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Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws

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PROFESSIONAL FOOTBALL'S DRAFT ELIGIBILITY RULE: THE LABOR EXEMPTION AND THE ANTITRUST LAWS

by Robert A. McCormick* and
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I. INTRODUCTION

Each season there are several extraordinarily talented athletes whose ability to play professional football before their college eligibility expires is undisputed. The most recent and dramatic example of this phenomenon is Herschel Walker.[1] At the conclusion of

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[1] Walker is focused upon only as the prototype of a class of persons: amateur football players whose services would be sought by professional teams but for the restraints of the National Football League's draft eligibility rule. Virtually every superlative has been used to describe his athletic ability. He has been described as "the perfect football machine, the ultimate merger of movement and might." Smith, *All Alone in the Open Field*, INSIDE SPORTS, Sept. 1981, at 28. Walker stands six feet, two inches tall, weighs two hundred twenty pounds and has been timed at ten and twenty-three hundredths seconds for the one hundred meter sprint making Walker among the two dozen fastest runners in the world. *Herschel Gets His Heisman*, TIME, Dec. 13, 1982, at 80. Coaches appear given to hyperbole in describing Walker. For example, University of Tennessee coach Johnny Majors described Walker as having "more going for him than any player who's ever played the game. He is something God puts on this earth every several decades or so." *Id.* Georgia Tech coach Bill Curry said, "Herschel is just the biggest, fastest football player who ever lived." *Id.*

The eyes of the sporting world fell upon Walker when he was still in high school. Walker was the state high school champion in events as disparate as the shot put and the one hundred yard dash. He set national high school football records by scoring eighty-six touchdowns in his school career and forty-five in his senior year alone. That year he lead his team to the Georgia state high school championship. He was a consensus high school All-American and Parade Magazine's national high school back of the year. Stories about efforts by colleges to recruit him are legion. *See, e.g.*, L. SMITH & L. GRIZZARD, GLORY, GLORY 71-73 (1981).

As a college freshman at the University of Georgia, his accomplishments continued to multiply. Walker gained more rushing yardage than any freshman in the history of the game. He finished third in the balloting for the Heisman Trophy—the first time a freshman had ever appeared in the top ten. He led the University of Georgia to a 1981 Sugar Bowl victory over Notre Dame, a game in which he was voted Most Valuable Player. Smith, *supra*, at 29. Georgia also had an undefeated season and won its first national championship

the 1980 season—Walker's first as a collegian—United Press International declared him the "National Back of the Year" and he was named first team All-American by every association acknowledging such achievements.[2] In 1981, Walker's sophomore season, his achievements mounted and records continued to fall.[3] After Walker's junior year, he was awarded the Heisman Memorial Trophy as the nation's outstanding collegiate player for 1982.[4] With one year of college eligibility remaining, Walker had already garnered ten National Collegiate Athletic Association records and was third on the all-time NCAA rushing list.[5]

In February of 1983, Walker stunned followers of college and professional football[6] when he signed a three year contract with

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in 1981. Kirkpatrick, *More Than Georgia's on His Mind*, SPORTS ILLUSTRATED, Aug. 31, 1981, at 44, 45.

[2] *Sporting News Sugar Bowl Media Guide*, Jan. 1, 1983, at 26. These associations are the Football Writers Association (first freshman in history), Kodak (first freshman in history), Walter Camp, Associated Press, and United Press International. *Id.* Walker's achievements in track and field were nearly as remarkable: He qualified for both the indoor and outdoor National Collegiate Athletic Association (NCAA) championships. Invitations to compete were extended to Walker from the prestigious Millrose Games, Martin Luther King Games, and Drake Relays. He was the country's seventh fastest collegiate sprinter at the 100 meter distance in 1981 and was a member of the 1981 NCAA Outdoor All-American team. *Id.*

[3] *Id.* Walker was the Associated Press' "Back of the Week" on two occasions and United Press International's (UPI) "Offensive Player of the Week" three times. Again a unanimous first team All-American, Walker was second in balloting for the Heisman Trophy. *Id.*

[4] *Walker Finally Wins Heisman*, Detroit Free Press, Dec. 5, 1982, at 2E, col. 1.

[5] *Sugar Bowl Media Guide, supra* note 2, at 26-27.

Most Yards Rushing by a Freshman in One Season: 1,616 in 1980
Most Yards Rushing by a Sophomore in One Season: 1,891 in 1981
Most Yards Rushing in Three Seasons: 5,259 in 1980-82
Most Games Gaining 100 Yards or More In One Season: 11 in 1981 (tied with 4 others)
Most Games Gaining 200 Yards or More by a Freshman: 4 in 1980
Average Yards per Game by a Freshman: 146.9 in 1980
Most Carries in Three Seasons: 994 in 1980-82
Most All-Purpose Yards Gained by a Freshman: 1,805 in 1980 (1616 rush, 70 rec, 119 KO ret)
Most Seasons Gaining 1,500 Yards or More: 3 in 1980, 1981, 1982
Most All-Purpose Yards in Three Seasons: 5,749 in 1980-82 (5,259 rush, 243 rec, 247 KO ret)

[6] Public reactions to the signing was so strong that Senator Arlen Specter introduced a bill, the Collegiate Student Athlete Protection Act of 1983, Senate Bill 610. U.S.A. Today,

the New Jersey Generals of the newly organized United States Football League (USFL).[7] This contract, estimated to bring Walker between $3.9 million[8] and $16.5 million[9] for the three year period, made him the highest paid player in the history of professional football.[10] By this signing Walker also became the first college undergraduate in modern times to play professional football in the United States.[11]

For more than fifty years, the National Football League (NFL) has refused to employ college undergraduates.[12] Under NFL rules, the only players eligible to be drafted are those who will have graduated by the following September 1st, or those who have either exhausted their college football eligibility or who first entered college at least five years earlier.[13]

Mar. 1, 1983, at 1C. This legislation would have exempted the draft eligibility rules from the antitrust laws. *Id.* However, representatives from the sponsoring Senator's office state that the bill will not be reported out of Committee. Telephone interview with Steve Johnson (Sept. 8, 1983) (an aide to Senator Specter).

[7] Washington Post, Feb. 24, 1983, at A1, col. 1.

[8] Zimmerman, *A New Round of Star Wars?*, SPORTS ILLUSTRATED, Mar. 7, 1983, at 41.

[9] Washington Post, Feb. 24, 1983, at A1, col. 1. Some reports had Walker earning as much as $16.5 million for the three-year period. *See* THE SPORTING NEWS, Mar. 7, 1983, at 53; Zimmerman, *supra* note 8, at 41.

[10] Washington Post, Feb. 24, 1983, at A27, col. 1. The largest annual salary prior to Walker's signing was $806,668 paid to O.J. Simpson in his final year of playing. *Id.*

[11] U.S.A. Today, Feb. 25, 1983, at 1C, col. 4. In 1925, Harold (Red) Grange left the University of Illinois after the final game of his senior year to sign with the Chicago Bears of the newly organized NFL, Detroit Free Press, Feb. 27, 1983, at 1F, col. 3. In 1974, Clarence Reece left the University of Southern California following his sophomore season and played in the Canadian Football League. In 1975, he signed a contract with the Houston Oilers of the NFL. The contract was disapproved by NFL Commissioner Rozelle on the grounds that Reece had not satisfied the league's eligibility requirements. Reece, alleging that the eligibility rules constituted an illegal group boycott sued the NFL. Upon assurances that no league team had encouraged Reece to leave college, the Commissioner rescinded his disapproval of Reece's contract. L. SOBEL, PROFESSIONAL SPORTS & THE LAW 466 n.3 (1977). In 1981, it was reported that Walker had been offered $1,500,000 to $2,000,000 to sign a three-year contract with the Montreal Alouettes of the Canadian Football League. Smith, *supra* note 1, at 30-31. *See also* L. SMITH & L. GRIZZARD, *supra* note 1, at 192. This offer apparently prompted alumni of the University to attempt to start an insurance agency in Walker's name. The plan was vetoed by the NCAA. *Id.*

[12] Washington Post, Feb. 24, 1983, A27, col. 4.

[13] NFL CONST. AND BY-LAWS art. XII, § 12.1; art. XIV, § 14.2 (1976). The *NFL Constitution and By-Laws* provide in art. XIV, § 14.2:

> The only players eligible to be selected in any Selection Meeting shall be those players who fulfill the eligibility standards prescribed in Article XII, § 12.1 of the

The USFL eligibility rule, like that of the NFL, excludes college undergraduates.[14] Spokespersons for the new league maintain that Walker's signing was a "special" circumstance[15] and that the league will abide by its eligibility rule when faced with a similar situation in the future.[16] The NFL steadfastly refused to alter its

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Constitution and By-Laws of the League.

Article XII, § 12.1(A) provides:

> No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university, or (3) such player receives a diploma from a recognized college or university prior to September 1st of the next football season of the League.

[14] N.Y. Times, Feb. 24, 1983, at 1, col. 5; N.Y. Times, Feb. 25, 1983, at A22, col. 1.; Detroit Free Press, Jan. 2, 1983, at 2C, col. 1.

On February 28, 1984, the USFL rule was declared to be a group boycott and thus a per se violation of section one of the Sherman Act (15 U.S.C. § 1). Boris v. USFL, No. CU 83-4980 (C.D. Cal. Feb. 28, 1984). The USFL advanced the following arguments in support of its rule: (1) the eligibility rule promotes on-field competitive balance among USFL teams; (2) very few college athletes are physically, mentally, or emotionally mature enough for professional football; (3) abolition of the rule would not benefit the college athlete; (4) the rule promotes the concept of the importance of a college education; (5) the rule promotes the efficient operation of the USFL by strengthening the sport at the college level; (6) the rule is not inflexible; and (7) the rule is necessary for competitive reasons. In rejecting the League argument, the court found that although the above reasons might have merit, the principal reason for the rule was to respond to the demands made by college coaches to retain the rule, thus insuring better access to college campuses. *Id.*

[15] N.Y. Times, Feb. 24, 1983, at A1, col. 1. Officials of the USFL have stated that permission to sign Walker was granted to the Generals because they had been advised that the draft eligibility rule was not legally defensible. Washington Post, Feb. 24, 1983, at A27, col. 2; The Sporting News, Mar. 7, 1983, at 53; U.S.A. Today, Feb. 24, 1983, at 1C.

On March 3, 1984, Marcus Dupree signed with New Orleans Breakers of the USFL. The Sporting News, Mar. 12, 1984, at 27, col. 1.

[16] N.Y. Times, Feb. 24, 1983, at A1, col. 1, B20, col. 3.; Detroit Free Press, Mar. 5, 1983, at 2D, col. 1; The Chronicle of Higher Education, Mar. 9, 1983, at 2D, col. 1. Other college undergraduate football players currently considered to be of interest to professional teams but excluded from the draft include: Dalton Hilliard, Louisiana State University; Ricky Hunley, University of Arizona; Ken Jackson, Pennsylvania State University; Bill Fralic, University of Pittsburgh, U.S.A. Today, Feb. 24, 1983, at 1C, col. 2. One former college player, Bob Boris, has sued the USFL challenging its draft eligibility rule. Boris v. USFL, No. CU 83-4980 (C.D. Cal. Feb. 28, 1984); *see also* N.Y. Times, Aug. 19, 1983, at A17, col. 6. Marcus Dupree, an undergraduate most prominently mentioned as one who, like Walker, could earn several hundreds of thousands of dollars annually if permitted to play professionally has said, "I don't really like school. College isn't for everybody and I guess it's just not for me." Looney, *New Philadelphia Story*, SPORTS ILLUSTRATED, June 20, 1983, at 39. This article demonstrates that the draft eligibility rules, by precluding employment for college undergraduates, violate the antitrust laws.

rule in the Walker case[17] and has pledged to continue to exclude all other college undergraduates.[18] Since undergraduate college football players such as Walker are, therefore, excluded from the draft and subsequent employment,[19] they must live with the ever-present danger of incurring a disabling injury that would preclude a professional career.[20] It has been said of the position Walker plays that, "[r]unning back, after all, is just a Faustian bargain: The devil only gives you so many years before he demands your knee cartilage."[21] The specter of injury to Walker was apparent. Before Walker became a professional, an NFL scout declared, "If the shoulder injury doesn't become chronic . . . he stands to become the richest rookie in the history of the NFL."[22]

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[17] During negotiations prior to Walker's signing, the NFL was given the opportunity to abandon its rule and sign Walker. They refused this opportunity. The Sporting News, Mar. 7, 1983, at 53; Denver Post, Feb. 28, 1983, at 10C, col. 1; Washington Post, Feb. 24, 1983, at 27A.

[18] Detroit Free Press, Mar. 25, 1983, at 8 D, col. 5; Zimmerman, *supra* note 8, at 44; U.S.A. Today, Feb. 24, 1983, at 3C.

[19] Such employment might bring amateur athletes sorely needed remuneration. Prior to Walker's signing, his family had not been financially well-heeled. Herschel is the fifth of seven children of Willis and Christine Walker of Wrightsville, Georgia (population 2,100). When Herschel was born, his mother had to travel to Dublin—11 miles away—since Wrightsville had no hospital or even a small clinic. For most of his life, Willis Walker worked on a farm for $20 per week while Christine earned $10 per week. After the seventh child was born, Mr. Walker gave up farming for work at a kaolin (chalk) manufacturing plant while Mrs. Walker took a job at a garment factory. Smith, *supra* note 1, at 32.

