFL was not a party to this particular case, the ruling, if not overruled on appeal, would be a dangerous precedent.

218. The inappropriate application of antitrust law transpires when the labor exemption does not perform its function. In the football cases, the courts have interpreted the exemption in a manner which precludes the doctrine's proper functioning. *See supra* notes 142-45 and accompanying text.

219. *See supra* notes 31-35 and accompanying text.

220. In *Smith*, the draft system failed the Rule of Reason test, because "its purpose and effect is to suppress competition." *Smith*, 593 F.2d at 1185. It is important to note, however, that the competition suppressed was that among employees.

of the Sherman Act.[221] The irony, though, is that the eligibility rule is exemplary of a union's success in securing a favorable agreement for its members.[222] The eligibility rule regulates the influx of new employees, football players, into the league.[223] New employees inevitably create a direct impact on the terms and conditions of employment of existing employees.[224] Because unions typically strive to negotiate desirable agreements pertaining to wages, hours, and terms or conditions of employment, a union has a substantial interest in the employment of these new employees.[225] Thus, the eligibility rule achieves the protection of the employees in the bargaining unit, consistent with labor law policy.[226] That the eligibility rule would fail substantive antitrust scrutiny, even though it constitutes a mere labor market restraint, suggests that there is a flaw in the courts' present approach to scrutinizing NFL player restraint mechanisms.[227] This inapposite result ensues because the very purpose of labor law is to eliminate competition among employees for wages and work conditions.[228] In direct contrast, antitrust law encourages competition.[229] The confrontation of the two sets of laws—antitrust and labor—in this manner will systematically produce undesirable results.

As indicated, application of Rule of Reason means that almost all labor restraints enacted pursuant to a union-employer agreement would violate the antitrust laws.[230] This result, however, offends the policy established by labor law[231] and unnecessarily subjects acceptable labor market restraints to an unsuitable antitrust analysis. The deficiencies in the nonstatutory labor exemption and antitrust analyses suggest that alternative guidelines are necessary. Alterations in the courts' current exemption analysis and the adoption of a more flexible approach to Rule of Reason analysis will better effectuate the

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221. *See supra* notes 31-35 and accompanying text.

222. *See* Leslie, *supra* note 14, at 1223. Unions usually do not produce net efficiencies because they are inherently anticompetitive. *See supra* note 76.

223. *See* text accompanying *supra* notes 1-3.

224. *See supra* notes 69 and 133-36.

225. *See supra* notes 69 and 133-36.

226. *See supra* notes 131-39 and accompanying text.

227. *See supra* notes 131-39 and accompanying text. Such a result is contrary to the true policy and concerns of antitrust law. Antitrust law is concerned with restraints that affect commercial competition (*i.e.*, the product market). *See supra* notes 14, 15, 68, 70.

228. *See supra* notes 86-87 and accompanying text.

229. *See supra* notes 26-27 and accompanying text.

230. *See* Leslie, *supra* note 14, at 1223; J. WEISTART AND C. LOWELL, *supra* note 10, at 541-61.

231. *See supra* note 18.

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policies embodied in these two polar sets of laws when applied to the football industry.

THE NECESSITY FOR ALTERNATIVE GUIDELINES: A PROPOSAL

To apply any law so that it is useful to other courts and similarly situated parties, there must be definite guidelines. In the case of antitrust law, neither the antitrust analysis nor the nonstatutory labor exemption analysis are cogent. Since the courts' current interpretations foster confusion, promote distorted results, and violate established policies, revisions are imperative.