Had Walker signed with the Canadian Football League, he could have shifted to the National Football League at age 22 when most players begin their professional careers and "stirred the grandest scramble in the history of human flesh." Smith, *supra* note 1, at 30. Walker did not want to go to Canada to ply his trade. "I don't think you should have to go outside your country to make a living anyway," he said. *Id.*

[20] In the 1981 Sugar Bowl game against Notre Dame, Walker was badly injured on his second carry. His left shoulder "subluxated" and he had to leave the game. It was the kind of injury that normally takes a player out of competition for three weeks. Kirkpatrick, *supra* note 1, at 45. Walker, however, returned to the game on Georgia's next series of plays. No runner had gained more than one hundred yards on Notre Dame all season. Walker was directed not to try to catch a pass, not to stiff-arm an opponent, and to hold the ball only with his right hand. Even though he was severely injured, Walker carried the ball thirty times, gained one hundred fifty yards and scored two touchdowns to gain the 17-10 victory, the Most Valuable Player award and the National Championship for his team. *Id.*

[21] Smith, *supra* note 1, at 30.

[22] *Id.* at 34. The prospect of injury was such that before the 1981 season, Walker's father planned to take out a loan of $6,000 to $8,000 to secure a one-year, $500,000 policy insuring against injury. *Id.* at 32.

The NFL's eligibility rule dates from the 1920's.[23] At one time, the League stated that the rule was adopted to provide competitive balance.[24] Today it appears to be more of a mechanism for maintaining a de facto farm system for the League that assures well-seasoned players for the draft.[25] By these rules the owners of the clubs have combined and conspired to restrain competition for Walker's services in flagrant violation of the antitrust laws. The obvious effect of the strictures is to deny other similarly situated college stars the opportunity to earn a livelihood in their chosen profession. The eligibility rule is the most restrictive rule of its type in professional sports and is devoid of legally cognizable justification.

This article's purpose is to examine the lawfulness of professional football's draft eligibility rules under the antitrust laws. Preliminary, however, it must be observed that the NFL's draft eligibility rule, unlike the rule of the USFL,[26] has been made part of the collective bargaining contract between the owners and the players' union.[27] In order to accommodate goals which are central to national labor policy, the labor exemption to the antitrust laws[28] accords immunity to many collectively bargained terms, which would violate the antitrust laws if unilaterally imposed by employers. Initially then, it must be determined whether agreement by labor and management over the draft eligibility rule exempts it

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[23] Underwood, *Does Herschel Have Georgia on His Mind?*, SPORTS ILLUSTRATED, Mar. 1, 1982, at 24.

[24] During the 1960's, the better NFL clubs drafted college players who, although not playing for their college teams in a given year, retained eligibility to play in a future year (so-called "red shirts") enabling dominant teams to stockpile future players. As a result, the League banned the drafting of red shirted college players until their college careers were actually completed. *See Rights of Professional Athletes: Hearings on H.R. 2355 and H.R. 694 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 51 (1975) (testimony of Pete Rozelle, Commissioner, National Football League).

[25] Underwood, *supra* note 23, at 24.

[26] Players in the USFL are not, as yet, represented by a collective bargaining representative. Because no collective bargaining has taken place over the draft eligibility rule in the USFL, the article's analysis pertaining to the labor exemption to the antitrust laws would not apply in a challenge to the draft eligibility rule in that league.

[27] *See infra* note 34 and accompanying text.

[28] *See infra* notes 52-53 and accompanying text.

from antitrust interdiction under the labor exemption.

If the exemption is applicable, no further inquiry into the restraints imposed by the rule is warranted.[29] Determining that the labor exemption does not immunize the NFL's draft eligibility rule under these circumstances, this article next analyzes the rules of both leagues under substantive antitrust principles. This analysis leads to the conclusion that the draft eligibility rules present a clear violation of the antitrust laws and, if challenged by a college undergraduate football player, should be struck down as illegal.

II. Application of the Labor Exemption to the League's Rule

> There's some authority in labor and antitrust law that certainly gives the union the right to bargain about the rights of potential employees.[30]

National labor policy seeks to promote collective bargaining to resolve important employer and employee concerns.[31] Because many agreements between labor and management also serve to restrain competition within the omnibus language of the Sherman Act,[32] a judicially created exemption—the so-called labor exemption—has been fashioned. The labor exemption attempts to accommodate inherent conflicts between national labor and antitrust policy and to protect labor-management agreements over issues of central importance to labor from antitrust interdiction.[33]

As previously mentioned, the NFL's draft eligibility rule has been made a part of the collective bargaining contract between the NFL owners and the players' union.[34] Additionally, the issue of po-

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[29] J. Weistart & C. Lowell, The Law of Sports 525 (1979).

[30] Underwood, *supra* note 23, at 24 (quoting Professor Paul Weiler, Harvard Law School, commenting on the draft eligibility rule).

[31] *See infra* notes 41-42 and accompanying text.

[32] 15 U.S.C. §§ 1-7 (1976). *See infra* note 49 and accompanying text.

[33] *See infra* notes 49-59 and accompanying text.

[34] The 1977 Collective Bargaining Agreement between the NFL and the National Football League Players Association (NFLPA) states in relevant part:

> Any provisions of the . . . N.F.L. Constitution and Bylaws . . . which are not superseded by this Agreement, will remain in full force and effect for the continued

tential employees' access to employment opportunities is, under some circumstances, a subject of substantial importance to unions and may constitute a mandatory subject of bargaining under the National Labor Relations Act (NLRA).[35] Thus, a provocative and important argument can be made that those national policies which promote collective bargaining and protect certain union activities also serve to immunize this contractual term from antitrust scrutiny.

The labor exemption to the antitrust laws has been a significant issue in virtually all modern antitrust challenges to player restraint systems.[36] Moreover, it has been invoked in recent cases by sports leagues to successfully parry antitrust attacks by players on the various player restraint schemes.[37] Exploration of the labor exemption defense is critical because if the exemption is available to the league in this situation, inquiry into the economic justifications for the restraint or the extent of the harm suffered by undergraduate

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> duration of this Agreement and, where applicable, all players, clubs, the N.F.L.P.A., the N.F.L., and the Management Council will be bound thereby.

NFLPA Collective Bargaining Agreement, art. I, § 2 (Mar. 1, 1977).

[35] 29 U.S.C. §§ 151-169 (1973). Section 158(d) of the Act defines collective bargaining as "[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." *Id.* § 158(d). Section 159(a) also declares that the union shall be the employees' exclusive representative "in respect to rates of pay, wages, hours of employment or other conditions of employment." *Id.* § 159(a). The phrase "wages, hours and other terms and conditions of employment," then, constitutes the issues about which the duty to bargain applies and matters which fall within this definition are mandatory subjects of bargaining. Beyond these areas, in so-called permissive subjects of bargaining, either party may refuse to negotiate and may implement decisions unilaterally. NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342 (1958).

[36] *See, e.g.*, Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979) (football); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (football); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (basketball); Kapp. v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (football); Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972) (hockey); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey).

[37] Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

players becomes unnecessary.[38] Furthermore, the invocation of the labor exemption in this situation raises difficult questions about the nature and scope of the doctrine. Thus an in-depth analysis of this exemption is necessary for a full appreciation of the thesis of this article.[39]

A. *Overview of the Labor Exemption*

The primary purpose of antitrust legislation is to promote freedom of competition in the marketplace.[40] On the other hand, the primary purpose of labor legislation, particularly as embodied in the National Labor Relations Act,[41] is to promote collective bargaining and to protect certain union or concerted employee activities.[42] Unions, however, are by their nature and purpose anticom-

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[38] See *supra* note 29 and accompanying text.

[39] There has been a wealth of scholarship addressing the doctrine of the labor exemption of the antitrust laws. The focus of this article is upon the application of the doctrine to negotiated player restraint systems in professional sports generally and the NFL draft eligibility rule particularly. A partial list of important writings on the doctrine includes: Boudin, *The Sherman Act and Labor Disputes* (pts. 1 & 2), 39 COLUM. L. REV. 1283 (1939), 40 COLUM. L. REV. 14 (1940); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Sovern, *Some Ruminations on Labor, the Antitrust Laws and* Allen Bradley, 13 LAB. L.J. 957 (1962); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

[40] *See infra* note 180. *See also* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945) ("[Antitrust policy] . . . seeks to preserve a competitive business economy. . . ."); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977) ("The purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply."). *See also* Fried & Crabtree, *Labor*, 33 ANTITRUST L.J. 38 (1967).

[41] 29 U.S.C. §§ 151-169.

[42] Congress' intent to protect unions and encourage collective bargaining is strongly established in the following excerpt from the preamble to the Act:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms

petitive.[43] As the United States Supreme Court has repeatedly recognized, a central purpose of the labor movement is to reduce competition among employees regarding wages and conditions of employment.[44] The goal of eliminating competition among individual workers for wages and other employment terms is achieved by individual employees relinquishing their prior right to individually pursue an employment contract. The union becomes the exclusive representative of all employees on the assumption that, through the pooling of strength and the threat of strikes and other concerted activity, greater benefits for employees as a group will be exacted. Inevitably, this process produces standardization of employment terms for particular classes of employees.[45] As a matter of course, unions seek agreements with employers that establish uniform terms and that consequently limit the opportunity of any individual employee to sell his services on the most favorable terms.[46] Some employees will be better off as a result, while for

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and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151. The NLRA further provides that employees have the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." *Id.* § 157.

[43] "In short, unionization, collective bargaining and standardization of wages and working conditions are inherently inconsistent with many of the assumptions at the heart of anti-trust policy." A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 872 (9th ed. 1981). "From the outset, the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it." St. Antoine, *supra* note 39, at 604.

[44] "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." UMW v. Pennington, 381 U.S. 651, 666 (1965).

[45] Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 9 (1971).

[46] It is a fundamental tenet of labor law that the rights of an individual must yield to those of the group. The Supreme Court has observed:

> But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group. . . . We find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages.

J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944). *See also* H. Wellington, Labor and the

other employees, such standardization will impair their ability to secure a better individual bargain.[47] Examples of union objectives with obvious anticompetitive effects include uniform wage rates, seniority systems, and hiring halls. A standard wage rate, present in most industries with industry-wide union contracts other than the sports industry, results in a competitive disadvantage for more highly skilled workers who could command a wage greater than the standard rate. Seniority systems and hiring halls have a similar effect upon less senior but more highly skilled employees. If unions, whose proper objectives are inherently anticompetitive, are to be accepted and indeed protected, restrictions on the free operation of the labor market must be tolerated.[48]

Agreements between employers and unions, then, are frequently "combinations in restraint of trade" within the literal language of the Sherman Act.[49] Nevertheless, case precedent firmly establishes that agreements regarding matters such as uniform wage rates, seniority systems, and hiring halls are entirely permissible.[50] Indeed, in view of the fact that these matters normally constitute mandatory subjects of bargaining,[51] they are clearly matters about which national labor policy encourages agreement.

The effort to accommodate these two important national policies

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LEGAL PROCESS 130 (1968); J. WEISTART & C. LOWELL, *supra* note 29, at 549.

[47] Jacobs & Winter, *supra* note 45, at 9-10; J. WEISTART & C. LOWELL, *supra* note 29, at 562.

[48] "We have long since concluded that the value of having unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences." St. Antoine, *supra* note 39, at 631.

[49] It is clear, however, that Congress' primary purpose in enacting the Sherman Act was to deal with business monopolies and restrictive trade practices, not trade union activities. Apex Hosiery v. Leader, 310 U.S. 469, 492-93 (1940). Indeed, a genuine question exists as to whether Congress intended the Act to apply to groups of employees at all. "On the basis of the Congressional debates . . . it is believed that no valid evidences can be found in the records of the legislative proceedings that Congress intended the Anti-trust Act to apply to labor organizations." E. BERMAN, LABOR AND THE SHERMAN ACT 51 (1930). *See also* Boudin (pt. 1), *supra* note 39, at 1285-87.

[50] *See, e.g.*, UMW v. Pennington, 381 U.S. 651, 665-66 (1965).

[51] *See* THE DEVELOPING LABOR LAW 389-90, 405, 407-09 (C. Morris ed. 1971); United States Gypsum Co., 94 N.L.R.B. 112 (1951), *modified*, 206 F.2d 410 (1953) (seniority systems as mandatory subjects of bargaining); Houston Chapter, Assoc. Gen. Contractors, 143 N.L.R.B. 409 (1963), *enforced*, 349 F.2d 449, *cert. denied*, 382 U.S. 1026 (1966) (hiring halls as mandatory subjects of bargaining).

has been left largely to the courts.[52] As the Supreme Court has crisply stated:

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[53]

The Court has addressed the proper accommodation of these policies on several occasions. Although the specific contours of the labor exemption remain uncertain, existing Supreme Court precedent[54] and lower court application of the labor exemption doctrine in cases challenging other aspects of the employment relationship, including the "reserve" systems in professional sports,[55] clearly show that the interests protected by the draft eligibility rule are far removed from those which national labor policy clothes with immunity.

Courts[56] and commentators[57] have urged various formulations

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[52] Judicial review of congressional efforts to create an antitrust exemption for labor has limited the statutory exemption to specific unilateral union activities including secondary picketing and boycotts. *E.g.*, United States v. Hutcheson, 312 U.S. 219, 233-37 (1941); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975); Handler & Zifchak, *supra* note 39, at 470. Negotiated agreements between unions and employers, therefore, are not subject to the statutory exemption. UMW v. Pennington, 381 U.S. 651, 662 (1965). As early as 1941, however, the Supreme Court recognized in *Hutcheson* that accommodating antitrust and labor policy required that some labor-management agreements be accorded a nonstatutory exemption from the antitrust laws. *Hutcheson*, 312 U.S. at 233-37; *see also Connell*, 421 U.S. at 622-23. As Justice Goldberg observed, to do otherwise would permit unions and employers to conduct industrial warfare but prohibit a peaceful resolution to their dispute. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 712 (1965) (Goldberg, J., dissenting).

[53] Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945).

[54] *See infra* notes 82-93, 118-21, and accompanying text.

[55] *See infra* notes 164-69 and accompanying text.

[56] *See, e.g.*, UMW v. Pennington, 381 U.S. 657, 672 (1965) (Goldberg, J., dissenting); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 697 (1965) (Goldberg, J., concurring). Justices Harlan and Stewart joined Justice Goldberg in *Pennington* and *Jewel Tea*. Under these Justices' view, the labor exemption should automatically immunize any labor-management agreement governing mandatory subjects of bargaining. *Jewel Tea*, 381 U.S. at 697-725.

for reconciling national labor and antitrust policy in order to determine whether any given labor-management agreement should be immunized. Any such reconciliation, however, inevitably entails a balancing of the agreement's impact on competition against the importance of the employee interests at stake.[58] Under this calculus, the anticompetitive effects of the draft eligibility rule outweigh any countervailing employee interests. That is, the wholesale extinction of employment opportunities for an entire class of prospective employees occasioned by the draft eligibility rule substantially burdens competition[59] without advancing any important interest of active football players as employees.

B. *Role of the Labor Exemption in Sports Litigation*

During the decade of the 1970's, traditional player restraints such as the draft,[60] reserve clauses,[61] and free agent indemnity arrangements[62] were successfully challenged by disaffected players in

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[57] Professor Sovern, for example, has urged that labor abuses be addressed not through Sherman Act application but "within the framework of our labor legislation." Sovern, *supra* note 39, at 963. Professor Winter has argued in favor of a legislative approach to regulating abuses arising from labor-management agreements. Winter, *supra* note 39, at 66-73. Professor Handler and William Zifchak have urged a similar approach. Handler & Zifchak, *supra* note 39 at 513-15.

[58] As Professor Meltzer has observed, "[w]hether any particular demand is exempt depends on weighing the interest in competition against the competing interests of the employees." Meltzer, *supra* note 39, at 724. Justice White, in his opinion in *Jewel Tea*, also remarked: "The crucial determinant is not the form of agreement . . . but its relative impact on the product market and the interests of union members." 381 U.S. at 690 n.5.

[59] *See infra* notes 181-83 and accompanying text.

[60] The draft is the mechanism by which entering players are allocated to teams, usually in reverse order of the selecting team's standing the prior year. The most hotly contested element of the draft has been the exclusive, perpetual right of the drafting team to negotiate for the drafted player's services. *See, e.g.*, Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979); Robertson v. NBA Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977). *See also* Pierce, *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L.Q. 566, 603 (1958); Note, *The Battle of the Superstars: Player Restraints in Professional Team Sports*, 32 U. FLA. L. REV. 669, 670 (1980).

[61] Reserve systems were characterized by a perpetual right in the employing club to renew the contract of the player and were enforced through no-tampering agreements. J. WEISTART & C. LOWELL, *supra* note 29, at 505-06. *See* Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 245 (1956) (blacklisting arrangement).

[62] Indemnity arrangements among teams insure that if a player leaves a club which

all professional sports except baseball.[63] These players argued that such rules impermissibly operated to restrain their ability to market their services freely.[64] In each case, the labor exemption was raised as a defense. The various leagues took the position that the putative restraint was the product of agreement between the employers, negotiating on a multi-employer basis, and the player association, negotiating as representative of all players. As a result, the leagues urged, the collectively bargained agreement should be shielded from subsequent attack by players whose representative has assented to the arrangement under scrutiny.[65]

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employs him to play for another team within the league, then the original team will be compensated in the form of a player, draft rights, or money. League by-laws frequently provide that if the former team and the acquiring team cannot agree on the type or amount of compensation the former team should receive, then the determination would be made by the league commissioner. In essence, the compensation is a forced trade. J. WEISTART & C. LOWELL, *supra* note 29, at 502-03. These arrangements have produced considerable litigation. For a discussion of the operation of indemnity arrangements, see Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). In these cases, players claimed that the forced compensation schemes operated to discourage prospective employing club owners from hiring available players and, therefore, restrained player mobility. *See* J. WEISTART & C. LOWELL, *supra* note 29, at 503.

[63] Since Justice Holmes' decision in Federal Baseball Club of Baltimore v. National League of Prof'l Baseball Clubs, 259 U.S. 200 (1922), baseball, alone among professional sports, has operated under a judicially created exemption from the antitrust laws. This exemption has engendered a great deal of comment and criticism. *See, e.g.*, L. SOBEL, *supra* note 11, at 66-72; Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 729-30 & n.129 (1981); Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COMM. L. REV. 737 (1971); Comment, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967). *See also* H.R. REP. NO. 2002, 82d Cong., 2d Sess. (1952).

[64] *See, e.g.*, Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (football); Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. Cir. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979) (football); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball), *aff'd*, 556 F.2d 682 (2d Cir. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (basketball); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979) (hockey).

[65] This argument was presaged by a 1971 *Yale Law Journal* article by Michael Jacobs and Professor Ralph Winter. *See* Jacobs & Winter, *supra* note 45. The authors argued that

Although the argument failed in *Flood v. Kuhn*[66] for reasons other than because of the labor exemption,[67] the various leagues sought to utilize the defense in the tide of litigation that followed.[68] Eventually a test emerged for the applicability of the labor exemption in cases challenging player restraints incorporated either directly or by reference into collective bargaining agreements. The standard was first set forth by the Eighth Circuit Court of Appeals in *Mackey v. National Football League*.[69] In *Mackey*, a group of active and retired NFL players argued that the League's free agent indemnity system, known as the Rozelle Rule, operated to restrain players' ability to market their services freely.[70] The NFL defended on the ground that the agreement was part of the collective bargaining contract[71] and that proper accom-

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certiorari had been improvidently granted in Flood v. Kuhn, 407 U.S. 258 (1972). Curt Flood had been traded by the St. Louis Cardinals to the Philadelphia Phillies without consultation and against his wishes. Major League Rule #9 stated that: "Upon receipt of written notice of such assignment" the player is "bound to serve the assignee." In paragraph 6(a) of his Uniform Player Contract, Flood had agreed that he could be so assigned.

Flood's first and most important cause of action complained that the reserve system violated the Sherman Act. Jacobs and Winter, however, argued that:

> For years the impact of antitrust principles on the arrangements allocating players among teams in professional sports has been hotly disputed. Now recent events seem to have brought this issue to a head. A malaise among good athletes like Curt Flood has increased the tempo of litigation. . . . We enter this crowded arena not to solve the antitrust dilemma, but to put it to rest. For, in the form in which it is generally debated, it is an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy.

Jacobs & Winter, *supra* note 45, at 1.

[66] 407 U.S. 258 (1972).

[67] The Court acknowledged in *Flood* that the narrow definition of interstate commerce adhered to in *Federal Baseball* had expanded so much in the intervening years that any exemption could no longer rest upon a finding that the baseball industry was not engaged in interstate commerce. The Court, however, refused to find baseball within the antitrust strictures, reasoning that Congress had failed to remove the exemption in the fifty years since the *Federal Baseball* decision. 407 U.S. at 285. The decision has been widely criticized. *See supra* note 63.

[68] *See supra* notes 36-37 and accompanying text.

[69] 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[70] *Id.* The players also claimed that the draft, the standard player contract, the option clause and the no-tampering agreement constituted impermissible anticompetitive practices of the defendants. *Id.* at 609.

[71] The 1968 contract between the player's association and the National Football League incorporated by reference the NFL constitution and by-laws of which the Rozelle Rule was a part. The 1970 agreement, though not referring to the rule directly, did require that all

modation of federal labor and antitrust policy required that the agreement be deemed immune from antitrust interdiction.[72] The court concluded that when evaluated under the rule of reason,[73] the indemnity rule could not be sustained.[74] More importantly, for the present purposes, the court also rejected the League's labor exemption defense.[75] In the court's view, the labor exemption would be available to the employer only if each element of the following three-prong test were met:[76]

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.
>
> Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining.
>
> Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[77]

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players sign the standard player contract. That contract, in turn, provided that the player agreed to comply with and be bound by the league constitution and by-laws. Further, representatives of the parties testified that it was their understanding that the Rozelle Rule would remain in effect during the term of the 1970 agreement.

[72] 543 F.2d at 612.

[73] *See infra* notes 183-84 and accompanying text.

[74] 543 F.2d at 620-22. The district court had found the rule unlawful as a per se violation of the Sherman Act. As to this point, the court of appeals reversed the lower court. *Id.* at 623.

[75] 543 F.2d at 615. The appeal of this case was the first time a federal court of appeals considered the immunity issue in the context of professional league sports. J. WEISTART & C. LOWELL, *supra* note 29, at 576.

[76] In applying this test, the court of appeals in *Mackey* specifically rejected a finding by the district court that the labor "exemption extends only to labor or union activities and not to the activities of employers." 543 F.2d at 612 (discussing the district court's finding at 407 F. Supp. at 1008).

[77] 543 F.2d at 614-15 (citations omitted). In *Mackey*, the court concluded that the indemnity arrangement affected only the parties to the agreement, and that although it was technically an arrangement among owners, it operated to restrict a player's mobility and depressed player's salaries. *Id.* at 618-19. Accordingly, the court concluded that the rule was intimately related to wages and thus constituted a mandatory subject of bargaining under the NLRA. *Id.* at 615. It was on the third prong of the test that the NFL's defense faltered. The appellate court found that substantial evidence supported the lower court's finding that

The application of the labor exemption to a collectively bargained indemnity system was most recently treated in *McCourt v. California Sports, Inc.*[78] The focus of this lawsuit was, once again, an "equalization" or free agent indemnity rule included in the collective bargaining contract between the National Hockey League and the player association.[79] Plaintiff hockey player had been assigned, against his wishes, to another team as part of a trade. He challenged the indemnity rule under the antitrust laws. Again, the League argued that the labor exemption insulated its negotiated system from antitrust application. The Court of Appeals for the Sixth Circuit found for the defendant League and, in so doing, specifically approved of and applied the standard for immunity set forth by the Eighth Circuit in *Mackey*.[80]

Because the Eighth Circuit standard has been accepted by appellate courts and because its application has been favorably received by commentators,[81] it is the logical starting point for discussion of the application of the labor exemption to the NFL's draft

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there had not been "bona-fide arm's-length bargaining over the Rozelle Rule" and that the simple acceptance of the rule by the union did not serve to immunize it. *Id.* at 616.

[78] 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

[79] 460 F. Supp. at 906. This rule was similar to the Rozelle Rule but provided that the decision regarding compensation was to be made by an independent arbitrator and not by the commissioner. Like the NFL's four-year rule, the NHL's indemnity rule was contained in a league by-law that had been incorporated by reference into the standard player contract which was signed by the player and approved by the Players' Association.

[80] 600 F.2d at 1198. As in *Mackey*, the court concluded that the restraint imposed by the indemnity arrangement affected primarily the parties to the agreement, constituted a mandatory subject of bargaining and, unlike *Mackey*, was a product of arm's-length bargaining. In this case, the Sixth Circuit rejected the district court's finding that no arm's-length bargaining had occurred because there had been no movement by the owners on that issue, and stated:

> [T]he trial court failed to recognize the well-established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue.

Id. at 1200.

[81] *See, e.g.*, J. WEISTART & C. LOWELL, *supra* note 29, at 582. Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest:* McCourt v. California Sports, Inc., 21 B.C.L. REV. 680, 681 (1980).

eligibility rule. Examination of the origins and limitations of each element of the *Mackey-McCourt* test is necessary because the contours of the labor exemption are vague rather than comprehensive. This vagueness makes a mechanical application of the aforementioned test improper.

Since the discussion ranges widely, however, it is appropriate to initially set forth the conclusions that will be reached. Supreme Court treatment of the labor exemption and basic principles of labor law make the elements of the *Mackey-McCourt* test, with limitations to be discussed later in this article, appropriate guidelines for the application of the exemption. In sum, the *Mackey* and *McCourt* formulations provide a shorthand method for striking the balance between the importance of the subject matter to employee interests and its anticompetitive effects.

1. *The Restraint on Trade Brought About by the Draft Eligibility Rule Does Not Primarily Affect Only Parties to the Collective Bargaining Relationship*

The first prong of the *Mackey-McCourt* standard mandates that the impact of the practice under scrutiny fall primarily on the contracting parties before agreement on the matter will come within the labor exemption. The origin of this requirement can be found in United States Supreme Court precedent, particularly in *UMW v. Pennington*,[82] *Allen Bradley Co. v. Local 3, IBEW*,[83] and *Connell Construction Co. v. Plumbers & Steamfitters Local 100*.[84] In each of these cases, the Supreme Court refused to grant antitrust immunity to agreements between employers and unions even though the agreement concerned wages or some other matter of mandatory bargaining and was of central concern to employees and unions.