The current application of the nonstatutory labor exemption enables courts to circumvent the function of the exemption[232] and to subject player restraint mechanisms to inappropriate antitrust scrutiny.[233] The courts' interpretations of the first and second prongs have not generated the ambiguities and confusion. The courts have been consistent in their interpretations of which matters constitute mandatory subjects and which restraints primarily involve only the immediate parties.[234] However, the courts' application of the third prong has enabled them to frustrate labor policies[235] and to subject otherwise acceptable labor market restraints[236] to the antitrust laws.[237] To resolve the problems created by the existing approach, courts should assume a role of limited involvement[238] when examining the existence of negotiations between the parties. Thus, once courts find that an exchange or trade-off has occurred, they should stop inquiry.[239] So long as a collective bargaining relationship exists between the parties, the third prong has been satisfied.[240] It is not necessary that

232. *See supra* notes 142-46 and accompanying text.
233. *See supra* notes 218-29 and accompanying text.
234. *See supra* notes 123-38 and accompanying text.
235. *See supra* notes 158-79 and accompanying text.
236. *See supra* notes 131-39 and accompanying text.
237. *See supra* notes 30-44 and accompanying text.
238. J. WEISTART AND C. LOWELL, *supra* note 10, at 580. *See* text accompanying *supra* notes 158-60.
239. This proposed modification in the courts' analysis means that the nonstatutory labor exemption would be operative and that the eligibility rule would be accorded immunity from antitrust attack: the rule constitutes a mandatory subject (*see supra* notes 132-33 and accompanying text); it does not affect outsiders (*see supra* notes 134-38 and accompanying text); and a collective bargaining relationship exists between the parties. [*see* Collective bargaining Agreement Between National Football League Management Council and the National Football League Players Association (1977)].
240. The basic thesis of this view is that activities ought to be exempt from the antitrust laws if: 1) the subject matter is a mandatory subject of bargaining; 2) agreement on the matter would have its primary effects within the bargaining unit

the restraint be the subject of a *quid pro quo*.[241]

This approach permits courts to effectuate the function of the exemption and to likewise observe the policies of labor and antitrust laws. Although the existing or potential employee who challenges the player restraint may not obtain satisfaction through the antitrust laws, he still has a viable means of redress through future collective bargaining and labor law mechanisms.[242] Furthermore, this approach recognizes that even though collective bargaining in the football industry is not the mature institution it is in other industries, professional football has employed the institution for nearly fifteen years.[243] Because during that time the parties invoked the rights available to them under the labor laws,[244] the parties should be bound to the normal principles of labor law.[245]

The proposed modification in the application of the exemption's third prong will permit the courts to accurately ascertain restraints which do not impact commercial competition[246] and to grant them antitrust immunity under the labor exemption. Nonetheless, a few adjustments in the substantive antitrust analysis are still necessary for future restraints which may genuinely warrant the scrutiny of the antitrust laws. These alterations do not require that the courts adopt new principles; they only oblige the courts to invoke and apply established principles, and to abandon the existing practice of stating

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involved in the negotiations; 3) a collective bargaining relationship exists between the parties. This thesis maintains that certain employment terms receive the benefit of the labor exemption whether or not they had been specifically subjected to bargaining. *See Pennington*, 381 U.S. at 710 (Goldberg, J. dissenting in part). *See also* J. WEISTART AND C. LOWELL, *supra* note 10, at 580. The authors propose the adoption of a "sham exception," which would require courts to additionally determine if negotiations lacked substance or if an activity was the product of union-employer collusion. This note does not advocate the adoption of such an exception, because the exception would require and allow courts to pursue discussions similar to those which have heretofore been defective and contrary to established principles. *See, e.g.*, text accompanying *supra* notes 136-39.

241. *quid pro quo* is defined as "what for what; something for something." BLACK'S LAW DICTIONARY 1123 (5th ed. 1979). *See* J. WEISTART AND C. LOWELL, *supra* note 10, at 580. *But see Mackey*, 543 F.2d at 615-23.

242. *See, e.g., supra* note 166. *See also Mackey*, 543 F.2d at 623 (court encouraged parties to solve their problems at the bargaining table).

243. *See supra* note 146.

244. For a survey of the use of strikes, lockouts, and grievance-arbitration procedures which the parties have invoked, see J. WEISTART AND C. LOWELL, *supra* note 10, at 823-36.