In *Pennington*, the union allegedly had agreed with major coal mine operators not to oppose rapid mechanization in their operations. The employer was to compensate the union for the resultant

[82] 381 U.S. 657 (1965).
[83] 325 U.S. 797 (1945).
[84] 421 U.S. 616 (1975).

reduction in the labor force by an increase in employees' wages. The union also promised the large companies to impose the increased wage scale on smaller competing companies irrespective of the ability of those companies to meet the greater wage demand. The Court concluded that this agreement, although directly concerning wages of employees and thus a mandatory subject of bargaining, was not within the labor exemption to the antitrust laws. The Court divided into three groups, each consisting of three Justices. The opinion of Justice White, designated as that of the Court, acknowledged that an agreement between a union and an employer regarding wages was of central concern to the union and, normally, would be exempt from antitrust application.[85] The opinion also recognized the right of the union to make uniform wage demands of employers, but only if undertaken individually and on its own initiative. The *Pennington* Court, nevertheless, held that:

> One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy . . . [t]he policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.[86]

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[85] 381 U.S. at 660.

[86] *Id.* at 665-68. It may be fairly argued that the objective of the agreement between the union and the employers in *Pennington* was the elimination of competition in the product market. Since the NFL's draft eligibility rule does not preclude potential teams from competing with existing teams, but instead suppresses competition in a labor market, the League might argue that *Pennington* is inapposite in the instant matter. The distinction between the labor market and the product market, however, is not easily drawn. Many union activities, such as secondary boycotts, restraints on the use of new technology or restriction of supply through control of hours of work, touch upon both the product and the labor market. "The impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act, . . . can be frustrated by monopoly powers exerted solely in the labor market." B. MELTZER, LABOR LAW 515 (2d ed. 1977). *See also* Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970). At the same time, the antitrust laws serve to protect access to employment opportunities even if secondarily to protecting the product market. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 744 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979). Therefore, reliance on this product-labor distinction would be misplaced. Professor Leslie has flatly said, "Antitrust regulation of unions does not turn on a distinction between the product and labor markets, nor on differences between direct and indirect limitations." D. LESLIE, CASES AND MATERIALS ON LABOR LAW 79 (Teacher's Manual 1978).

The defect in the arrangement in *Pennington*, then, was that the union bound itself with the major coal operators to impose demands upon persons not party to the collective bargaining relationship.

Support for this requirement may also be found in *Allen Bradley*.[87] There, in a complex series of agreements, electrical contractors in the New York City area agreed with the union to buy equipment only from manufacturers recognizing the local union. Electrical equipment manufacturers in turn agreed to limit their sales to contractors also recognizing the local union. The effect of this arrangement was a refusal to deal with nonsignitory electrical equipment manufacturers, such as the plaintiff. The agreement also excluded electrical contractors from competition for the New York City area business. The Court concluded that the labor exemption would not save the obvious restraint on competition even though the union's purpose was to increase members' wages and employment opportunities: "[W]hen the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions."[88] This phrase was quoted and emphasized by the Court in *Pennington* and supports the position that an extra-unit focus by labor and management may remove an agreement from immunity.[89]

Finally, the Supreme Court's decision in *Connell*[90] also prohibited an extra-unit focus. In *Connell*, the union sought agreements from general contractors that they would select only firms that were signitory to collective bargaining contracts with the union as subcontractors. The union, however, disavowed any interest in organizing the employees of the general contractors. The effect of this arrangement was to preclude non-union subcontractors from

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[87] 325 U.S. 797 (1945).

[88] *Id.* at 809.

[89] *See* Meltzer, *supra* note 39, at 715-16; Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); Weistart, *Judicial Review of Labor Agreements: Lessons from the Sports Industry*, 44 LAW & CONTEMP. PROBS., Autumn 1981, at 109, 112.

[90] 421 U.S. 616 (1975).

competing for jobs. Consequently, firms which might offer important price or quality advantages were precluded from marketing their services to the general contractor.[91] The direct market restraint on strangers to the relationship was an important factor in the Court's conclusion that the labor exemption was unavailable, even though the goal of the union was to expand employment opportunities for its members.

In each modern Supreme Court case refusing immunity to labor management agreements, then, an important factor has been that the primary effect of the contract was to restrain parties who were strangers to the collective bargaining relationship. The Court has found this fault in the agreements to be determinative, despite the recognition that the interest pursued by the union was of central importance to it and its members.[92] At the same time, when the anticompetitive effect of an agreement has fallen primarily upon the parties to the collective bargaining relationship, the Court has been willing to extend the exemption even to matters of arguably less concern to the union.[93] Thus, it is understandable that the courts have looked closely at who is primarily affected by the restraints of a labor-management agreement and have limited the application of the labor exemption to those arrangements in which the restraint falls primarily on the parties to the relationship.

While this requirement is helpful, it nonetheless constitutes an oversimplification. First, the line between internal and external effects is murky. Labor and management bargain and indeed are required to bargain upon demand over matters that frequently impinge upon the interests of strangers to the collective bargaining relationship.[94] For example, agreements limiting the employer's

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[91] *Id.* at 625.

[92] "[A]ll of the cases in which a union agreement was found not to be exempt involved situations in which the extra-unit product market effects were the source of the objections raised." J. WEISTART & C. LOWELL, *supra* note 29, at 563 (citation omitted).

[93] In *Jewel Tea*, part of the labor-management agreement concerned the marketing hours of the employer. At the same time, the effect of the agreement restrained only the parties to the relationship. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684-85 (1965). *See* St. Antoine, *supra* note 39, 622 n.90 (1976).

[94] *See supra* notes 82-90 and accompanying text. "It is inevitable that labor and management are required to bargain over matters that impinge directly or indirectly on the interest of strangers to the bargaining relationship." Handler & Zifchak, *supra* note 39, at

ability to subcontract work or introduce labor-saving devices are sought by unions to preserve work for their members and frequently constitute subjects of mandatory bargaining,[95] but also may severely limit the opportunity of third-party firms to do business with the contracting employer. Similarly, a most-favored-nations clause,[96] designed to protect an employer against competition from firms with lower labor costs, is also considered a mandatory subject of bargaining[97] and ought to be accorded immunity even though such arrangements have obvious external effects and serve to limit competition.[98] Finally, and most germane to this analysis, union hiring hall arrangements often serve to limit competition for employment.[99] They, too, are mandatory subjects of bargaining.[100]

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[95] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (subcontracting of bargaining unit work a mandatory subject to bargaining); Local 24, Int'l Bhd. of Teamsters v. Oliver, 362 U.S. 605 (1960) (Oliver II) (amount of rent employer will pay independent truckers a mandatory subject of bargaining); NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384 (8th Cir. 1974) (automation of employer's process a mandatory subject of bargaining).

[96] Most-favored-nation clauses, prevalent in the construction industry, require the union to give the employer the most favorable terms the union subsequently grants any other employer. *See* St. Antoine, *supra* note 39, at 610.

[97] Notwithstanding the language in UMW v. Pennington, 381 U.S. 657, 710 (1965), that a union may not "impose a certain wage scale on other bargaining units", most-favored-nation clauses are not only permissible, but also may constitute mandatory subjects of bargaining. *See, e.g.*, Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546 (1970) (most-favored-nation clauses are not per se invalid under *Pennington*); Dolly Madison Indus., 182 N.L.R.B. 1230 (1970).

[98] St. Antoine, *supra* note 39, at 611. *See* Hotel, Motel, Restaurant, Hi-Rise Employees & Bartenders Union Local 355, 245 N.L.R.B. 774 (1979).

[99] A collective bargaining contract may include a provision that establishes a union-operated exclusive hiring hall. This hiring hall operates as the sole source of skilled laborers for the employer. Generally, the union hiring hall refers applicants on the basis of factors such as seniority, length of residence in the area and work experience in the trade. Hiring halls, therefore, can effectively limit competition for employment in their respective industries because these factors, rather than ability to perform the job, determine who actually gets hired. *See, e.g.*, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); Houston Chapter Assoc. Gen. Contractors v. NLRB, 143 N.L.R.B. 409, 416 (1963) (members Rogers & Leedom, dissenting), *enforced*, 349 F.2d 449 (5th Cir. 1965). *See also* J. WEISTART & C. LOWELL, *supra* note 29, at 562-63; Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 LAB. L.J. 505, 506 (1958); Jacobs & Winter, *supra* note 45, at 8.

[100] *Houston Chapter*, 143 N.L.R.B. 409. Both the NLRB and the Supreme Court have noted that although the exclusive hiring hall may encourage union membership, it has well served both management and labor, especially in the maritime field and in the building and construction industry where the employee is frequently a stranger to the area where the work is to be performed. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667

Although such arrangements may have a dramatic impact on strangers to the collective bargaining relationship, the hiring hall can be accorded antitrust immunity.

It is apparent that the internal-external distinction is not a wholly satisfactory one. Nevertheless, it can be said that those agreements that have as their primary purpose or effect the elimination of competition from strangers to the collective bargaining relationship, ought to fall outside the scope of immunity unless this impact is outweighed by some vitally important union purpose. The NFL draft eligibility rule, though it may preserve and prolong employment for current unit members, has, as its direct effect, the restraint of amateur athletes who as yet are strangers to the bargaining relationship and does not significantly advance any important union goal. Restraining college undergraduates from competing for a position on an NFL team is in fact the direct object of the agreement between the NFL and the National Football League Players Association (NFLPA). Like the small mine operators in *Pennington*, the non-New York City manufacturers in *Allen Bradley*, and the non-union subcontractors in *Connell*, these amateurs—still strangers to the bargaining relationship—are the direct (and only) object of the restraint. Immunity, therefore, cannot be claimed.

2. *The Draft Eligibility Rule Is Not a Mandatory Subject of Bargaining*

The second prong of the test established in *Mackey* and *McCourt* requires that the particular player restraint under scrutiny be a mandatory subject of bargaining within the meaning of the National Labor Relations Act[101] (NLRA) for the agreement on the

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(1961); Mountain Pacific Chapter, Assoc. Gen. Contractors, 119 N.L.R.B. 883 (1957). In these industries, the hiring hall has served "to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employees." *Id.* at 896 n.8. No similar purpose is served by the NFL's draft eligibility rule. *See infra* notes 147-49 and accompanying text.

[101] The Act compels employers and unions to negotiate regarding wages, hours and other terms and conditions of employment if demanded by either party. Section 158(a)(5) of the NLRA makes it unlawful for an employer to "refuse to bargain collectively" with the employees representative, subject to section 159(a). 29 U.S.C. § 158(a)(5). Section 159(a)

matter to be afforded immunity.[102] The basis for this requirement is grounded in the several principles. First, as a matter of logic, if one body of law—labor law—mandates negotiation regarding a particular matter, another body of law—antitrust law—ought not condemn the fruits of that negotiation. Second, as a practical matter, such an outcome could serve to undermine the process of collective bargaining; concerns regarding potential antitrust implications of a given proposal could impede progress toward resolution of important employer or employee concerns. If a union or one of its members could successfully challenge a matter on which agreement had been reached, then the lesson learned would be that objectives won at the bargaining table might be later lost in court. The ultimate consequence would be a greater hesitancy to make concessions because the lawfulness of the *quid pro quo* was uncertain.[103] Finally, the statutory design of the NLRA places the union

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establishes that the employee representative is the exclusive representative for the purposes of collective bargaining regarding rates of pay, wages, hours of employment or other conditions of employment. 29 U.S.C. § 159(a). Section 158(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(d). These subjects establish the outer limits of the duty to bargain and within these areas bargaining is obligatory upon demand. *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); *see also*, Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox & Dunlop, *Regulations of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971); Note, *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition*, 58 YALE L.J. 803 (1949).

[102] *See supra* notes 76-77 and accompanying text. "To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme." Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 711-12 (1965) (Goldberg, J., dissenting in part). *See also* J. WEISTART & C. LOWELL, *supra* note 29, at 568; Jacobs & Winter, *supra* note 45, at 25-27.

[103] J. WEISTART & C. LOWELL, *supra* note 29, at 559-61. See especially notes 482-84 where the authors describe how the prospect of antitrust review of the Rozelle Rule dramatically influenced and impeded progress toward a contract during the 1975 NFL-NFLPA negotiations. Jacobs and Winter further argue that antitrust review of mandatory subjects would remove one subject from the package of quids and quos resulting in greater likelihood the parties would be less satisfied than if the agreement were freely reached by them and, therefore that the congressional goal of labor peace and industrial stability would be undermined. "Denying a demand to a party may thus increase the chances of a strike because it lessens the area of possible compromise without affecting the underlying strength of the

and the employer at the bargaining table and delineates the matters they either must, may, or may not discuss.[104] The parties are to be left on their own to negotiate the substantive terms of the bargain. As the Supreme Court has stated: "Within the area in which collective bargaining [is] required, Congress was not concerned with the substantive terms upon which the parties agreed."[105] Congress recognized that there are no absolute standards by which to assess the reasonableness or propriety of bargained-for agreements[106] and that courts are particularly inappropriate forums for making such determinations.[107]

The requirement that the term under scrutiny must involve a mandatory subject of bargaining draws strength from Justice Goldberg's opinions, joined by Justices Harlan and Stewart, in *Pennington* and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[108] Justice Goldberg's *Jewel Tea* opinion flatly stated: "[T]he Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws."[109] Justice White, in the opinion designated as that of the Court, also recognized the centrality of Goldberg's perspective. He wrote, "[E]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[110] The Supreme Court, however, has never embraced Justice Goldberg's per se approach. It has, instead, weighed the importance to labor of the issue under scrutiny against its impact on

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parties." Jacobs & Winter, *supra* note 45, at 13. For a rebuttal, see L. SOBEL, *supra* note 11, at 325-29.

[104] *See, e.g.*, Handler & Zifchak, *supra* note 39, at 253, 501.

[105] Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

[106] *See, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-90 (1960); Jacobs & Winter, *supra* note 45, at 12-13.

[107] *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 49-50 (1968). *See also* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 716-17 (1965) (Goldberg, J., dissenting).

[108] Justice Goldberg concurred in the judgment in *Jewel Tea*, 381 U.S. at 697, and dissented in UMW v. Pennington, 381 U.S. 657, 672 (1965).

[109] 381 U.S. at 710.

[110] *Id.* at 689.

trade.[111] The Court's refusal to accord an automatic exemption to mandatory subjects strongly suggests that the second prong of the test set forth in *Mackey* and *McCourt* is, in fact, somewhat broader and more flexible than their holdings connote.

As will be shown, the subject matter of the National Football League's draft eligibility rule is not a mandatory subject of bargaining but is, instead, a permissive subject.[112] Even if our characterization of the rule as a permissive subject of bargaining is wrong, however, a contrary determination that the matter falls within the area of compulsory bargaining would not result in automatic immunity.[113] While examination of the draft eligibility rule

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[111] In *Jewel Tea*, the Supreme Court baldly articulated a balancing test:

> The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests in union members.

Id. at 690 n.5.

> [A]lthough the effect on competition is apparent and real, . . . the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work.

Id. at 691. Thus, the Court found the importance of the issue to labor to outweigh its impact on competition. *Id.* at 691.

Professor Meltzer has observed that: "Whether any particular demand is exempt depends on weighing the interest in competition against the competing interests of the employees." Meltzer, *supra* note 39, at 724-26 (quote at 724). Professor Weistart and Lowell agree: "It is wholly proper that attention be given to the effect of a particular provision upon business competition. But the degree of restraint must be weighted against the type of employee interest at stake." J. WEISTART & C. LOWELL, *supra* note 29, at 536. On the other hand, Professor St. Antoine suggests a serious caveat to the weighing process. St. Antoine, *supra* note 39, at 615-16.

[112] *See infra* note 151 and accompanying text.

[113] *See* Mackey v. NFL, 543 F.2d 606, 614 n.14 (8th Cir. 1976), *cert. dismissed*, 438 U.S. 801 (1977). Professor Meltzer has observed that *Jewel Tea* teaches that "[t]he scope of [the] exemption was not co-extensive with the area of mandatory bargaining. Characterization of the subjects of agreement as mandatory appears, in other words, to be a necessary but not a sufficient condition of exemption." Meltzer, *supra* note 39, at 724. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975), too, appears to forecast a narrow range of protection to be accorded employee interests. In *Connell*, the union's objective was to expand employment opportunities for members. Although this purpose is of central concern to unions, the Supreme Court refused immunity. *Id.* at 621. "The primary importance of the decision would seem to be in its teaching that a direct, unmitigated market restraint will be sustained only where it is necessary to protect the most fundamental of employee interests." J. WEISTART & C. LOWELL, *supra* note 29, at 539 (citations omitted). As we have

to determine whether it is a mandatory or a permissive subject of bargaining is an important inquiry under the *Mackey-McCourt* standard, the issue of immunity ultimately turns on weighing employee interests against the impact of the agreement on competition. Determining the character of the subject matter as a mandatory or permissive subject of bargaining will reveal much about the relative importance of the issue to employees and therefore will greatly facilitate the balancing process.

The NLRA obligates employers to bargain collectively[114] regarding "wages, hours, and other terms and conditions of employment"[115] with the representative of his employees.[116] Together, then, these provisions extend the employer's obligation to bargain only as to those subjects within the meaning of "wages, hours, and other terms and conditions of employment" and only regarding the employer's "employees" in a "unit appropriate for such purposes" that the union represents.[117]

For two reasons, the draft eligibility rule is not a mandatory subject of bargaining. First, amateur athletes such as Walker are not employees to whom an employer's obligation to bargain flows. Second, the subject matter itself, employment eligibility, is not within the definition of wages, hours, and other terms and conditions of employment in this setting.

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argued, in the matter of Walker, the unmitigated restraint on entry to employment far outweighs the importance of the employee interests at stake.

[114] 29 U.S.C. § 158(d) defines "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." *Id.*

[115] 29 U.S.C. § 158(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)." *Id.*

[116] 29 U.S.C. § 159(a) states: "Representative designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." *Id.*

[117] *See supra* notes 114-16.

a. Amateur athletes are not "employees" within the meaning of the NLRA

In *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*,[118] the Supreme Court addressed the scope of the term "employee." The issue was whether the employer's unilateral modification of a health insurance program for retirees constituted an unlawful refusal to bargain. The Court first determined that retirees were not "employees" to whom the duties of the Act flowed.[119] In the Court's view, the legislative history of the Taft-Hartley Act dictated that the definition of the term "employee" should not be stretched beyond its plain meaning, which included only those who worked for another for hire.[120] Further, the Taft-

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[118] 404 U.S. 157 (1971).

[119] *Id.* at 164-76 and cases cited therein.

[120] *Id.* at 166.

The term "employee" is defined, unfortunately, by reference to itself. Section 152(3) of the Act provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

29 U.S.C. § 152(3).

Nevertheless, there was potent support for the Court's conclusion in *Pittsburgh Plate Glass*. In 1944, in NLRB v. Hearst Publications, 322 U.S. 111, 132, *reh'g denied*, 322 U.S. 769 (1944), the Supreme Court had sustained the Board's finding that newsboys were "employees" rather than independent contractors. The Court affirmed the Board's conclusion and stated that Congress intended "a wider field than the narrow technical legal relation of 'master and servant' as the common law had worked this out in all its variations. . . ." *Id.* at 124. Congress reacted to *Hearst* in 1947 by specifically excluding from the definition of "employee," "any individual having the status of independent contractor." The House Report of the Taft-Hartley Act explained:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, . . . between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and

Hartley amendment made it clear that general agency principles were to be looked to for the purpose of distinguishing between "employees" and independent contractors.[121]

Other important considerations support the narrow interpretation of "employee" and the conclusion that college undergraduates, like the retirees in *Pittsburgh Plate Glass*, are not "employees" within the meaning of the Act. A union is the exclusive bargaining representative only for the employees in an appropriate bargaining unit.[122] An appropriate unit is limited by a well-established National Labor Relations Board rule to those employees who share a "community of interest"[123] and excludes those persons outside that community whose interests would be submerged in an over inclusive and presumably unsympathetic, grouping.[124] In addition to finding the pensioners outside the meaning of "employee," the Court in *Pittsburgh Plate Glass* further concluded that active and retired employees "plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit."[125]

> it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.

H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947).

[121] *Pittsburgh Plate Glass*, 404 U.S. at 168. *See generally*, C. MORRIS, *supra* note 51, at 206-08, 772.

[122] 29 U.S.C. § 159(a). R. GORMAN, BASIC TEXT ON LABOR LAW 379 (1976); *Pittsburgh Plate Glass*, 404 U.S. at 171.

[123] To determine whether a "community of interest" exists among groups of employees, the Board looks to factors such as:

> (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

R. GORMAN, *supra* note 122, at 69. *See* 15 N.L.R.B. Ann. Rep. 39 (1950); C. Morris, *supra* note 51, at 217-19.

[124] *Pittsburgh Plate Glass*, 404 U.S. at 172-73; Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962); R. GORMAN, *supra* note 122, at 379.

[125] *Pittsburgh Plate Glass*, 404 U.S. at 173. The Court pointed to previous NLRB cases in which retirees had been excluded from a petitioned-for unit. *Id.* at 174-75. *See, e.g., In re*

Although they are merely prospective employees, undergraduate football players, clearly have a co-existing interest in future wages and benefits along with active unit members. As regards the matter at hand, however—entry barriers to employment—the interests of active and prospective players are diametrically opposed. Greater access to employment for prospective players will result in marginally less job security for active players. Thus, like the *Pittsburgh Plate Glass* pensioners who could not appropriately be grouped with active employees, undergraduate players such as Walker, because they are not employees, could not be appropriately placed in the same collective bargaining unit as active players. For example, Walker could not be eligible to vote in an election to determine the selection of a bargaining representative.[126] This denial of suffrage is critical. As the Court has pointed out: "[I]t would be clearly inconsistent with the majority rule principle of the Act to deny a member of the unit at the time of an election a voice in the selection of his bargaining representative."[127]

Since college undergraduates are not "employees" within the meaning of the Act, and could neither be included in a bargaining unit with active players nor vote for the selection of a bargaining representative, the duty to bargain on their "terms and conditions of employment" does not attach.

Public Service Corp., 72 N.L.R.B. 224, 229-30 (1947); *In re* J.S. Young Co., 55 N.L.R.B. 1174, 1175 (1944). The Court recognized the common concern of active and retired employees in assuring that the latter's benefits remained adequate, but also noted that the union might see fit to bargain for improved wages or other conditions at the expense of retirees' benefits. *Pittsburgh Plate Glass*, 404 U.S. at 173.

[126] Retirees in *Pittsburgh Plate Glass* were similarly found ineligible to vote. 404 U.S. at 174-75. Moreover, the NLRB has consistently held "that for one to be able to vote in a representation election, the person must be employed during the established payroll eligibility period and must also be employed on the day of the election." Macy's Missouri-Kansas Div. v. NLRB, 389 F.2d 835, 842 (8th Cir. 1968). *See* Gulf States Asphalt Co., 106 N.L.R.B. 1212, 1214 (1953).

[127] *Pittsburgh Plate Glass*, 404 U.S. at 175. As the Court recognized, this principle does not go so far as to preclude the NLRB from establishing reasonable regulations governing Board-conducted elections. For example, the Board may legitimately deny a ballot to employees hired after the eligibility cut-off date. *Id.* at 175 n.15. *See also Pittsburgh Plate Glass*, 177 N.L.R.B. 911, 919 (member Zagoria dissenting), *enforcement denied*, 427 F.2d 936 (6th Cir. 1970), *aff'd*, 404 U.S. 157 (1971).

b. The draft eligibility rule is not a mandatory subject of bargaining under the NLRA

As shown earlier, the employer's duty to bargain goes only to those matters falling within the statutory formulation of "wages, hours, and other terms and conditions of employment."[128] While the Act does not immutably fix a list of subjects within the statutory requirement,[129] one may say that mandatory subjects characteristically must settle an aspect of the employer-employee relationship.[130] At the same time, permissive subjects fall into two groups. One group's primary characteristics are that the subject concerns the relationship of the employer to third persons and is traditionally considered within the prerogative of management.[131] It is beyond cavil that Walker is such a third person and the conditions upon which he may be hired are normally matters within the prerogative of management.

Nevertheless, as the Court observed in *Pittsburgh Plate Glass*, there are some important exceptions to the rule that "matters involving individuals outside the employment relationship do not fall within [the mandatory] category."[132] In each case in which an exception has been found, however, it has been based upon a determination that in addition to involving parties outside the relationship, the issue also "vitally" affects the terms and conditions of

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[128] *See supra* text accompanying notes 101, 104-07. *Cf. Pittsburgh Plate Glass*, 404 U.S. at 176-82.

[129] During consideration of the Taft-Hartley amendments to the NLRA, the House Bill contained an actual list of mandatory subjects of bargaining. *See* H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947) *reprinted in* 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 31, 40 (1948). Congress rejected this approach in favor of continuing to vest the NLRB with power to define mandatory subjects of bargaining on a case-by-case basis. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 675 n.14 (1981). *See also* McCormick, *Union Representatives as Corporate Directors: The Challenge to the Adversarial Model of Labor Relations*, 15 U. MICH. J.L. REF. 219, 227 n.42 (1982).

[130] "In general terms, the limitation in [§ 8(d)] includes only issues that settle an aspect of the relationship between the employer and employees." *Pittsburgh Plate Glass*, 404 U.S. at 178. R. GORMAN, *supra* note 123, at 523; *cf.* NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958) ("wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining).

[131] R. GORMAN, *supra* note 122, at 523.

[132] 404 U.S. at 178. *See* R. GORMAN, *supra* note 122, at 528-29.

employment of active employees.[133] Thus, in *Local 24, International Brotherhood of Teamsters v. Oliver*,[134] for example, the union and the employer negotiated a minimum rental fee that the employer would pay to truck owners who used their own vehicles in the employer's service in place of the employer's own employees. Due to the direct and potentially devastating impact of an inadequate rental fee on the employees' job security, the Court concluded that the term "was integral to the establishment of a stable wage structure for [employees]"[135] and, consequently, held that it was a mandatory subject of bargaining. Similarly, in *Fibreboard Paper Products Corp. v. NLRB*,[136] the Court held that a subcontracting provision that replaced employees in the existing unit with those of an independent contractor to perform the same work under similar working conditions was a mandatory subject of bargaining. Again, however, the critical factor in determining whether the bargaining subject was mandatory was that the third party matter and employee job security were intimately and directly related.