245. Jocobs and Winter, *supra* note 72, at 12-13. The authors suggest that in focusing upon group boycott and merger theories, both the litigants and courts have overlooked the dispositive consideration of national labor policy.

246. *See supra* notes 107-14 and accompanying text.

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and subsequently ignoring the principles.[247] First, the courts should apply the principle that the joint venture nature of the NFL renders application of a classic boycott theory to the league inappropriate.[248] Second, the courts must give effect to the previous realization that the specialized economic framework of the NFL necessitates Rule of Reason analysis[249] and the Rule's corresponding advantage of a flexible inquiry into the purported justifications for a restraint.[250] Finally, when ultimately scrutinizing a restraint under Rule of Reason analysis, the courts should give substantial consideration to the facts peculiar to the football industry, the history of the particular activity, and the purpose of the activity.[251] While courts have acknowledged the authority to make these inquiries,[252] they have not pursued the authority in a way that indicates that the specialized nature of the industry had indeed been given actual and substantial consideration.[253] The courts must take advantage of the inherent flexibility of Rule of Reason analysis. The principles of the rule and the special nature of the football industry mandate it.[254]

CONCLUSION

Antitrust law promotes and protects free and unfettered competition in the product market. In the traditional business market, this goal is both desirable and workable. However, in the context of the football industry, application of this policy to NFL player restraint mechanisms ultimately produces distorted results.

The reason for these inconsistent outcomes is the critical difference between the factual situations that arise in the two industries.

247. *See, e.g., Smith*, 593 F.2d 1173; *Mackey*, 543 F.2d 606.

248. In discussing such an application to the draft system practiced within the NFL, Judge MacKinnon noted: "to argue about the fine details of a draft . . . in order to comply with a hornbook interpretation of a law that was never intended to apply to sports is pure folly." *Smith*, 593 F.2d at 1203-05 (MacKinnon, J., concurring in part and dissenting in part). Note that application of the group boycott theory may, however, be appropriate when a restraint encompasses both the NFL and the USFL; the two leagues, arguably, are competitors. *See supra* notes 202-05 and accompanying text.

249. *See supra* notes 52-56 and accompanying text.

250. *See supra* notes 30-35 and accompanying text.

251. *See supra* note 30.

252. *See, e.g., Smith*, 593 F.2d at 1175; *Mackey*, 543 F.2d at 618-20.

253. *See, e.g., Smith*, 593 F.2d at 1175, 1203 (MacKinnon, J., concurring in part and dissenting in part, recognized the irony in the majority's holding that the draft constituted a restraint of trade. He maintained that in light of the special nature of the industry, the suppression of competition in that manner was essential in providing the fans with an entertaining product).

254. This would not violate established principles. *See supra* note 35.

In the traditional business context, the primary dispute involves the effect of a union-management agreement on the product market. Because antitrust law is primarily concerned with effects on the product market, an activity which produces such an impact warrants antitrust scrutiny. In the football industry, the disputes entail the effect of a union-management agreement in the labor market. Since the impact is not on the product market, antitrust policy is not applicable. To distinguish between the two types of effects, and thus determine the appropriateness of antitrust scrutiny, the Supreme Court developed the nonstatutory labor exemption.

The problems which later arise in the course of antitrust litigation in football originate in the courts' application of the third prong of nonstatutory labor exemption analysis. The courts' inquiry into the negotiations between the parties enables them to deny antitrust immunity to football's blatant labor market restraints. Consequently, labor market restraints undergo substantive antitrust scrutiny in direct contravention of antitrust law's primary concern for product market restraints. Such scrutiny inevitably arouses the direct confrontation of labor and antitrust law. The ramifications of this confrontation are effectively reflected in the specific policy of each body of law: antitrust law promotes competition in the relevant market while labor law discourages competition in the relevant market. Hence, to prevent the interplay of these polar sets of laws, courts must elicit the proper functioning of the nonstatutory labor exemption by invoking a deferential approach to their examination of the parties' negotiations.

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