In *Pittsburgh Plate Glass*, on the other hand, the Court found that the effect of pensioners' insurance benefits on active employees was too insubstantial to bring the issue within the collective bargaining obligation.[137] In the Court's view, the effect of pensioners' insurance benefits on the "terms and conditions of employment" of active employees was "hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*."[138] The Court further

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[133] *Pittsburgh Plate Glass*, 404 U.S. at 179. As a result, "[t]he employer may be obligated to bargain about payments to third persons which directly threaten the wages of its own employees, or about subcontracting to third parties." R. GORMAN, *supra* note 123, at 529. *See also* UMW, 231 N.L.R.B. 573 (1978). There, the Board determined that a successorship clause was a mandatory subject of bargaining because "agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership." *Id.* at 575.

[134] 358 U.S. 283 (1959).

[135] United States v. Drum, 368 U.S. 370, 383 n.26 (1962) (discussing *Oliver*, 358 U.S. at 294).

[136] 379 U.S. 203 (1964).

[137] 404 U.S. at 180.

[138] *Id.* The Court recognized that active employees might benefit by the inclusion of retired employees under the same health insurance contract as active employees because adding persons to the group generally tends to lower the overall rates for coverage. The

observed that the interests of active and retired employees might not be harmonious. Although the union might find it advantageous to bargain for improvements in pensioners' benefits, it might nevertheless find improvement of current income for active employees to be a more desirable objective.

In the matter of Walker, the draft eligibility rule erects an artificial obstacle to employment for amateur athletes that incidentally benefits marginal players whose place on team rosters would be threatened by the rule's abolition. This benefit could hardly be said to "vitally" affect the terms and conditions of employment for unit members. Moreover, the situation is not even remotely analogous to the wholesale loss of jobs for unit employees threatened in *Oliver* and *Fibreboard.* In fact, the interests of current and prospective employees are far more at odds than they are in harmony. It is, of course, possible that the NFLPA would seek the removal of the rule. The far greater likelihood, however, is that the union would less vigorously represent the interests of persons not yet employed when those interests conflicted with the job security of active players.

The draft eligibility rule concerns the relationship between the employing clubs and persons outside the collective bargaining relationship without vitally affecting active players. In addition, the interests of prospective players and active players regarding the rule conflict. As a result, the draft eligibility rule does not come within the exception to the rule that matters involving persons outside the employment relationship are permissive rather than mandatory subjects of bargaining. Being a non-mandatory subject, the eligibility rule fails the second prong of the *Mackey-McCourt* standard, and consequently, should not be immunized from antitrust interdiction.

It might appear obvious that during his college years Walker was

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Court, nevertheless, found this impact to be "speculative and insubstantial at best." *Id.* The NLRB in *Pittsburgh Plate Glass* had also observed that "changes in retirement benefits for retired employees affect the availability of employer funds for active employees." 177 N.L.R.B. at 915. The Court answered that this impact on active employees was, as well, "too insubstantial" to render the subject a matter of compulsory negotiation. 404 U.S. at 176-77 n.17.

not an employee and that the draft eligibility rule concerns neither wages, hours, nor working conditions. This lengthy inquiry into the nature of the subject matter is necessary, however, because under certain circumstances, persons outside the bargaining unit, including applicants for employment[139] and registrants at hiring halls,[140] are "employees" within the ambit of the Act. It is also true that hiring halls, which have the effect of regulating access to employment opportunities, are mandatory subjects of bargaining.[141] Therefore, an argument by analogy might be tendered that the draft eligibility rule constitutes a mandatory subject of bargaining that ought to be afforded immunity from antitrust scrutiny. While the matter is not wholly free from doubt, on balance it appears that the context in which the draft eligibility rule arises is sufficiently distinguishable from that of hiring halls to conclude that the subject matter of the rule does not constitute a mandatory bargaining subject. In the NLRB cases that held the Act to encompass prospective employees, the issue arose in the context of an employer's refusal to hire, or a union's refusal to refer for employment, rather than in the bargaining context presented here. As the Supreme Court has recognized, the extension of the Act's protection against discrimination to job applicants "is an inevitable corollary of the principle of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply."[142] As has been shown, however, and as the Court recognized in *Pittsburgh Plate Glass*,[143] democratic principles underlying the Act preclude the representation aspects of the Act from attaching before an employee's actual hire.[144]

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[139] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 182-87 (1941).

[140] Local 872, Int'l Longshoremen's Ass'n, 163 N.L.R.B. 586 (1967).

[141] Houston Chapter, Assoc. Gen. Contractors, 143 N.L.R.B. 409, 441 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

[142] *Phelps Dodge*, 313 U.S. at 185. *See* Atlantic Maintenance Co. v. NLRB, 305 F.2d 604 (3d Cir. 1962) (an employer's discriminatory refusal to hire an applicant is a violation despite the employer arguing that persons must be "employees" to come within the Act's protection). *See also* Local 872, Int'l Longshoremen's Ass'n, 162 N.L.R.B. 586 (1967) (union unlawfully refused to consider applications for employment and requests for desirable jobs from persons who were not union members and persons who had filed unfair labor practice charges against union).

[143] *See supra* text accompanying note 127.

[144] *See supra* text accompanying notes 122-27. Two NLRB members have stated: "Al-

While it is true that hiring halls frequently constitute mandatory subjects of bargaining, an argument by analogy that the draft eligibility rule also constitutes a mandatory subject of bargaining fails. In *Houston Chapter, Associated General Contractors*,[145] the NLRB held that employment included the initial act of hire and that the hiring halls was a mandatory subject of bargaining. The NLRB stated that: "[W]e do not deem the Supreme Court to have limited its definition of 'employees' to those individuals already working for the employer. Rather, the Court contemplated prospective employees as also within the definition."[146] Consequently, the Board extended the scope of mandatory bargaining to include matters directly affecting prospective employees. It must be emphasized, however, that the Board found it "highly significant" that the case arose in the context of the building and construction industry—"an industry characterized by intermittent employment which has received special statutory consideration."[147] Because employees are frequently laid off and rehired within the construction industry, active and prospective employees share a strong mutual concern about opportunities for employment which are directly affected by the job priority standards established by the hiring hall.[148] The professional football industry is the antithesis of the construction industry in that employees are frequently employed

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though the Court [in *Phelps Dodge*] held that the Act protects applicants for employment against discrimination in the hiring process, that case by no means stands for the proposition that prospective employees are employees as to whom bargaining is mandatory under Section [158(d).]" Houston Chapter, Assoc. Gen. Contractors, 143 N.L.R.B. 409, 417 (1963) (members Rodgers and Leedom, dissenting), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

[145] 143 N.L.R.B. 409 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

[146] *Id.* at 412 (citations omitted).

[147] *Id.*

[148] The court of appeals in *Houston Chapter* also placed great emphasis on the factual setting for the hiring hall demand. The Court found that:

> The record here discloses that employment in the construction trade is transitory in nature, with employees moving from job to job and employer to employer. The nature of the employment does not lend itself to employee security through seniority rights. The proposal of the union was to establish a system of seniority rights and job priority through the use of non-discriminatory hiring hall.

349 F.2d at 452. The court in NLRB v. Tom Joyce Floors, 353 F.2d 768 (9th Cir. 1965), found hiring halls to be a mandatory subject of bargaining for the same reason.

by a single employer for the duration of their careers.[149]

The purpose of the draft eligibility rule is primarily to provide NFL teams with a farm system for the training of future players. This benefit inures solely to employers and provides no contemporaneous benefit to employees. The entire justification for hiring halls is grounded on their value in "eliminat[ing] wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers."[150] It is clear that the justification for the extension of mandatory subjects of bargaining to encompass union hiring halls in the construction industry does not apply in professional football. It is also clear that most matters regarding the conditions precedent to the establishment of working conditions are not within the duty to bargain.[151] Accordingly, the NFL rule does not come within the narrow exception to the rule that prehire matters are non-mandatory subjects of bargaining and falls short of the second prong of the *Mackey-McCourt* test. Any argument suggesting that the draft eligibility rule

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[149] The average playing career of an NFL player is 4.6 years. NFLPA, *Q. Why a Percentage of Gross?* 4 (Sept. 1981) (a report to NFLPA members). In 1981, of 137 players who were free agents, none were signed by a different team. Since 1977, a total of 510 players have been free agents. Six have been signed by new teams. *Id.* at 34.

[150] Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 672 (1961) (quoting Mountain Pacific Chapter, Assoc. Gen. Contractors, 119 N.L.R.B. 883, 896 n.8 (1957)). In the unlikely event the draft eligibility arrangement was viewed as being sufficiently like a hiring hall to make the issue a mandatory subject of bargaining, the arrangement would necessarily be analogized to an exclusive hiring hall. It is well established that a union violates sections 158(b)(1)(A) and 158(b)(2) of the NLRA when it operates a hiring hall upon unreasonable, arbitrary, or capricious considerations. *See, e.g.*, Journeymen Pipe Fitters Local 392, 252 N.L.R.B. 417 (1980); Painters Local 1555, 241 N.L.R.B. 741 (1979); Laborers, Int'l Union, Local 282, 236 N.L.R.B. 621 (1978); International Ass'n of Bridge Workers Local 433, 228 N.L.R.B. 1420 (1977), *enforced*, 600 F.2d 770 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); Local 174, Int'l Bhd. of Teamsters, 226 N.L.R.B. 690 (1976). The requirements of the draft eligibility rule are wholly irrelevant to the successful performance of the job of a professional football player. Therefore, considerations such as those embodied in the draft eligibility rule would be outside those upon which the union could permissibly exclude applicants.

[151] For example, in Local 164, Bhd. of Painters of America, 126 N.L.R.B. 997 (1960), *enforced*, 293 F.2d 133 (D.C. Cir.), *cert. denied*, 368 U.S. 824 (1961), the Board considered the question whether a union proposal that the employer post a performance bond was a mandatory subject of bargaining. The Board decided that it was unwilling to say that a condition precedent to employment is a condition of employment, such as wages and hours, in the meaning of the statute. 126 N.L.R.B. at 1002.

is sufficiently like the hiring hall to make bargaining over the subject obligatory overlooks the fact that the hiring hall serves a unique and important function in the setting of industries with frequent employee turnover. The draft eligibility rule serves no analogous function.

3. *Bona Fide Arm's-Length Bargaining*

The third prong of the *Mackey-McCourt* standard requires that the restraint under scrutiny be a product of vigorous collective bargaining before immunity will attach. In both *Mackey* and *McCourt*, the critical factor was the extent to which the free agent indemnity rule under challenge was the product of actual bargaining. In *Mackey*, as in the present situation, the rule under scrutiny had been made part of the collective bargaining contract between the NFL and the NFLPA through incorporation by reference.[152] The League there argued, as it could be expected to in a challenge to the draft eligibility rule, that the rule's incorporation into the collective bargaining contract immunized it from antitrust scrutiny. The *Mackey* court, however, determined that the Rozelle Rule was not, in fact, the product of "bona-fide arm's-length bargaining."[153] The court reviewed the recent bargaining history and found that the rule remained unchanged since its unilateral implementation prior to collective bargaining.[154] The opinion affirmed the district court's finding that the union had received no *quid pro quo* for the rule's inclusion in the collective bargaining contract.[155]

In *McCourt* the district court noted that the terms of the challenged contractual provision were identical to a rule adopted by the owners three years earlier.[156] Therefore, the court concluded that the rule had been "unilaterally" included in the collective bargaining agreement, was not the product of bona fide arm's-length

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[152] Mackey v. NFL, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[153] *Id.* at 616.

[154] *Id.* at 610-13.

[155] *Id.* at 616.

[156] McCourt v. California Sports, Inc., 460 F. Supp. 904, 910-11 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

bargaining and would not come within the labor exemption.[157] The Sixth Circuit disagreed with the district court's characterization of the bargaining process. The appellate court observed that the players' association had employed several bargaining tactics, including the threat of a strike and antitrust litigation,[158] but had failed in its effort to alter the League's position on this issue.[159] Since the League had assented to other benefits in exchange for the provision under challenge, its inclusion in the agreement was the result of legitimate, albeit hard, bargaining.[160] Available evidence reveals that the draft eligibility rule, incorporated by reference into the collective bargaining agreement is not the product of actual give-and-take during negotiations.[161] This fact alone places the matter beyond the standard for immunity set forth in *Mackey* and *McCourt*.

In addition, although the requirement of actual bargaining has not been a factor in Supreme Court review of the labor exemption,[162] it has been a critical determinant in antitrust challenges to reserve system components in professional sports.[163] In *Philadel-*

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[157] *Id.*

[158] 600 F.2d at 1202.

[159] *Id.* at 1202 n.12.

[160] *Id.* at 1203.

[161] Interview with Richard A. Berthelsen, Assistant Executive Director, NFLPA (January 9, 1982). According to Berthelsen, discussion of the draft eligibility rule had been specifically excluded from collective negotiations. At the same time, however, the Preamble to the 1977 agreement between the NFL and the NFLPA states: "Whereas, the NFLPA and the Management Council mutually acknowledge that this Agreement is the product of bona fide, arms-length collective bargaining." NFLPA Collective Bargaining Agreement 6 (Mar. 1, 1977).

[162] Indeed, in Supreme Court cases, the unions and not the employers had initially proposed and bargained for the adoption of the challenged restraints. *See, e.g.*, Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975). *See also* Weistart, *supra* note 89, at 113-14.

[163] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 288 (1972) (Marshall, J., dissenting); Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979), Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 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).

phia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., for example, a franchisee of the fledgling World Hockey Association alleged that the National Hockey League (NHL) reserve clause, league affiliation agreements, and other devices to control player mobility were violative of the antitrust laws.[164] The district court, in finding for the plaintiffs,[165] gave careful attention to the extent of actual bargaining between the NHL and the Player's Association over the reserve system restraints under attack. The court observed that the matter had originally been inserted in individual player contracts before the advent of the players' union. The court, while finding as a matter of fact that the arrangement under attack had been "discussed," refused to conclude that it was a product of "collective bargaining."[166] Similarly, in *Robertson v. NBA*,[167] a group of professional basketball players attacked components of the reserve system and the draft as impermissible restraints on trade. The League urged a two-prong standard for immunity: "(1) Are the challenged practices directed against nonparties to relationship; if they are not, then (2) are they mandatory subjects of collective bargaining? If the answer to No. 1 is no and to No. 2 yes, the practices are immune . . . ."[168] The court stated that if the practices under scrutiny had been the subject of collective bargaining, then a subsequent agreement might have been insulated from antitrust interdiction. In *Robertson*, however, the court found as a matter of fact there had been no tradeoff or exchange between the parties over the issue. The court embraced the

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[164] 351 F. Supp. 462 (E.D. Pa. 1972).

[165] The court enjoined the National Hockey League from bringing actions against players whose contracts, but for the reserve clause, had expired. *Id.* at 519.

[166] 351 F. Supp. at 484-86. The court found that the players' association had not received any trade-offs in return for an agreement to maintain the clause and that although the players' association had requested a modification in the reserve clause, neither side had modified its position. The court noted that in Supreme Court cases, a grant of immunity had followed actual collective bargaining and held that such immunity in this case failed for want of "serious, intensive, arm's-length collective bargaining." *Id.* at 499. The court also took note that in all Supreme Court cases addressing the labor exemption, the putative restraint had been sought by the union while here the union opposed the matter. *Id.* at 498.

[167] 389 F. Supp. 867 (S.D.N.Y. 1975).

[168] *Id.* at 886 (NBA argued this standard was derived from UMW v. Pennington, 381 U.S. 667 (1965), and Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965)).

same standard set forth in *Philadelphia World Hockey*, namely, "[s]erious, intensive, arm's-length bargaining."[169]

It appears that the justification for the requirement of actual negotiations is two-fold. First, actual bargaining is strong evidence that, in the end, the union considered and approved of the restraint.[170] Given the origins of the exemption as a protective device for unions, such a requirement has been thought necessary by reviewing courts.[171] Second, to the extent that labor exemption doctrine has been extended to insulate collective bargaining agreements as well as union activities from antitrust review, the requirement insures that actual bargaining takes place and prevents the exemption from becoming a mechanism by which employers utilize a weak union to shield otherwise unlawful activities.[172]

It would appear, however, that the requirement of "actual bargaining" is fraught with danger and should be applied only in narrowly circumscribed situations. The distinction between discussion and bargaining is too obscure to discriminate the licit from the illicit. The NLRA, of course, requires that parties bargain in good faith over mandatory subjects of bargaining.[173] While the Board will outlaw disengenuous or "surface bargaining,"[174] there is no requirement that parties modify original positions or otherwise make

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[169] *Id.* (quoting *Philadelphia World Hockey*, 351 F. Supp. at 499-500).

[170] To the extent that a general principle emerges from the [Robertson] case, it seems to be the same point made by the court in *Philadelphia World Hockey*: the labor exemption will be applied only to those practices which have been approved by the union. The approval which is given must be more than passive acquiescence and be the product of serious, good faith bargaining.

J. WEISTART & C. LOWELL, *supra* note 29, at 573 (citations omitted).

[171] *See id.*

[172] In United States v. Hutcheson, 312 U.S. 219 (1941), the Court held that the labor exemption immunized a union from antitrust liability for certain secondary boycott activities "so long as a union acts in its self interest" and does not conspire with non-labor groups. *Id.* at 232. *Hutcheson* has "had significant effect in cementing the notion that the promotion of employee interests was a critical ingredient in the grant of the exemption." Weistart, *supra* note 89, at 114 n.30.

[173] *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Co., 356 U.S. 342 (1958); *see also* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

[174] *See, e.g.*, NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

exchanges as to any particular matter.[175]

The particular posture under which the prior sports cases arose unquestionably contributed to the development of the requirement of "actual" bargaining. In all such cases, the employment terms under scrutiny antedated the establishment of a mature collective bargaining relationship between the owners and players. The unions were, relatively speaking, weak.[176] Later, when a component of the reserve system appeared in a collective bargaining agreement and was challenged by disaffected players, the teams sought a grant of immunity under the labor exemption. Courts were unwilling to permit the employers to use the union as a shield to protect them from clear liability for restraints which were, in effect, unilaterally imposed. Given the fact that the original purpose of the labor exemption was to protect unions and their legitimate organizational and collective bargaining activities, the prospect that the labor exemption doctrine might be used as "a cat's-paw to pull the employers' chestnuts out of the antitrust fires"[177] was an unsavory one for courts. Since the unions in professional sports have matured, however, there is less justification for the requirement of "actual bargaining" when the subject matter appears in the collective bargaining contract.[178] Now there is considerably more reason to assume that if a matter appears in a collective bargaining contract, either directly or by reference, that it is the product of arm's-length bargaining.[179]

If bona fide arm's-length bargaining were the only ground for finding the eligibility rule not covered by the labor exemption, then one should not conclude that the matter falls outside the area of immunity. Given the determination stated earlier that the matter fails all three prongs of the standard, however, lack of actual

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[175] *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956).

[176] *See generally* Krasnow & Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749, 759-66 (1963).

[177] United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1948).

[178] Professor Weistart has argued, "If the parties to the disputed agreement have a long-standing and well-established bargaining relationship . . . it is difficult to imagine the justification for questioning the effectiveness of either side's consent to a particular term in a particular negotiation." Weistart, *supra* note 89, at 128-29 (citation omitted).

[179] *Id.* at 128-31.

bargaining is one more justification for not extending immunity. More importantly, the fact that the draft eligibility rule has not been subjected to actual negotiation gives rise to the question of what effect vigorous bargaining between the NFL and the NFLPA should have upon labor exemption applicability. Realistically, this third prong of the *Mackey-McCourt* standard adds nothing to the necessary analytical task of balancing employee interests against anticompetitive effects. Because the third prong of the standard is the least justifiable measure of labor exemption applicability, it can be concluded that even if the parties were to vigorously bargain over the draft eligibility rule, a subsequent agreement on the matter would not immunize the rule under the labor exemption.

This section has demonstrated that the draft eligibility rule clearly fails the first two prongs of the *Mackey-McCourt* test for applying the labor exemption. The effect of the restraint on trade does not fall primarily only on the parties to the collective bargaining relationship but on college football players who are precluded from joining professional leagues. The eligibility rule is not a mandatory subject of collective bargaining as defined by statute and judicial precedent. Moreover, even if the rule meets the third prong of the test and was actually bargained for, which is a difficult factual determination under the circumstances, that fact would and should not be sufficient to apply the labor exemption. It would not justify exemption because the test is cumulative rather than alternative, and all three prongs must be met. It should not justify exemption because the presence or absence of actual bargaining over a provision adds little to the analysis of its effect on the conflicting goals of antitrust law and labor law—unrestrained economic competition versus protection of legitimate employee concerns. Inasmuch as the labor exemption is not available to save the draft eligibility rule from antitrust scrutiny, the next section examines the rules of both leagues under substantive antitrust doctrine.

III. The Antitrust Laws

The basic policy of the federal antitrust laws is to prohibit unreasonable restraints on economic competition.[180] One of the oldest and best established of these restraints is a contract which unreasonably forbids anyone from practicing his calling.[181] When an athlete is declared ineligible for the professional football draft, he is effectively prevented from practicing his trade.

The draft eligibility rule is only one of a number of player restraint rules which have been imposed upon professional athletes by the concerted action of team owners. Many of these rules directly restrained competition for player services by impeding the free movement of players between teams.[182] Because these rules were the product of an agreement by the owners which seriously interfered with a player's ability to freely practice his trade, they were challenged as illegal under the Sherman Act. In most cases, the players successfully claimed that the rules were concerted refusals to deal or group boycotts, which unreasonably restrained competition for player services.[183] Since the draft eligibility rule is

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[180] Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911). The Court said:

> [T]he dread of enhancement of prices . . . which . . . would flow from the undue limitation on competitive conditions caused by contracts or other acts . . . led . . . to the prohibition . . . [of] all contracts or acts which were unreasonably restrictive of competitive conditions, either from the[ir] nature . . . or where . . . the[y] had not been entered into or performed with legitimate purpose of reasonably forwarding personal interest and developing trade . . . .

Id. at 58.

[181] Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (opinion by L. Hand).

[182] Typical examples are: (1) reserve and option clauses, (2) the draft, and (3) no-tampering rules. *See generally* J. Weistart & C. Lowell, *supra* note 29, at 500-24.

[183] Linseman v. WHA, 439 F. Supp. 1315 (D. Conn. 1977) (league rule declaring that players younger than twenty years of age were not eligible for the WHA draft struck down); Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979) (NFL player draft, as it existed in 1968, struck down); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (Rozelle Rule, which required compensating a player's former employer if he signed with another team, was struck down on the ground that it deterred clubs from signing free agents); Bowman v. NFL, 402 F. Supp. 754 (D. Minn. 1975) (league resolution which prevented players from the defunct WFL from signing contracts with NFL teams until the season ended declared illegal); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (group boycott of quarterback Joe Kapp for refusing to sign standard player

a restraint on competition for the services of college athletes, it too is illegal if it unreasonably restrains competition. Any inquiry into the legality of the rule must begin with a review of the Supreme Court cases dealing with boycotts and concerted refusals to deal.

A. *The Supreme Court—Boycotts and Concerted Refusals to Deal*

While section I of the Sherman Act,[184] if read literally, would condemn every type of concerted restraint of trade, the Supreme Court has interpreted the statute as prohibiting only undue or unreasonable restraints of trade.[185] This rule of reason as formulated by the Court left a good deal open to inquiry and proved difficult and time-consuming to apply. Under the rule, it is first necessary to perform an in-depth analysis of the facts of the case to identify the exact nature of the practice involved. The trial court is required to hear evidence concerning the purpose of the activity. If it is determined that the purpose of the practice was to limit competition, then it is declared illegal. If, on the other hand, it is determined that there was no anticompetitive purpose, the inquiry is not at an end. It is then necessary to assess the effect on competition. If the net effect of the practice is to lessen competition, then it is likewise illegal.[186]

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contract held illegal); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (NBA's version of the Four-Year Rule declared illegal).

[184] 15 U.S.C. § 1 (1976). This section states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.*

[185] Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911). In this case there was no reason to engraft upon section 1 of the Sherman Act a qualification of reasonableness. Standard Oil controlled almost 90% of the nation's refining capacity. It had achieved this position by employing business practices which could not be justified as normal competitive practices. It had coerced railroads into granting it preferential rates, engaged in local price discrimination and business espionage, and committed other vicious acts intended to force local competitors out of business. *Id.* Chief Justice White went beyond these clear facts and attempted a lengthy, and for this case unnecessary, statutory explication resulting in the rule of reason.

[186] The test of legality is whether the restraint imposed merely regulates competition, or suppresses or destroys 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 actual or

It did not take very long for the Court to determine that there are certain types of agreements which have such a pernicious effect on competition that they can be conclusively presumed illegal without any elaborate inquiry into the precise harm which they caused.[187] This principle of per se unreasonableness has been applied to price fixing,[188] market divisions,[189] boycotts,[190] and tying arrangements.[191]

Whenever a court discusses per se violations, it invariably mentions group boycotts and concerted refusals to deal.[192] The Supreme Court has been quick to condemn such restraints in language which implies that these arrangements are always a violation of the Sherman Act. In *Paramount Famous Lasky Corp. v. United*

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probable effect. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained, are all relevant facts. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[187] In United States v. Trenton Potteries Co., 273 U.S. 392 (1927) the defendants, who controlled 82% of the market, had formed a cartel which fixed prices and limited sales to specified jobbers. Defendants were convicted in a criminal case. The court of appeals reversed, holding incorrect an instruction to the jury that if they found price fixing they should not consider whether or not the prices fixed were reasonable. The Supreme Court reinstated the verdict. In an opinion by Mr. Justice Stone, it ruled that the trial court had been right, saying:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. . . . The reasonable price fixed today may through economic or business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable . . . .

Id. at 397. Read literally, the cases hold that proof of the mere existence of a price-fixing agreement establishes defendant's illegal purpose and that the prosecution need show nothing further. *See also* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[188] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Albrecht v. The Herald Co., 390 U.S. 145 (1968); Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

[189] United States v. Topco Assoc., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[190] United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941).

[191] United States Steel Corp. v. Fortner Enter., 429 U.S. 610 (1977); International Salt Co. v. United States, 332 U.S. 392 (1947).

[192] L. SULLIVAN, *supra* note 40, at 229, 261.

States,[193] for example, a group of film distributors agreed that they would include in every standard exhibitor contract a clause which required arbitration of all disputes. They further agreed that none of them would deal with any exhibitor who refused to agree to such terms. The Court rejected the industry's claim that the clause in its agreement requiring that there be no dealing with non-complying exhibitors was necessary to protect the industry against undesirable practices. The opinion stated, "It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal."[194]

Similarly, in *Fashion Originators' Guild, Inc. v. FTC*,[195] when a group of manufacturers of women's clothing agreed to refuse to sell their products to any retailer who sold garments which had been copied from a guild member, the Court had no difficulty finding that such a practice was illegal.[196] The defendants' aim to protect themselves from allegedly illegal conduct was no justification. The Court held that "[u]nder these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."[197]

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[198] the Court reiterated that group boycotts or concerted refusals to deal could not be saved by allegations that they were reasonable.[199] In keeping with

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[193] 282 U.S. 30 (1930).

[194] *Id.* at 43. Any doubt about whether a per se approach was being used in these cases was dispelled when the Court said: "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

[195] 312 U.S. 457 (1941).

[196] *Id.* at 468.

[197] *Id.* at 468.

[198] 359 U.S. 207 (1959).

[199] *Id.* at 212. In *Klor's*, a large department store used its economic power to coerce then national appliance manufacturers and their distributors to stop selling to a competing appliance store. *Id.* at 209.

its rigid view regarding such practices, the Court has held that the agreement of a group of automobile dealers to encourage General Motors to stop selling to discount outlets was a classic conspiracy amounting to a group boycott and therefore per se illegal.[200]

Based on the above cases, it would seem that any concerted action by competitors, including a league's concerted refusal to draft a college football player, constitutes a per se violation of the Act. There is, however, the possibility that under certain circumstances, an otherwise per se violation might be permitted if it comes within the so-called *Silver* exception.

1. *The Silver Exception*

In *Silver v. New York Stock Exchange*,[201] the Court indicated that under certain circumstances a practice which would ordinarily be a per se violation of the Sherman Act might be permitted. In holding that the Exchange had violated the Sherman Act because it excluded a broker from access to its facilities without a hearing, the Court stated that "absent any justification derived from the policy of another statute or otherwise," the action of the Exchange would be illegal per se.[202] This language implies that the Court has left the door open for otherwise impermissible restraints in certain types of self-regulatory schemes.

Whether the door is merely cracked or flung wide open, however, has been the subject of much debate. Some believe that *Silver* sets forth a very narrow exception mandated by legislative action.[203]

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[200] United States v. General Motors Corp., 384 U.S. 127 (1966).

[201] 373 U.S. 341 (1963). Silver was a securities dealer in Dallas, Texas. His firm was not a member of the New York Stock Exchange ("NYSE"). Initially, the New York Stock Exchange gave "temporary approval" to Silver to establish direct private telephone connections to several NYSE member firms as well as stock ticker service directly from the floor of the Exchange in New York City. Subsequently, without prior notice to Silver, the NYSE decided to disapprove these connections and instructed its member firms to disconnect the lines to Silver.

[202] *Id.* at 348-49.

[203] Blalock v. Ladies Prof'l Golf Ass'n, 359 F. Supp. 1260, 1265-67 (N.D. Ga. 1973) (the suspension of the plaintiff for alleged cheating was declared unlawful per se because players excluded a rival from the market and thus effected " 'a naked restraint of trade' " through defendant's "completely unfettered, subjective discretion") (quoting McQuade Tours, Inc. v.

Others read the case more expansively,[204] and have set forth the following three requirements:

> (1) The industry structure requires self-regulation.
> (2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
> (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.[205]

2. *The Rule of Reason*

In spite of the strong language used by the Supreme Court, there have been numerous lower court decisions upholding various types of self-regulatory schemes that have the effect of a boycott.[206] A number of commentators have attempted to reconcile these cases with the Supreme Court's apparent hostility to all forms of concerted refusals to deal,[207] but the explanations given for these decisions are almost as numerous as the cases themselves. Inasmuch as the eligibility rule is a central provision of the professional football's draft system, which is arguably a self-regulatory scheme, it is necessary to venture into this legal "no man's land."

Consolidated Air Tour, 467 F.2d 178, 187 (5th Cir. 1972)). *See also* L. SULLIVAN, *supra* note 40, at 247.

[204] J. WEISTART & C. LOWELL, *supra* note 29, at 599; *see also* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

[205] *See* United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980); Linseman v. WHA, 439 F. Supp. 1315, 1321 (D. Conn. 1977), *injunction reinstated sub nom.* Haywood v. NBA, 401 U.S. 1204 (1971). *See also* Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

[206] *See* North American Soccer League v. NFL, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part & rev'd in part*, 670 F.2d 1249 (2d Cir. 1982). *See also* Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Deesen v. Prof'l Golfer's Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966).

[207] *See* L. SULLIVAN, *supra* note 40, at 229-33; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); Comment, *Player Control Mechanisms in Professional Sports*, 34 U. PITT. L. REV. 645 (1973).

In an effort to establish some guidelines, Professor Sullivan proposes that only classic boycotts should be per se violations while other forms of concerted action should be analyzed under the rule of reason.[208] A classic boycott occurs when a group of competitors seek to protect themselves from competition from non-group members by taking concerted action aimed directly at depriving their competitors of some essential trade relationship. For example, in order to drive a troublesome price-cutter out of the market, a group of automobile manufacturers might agree to stop buying steel from a supplier unless the supplier refused to sell its product to the non-group auto manufacturer.[209] Since under these circumstances the purpose is clearly anticompetitive, there is no justification for engaging in any extended factual analysis. The benefits of such an arrangement are minimal, and the dangers to competition are substantial. Thus, Professor Sullivan's approach is based on analyzing the purpose and effect of the agreement. If the purpose is anticompetitive, then it should be conclusively presumed illegal. If, on the other hand, the purpose of the practice is not to restrain competition, but its effect is anticompetitive, it should be analyzed under the rule of reason.

This apparently is true even if the boycott is also used to achieve a reasonable program of industry self-regulation. In *Silver*,[210] for example, the Court rejected the use of a boycott as a means of self-policing. In holding that such action violated the Sherman Act, the Court stated that the reasons for the action were irrelevant.[211] The Court further stated that the boycott, if not exempt under the Securities and Exchange Act, would be a per se violation.[212]

On the other hand, there are arrangements which do not have

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[208] L. SULLIVAN, *supra* note 40, at 229-33.

[209] The desired end can be achieved in a number of ways. For example, boycotting wholesalers may exclude from the wholesale level manufacturers or retailers seeking to integrate vertically. Or, a group such as brokers may seek to protect themselves from competition from non-group members by concertedly ceasing to deal with them. Sometimes boycotters coerce one or more suppliers or customers to stop dealing with the boycott target. *Id.* at 230-31.

[210] 373 U.S. 341 (1963).

[211] *Id.* at 365-66.

[212] *Id.* at 347.

the purpose of harming competition, but may nevertheless have the effect of a boycott. These are referred to as concerted refusals to deal.[213] In these cases, a group of competitors agree to take some concerted action which has the effect of excluding a noncompetitor from the market place. For example, a group of soft drink manufacturers might agree to not use saccharin in their product. The effect of this arrangement is that none of the manufacturers will deal with the supplier of saccharin. This arrangement has neither the purpose nor the effect of the classic boycott, which is to put a competitor out of business. Thus, in Sullivan's view, it should be judged by the rule of reason.

Another commentator, using an approach developed by Professor Coons, has taken a somewhat different view of the problem. According to this approach, the legality of the concerted action should be judged by whether its purpose is commercial, motivated by pursuit of profit, or noncommercial.[214] If the group's purpose is commercial,[215] it should be judged by the traditional rules which apply to boycotts. If, on the other hand, the group's purpose is noncommercial and is found to further a socially beneficial goal, then it should be upheld.[216]

This approach appears to be unworkable in the present situation. A group of noncompetitors will always have only noncommercial purposes in mind when they engage in any concerted action. For example, a group of parents who agree to boycott an X-rated movie theatre are only interested in protecting themselves, their families, and their neighborhood from the influence of the theatre. On the other hand, the purposes of a group of competitors will

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[213] *See* L. SULLIVAN, *supra* note 40, at 256-59.

[214] Comment, *supra* note 207.

[215] Purpose should be differentiated from intent. A group's purpose is its ultimate goal, while its intent is its immediate goal. Thus, in a group of private citizens who agree to withdraw their patronage from those theatres which show X-rated movies, for example, their purpose would be to promote public morality and their intent would be to bring economic sanctions upon those owners who show X-rated movies. *Id.* at 656-57.

[216] At least as regards the services of football players, there is no doubt that the teams are competitors. *See* North American Soccer League v. NFL, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part & rev'd in part*, 670 F.2d 1249 (2d Cir. 1982). Professor Coons observes that "in any case involving businessmen acting with reference to their businesses, the Court will disregard any oddment of non-commercial purpose." Coons, *supra* note 207, at 727.

generally be both commercial and noncommercial. For example, a league would probably seek to justify the rule because it insures that each player will have an opportunity for a college education,[217] promotes player safety[218] and is necessary to insure a pool of talented players for the League.[219] While the first two reasons are nonprofit oriented, the third reason is basically economic in nature. When the purposes are a mixture of economic and noneconomic reasons, this second approach breaks down because it offers no guidance as to how such a case should be handled. Moreover, even if this approach could be modified to deal with these cases, it appears that the Supreme Court would not accept this line of analysis of "noncommercial' schemes which are adopted by competitors.[220]

The rule of reason approach is nevertheless consistent with the view that professional football differs significantly from most other business ventures since the professional football teams, for most purposes, are not competitors in the economic sense.[221] In *Smith v.*

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[217] *See infra* notes 252-54 and accompanying text.

[218] *See infra* notes 262-64 and accompanying text.

[219] *See infra* text accompanying note 255.

[220] In Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961), for example, the defendant operated a testing laboratory for gas appliances and refused to give its "seal of approval" to an appliance found to be safe. Citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the Supreme Court held that the denial of the seal fell within the per se rule. The Court found that competitors of plaintiff had influenced the association and caused it to withhold approval of plaintiff's burner by using tests not based on objective standards. *Id.* at 659-60.

[221] NCAA v. Board of Regents, ___ U.S. ___, 104 S. Ct. 2948 (1984), involved a television contract that imposed price and output restraints which would have traditionally been viewed as per se violations. The Court, however, held that it would apply the rule of reason to this case since the industry was one in which horizontal restraints on competition were essential if the product was to be available at all. Arguably, the Court could follow the same approach in the case of the draft eligibility rule even if it might otherwise be considered a per se group boycott. The League might argue that since its teams are not competitors in the economic sense it should be viewed as a single economic entity and thus not capable of violating section 1 of the Sherman Act. In cases not involving player restraints, both the National Hockey League and the National Basketball Association have successfully argued that they are joint ventures which are exempt from the purview of the Sherman Act. *See* San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966, 970 (C.D. Cal. 1974); Levin v. NBA, 385 F. Supp. 149, 150 (S.D.N.Y. 1974). In North American Soccer League v. NFL, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part, rev'd in part, & remanded*, 670 F.2d 1249 (2d Cir. 1982), the NFL successfully argued that its acts were those of a single economic entity. In Smith v.

Pro Football, Inc.,[222] the D.C. circuit court viewed the NFL as basically a joint venture which provides an entertainment product—football games and telecasts. Since this is the case, no team is interested in driving any other team out of business because this would ultimately lead to the failure of the entire league. As a practical matter, the leagues may thus be more closely analogous to a profession than to a business venture.[223] If so, the leagues arguably would be free to vary their practices with regard to how they provide their product.[224] It should be noted, however, that in regard to talent the teams do compete in the identifiable market of college

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Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979), the court rejected the single entity argument. This inconsistency was explained in the *North American Soccer* case when the court stated:

> If member teams of a professional sports league compete with each other in an identical market, § 1 of the Sherman Act applies; the legality of restraints on such competition is judged by the rule of reason. . . . Thus the single economic entity defense fails in the player contract restriction cases, where all member teams compete with each other for players, and league restraint of that competition damages the players.

Id. at 677.

[222] 420 F. Supp. 738 (D.C. Cir. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979). In this case, Smith challenged the legality of the NFL player chart as it existed in 1968. Basically, he claimed that but for the draft he would have negotiated a far more lucrative contract if he could have negotiated with any of the NFL teams rather than only with the team who drafted him.

The Court found that the draft violated section 1 of the Sherman Act, holding that the draft had an anticompetitive impact on the market for players services and that the draft's allegedly pro-competitive effect upon playing field equality among teams did not encourage competition in the economic sense. 593 F.2d at 1187-89.

[223] See Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 n.17 (1975), where the Court stated:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

[224] It should be pointed out, however, that joint ventures do not enjoy blanket immunity under the Sherman Act. In Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951), the Court specifically stated that agreements between legally separated companies which reduce competition among themselves cannot be justified by calling the activity a joint venture.

football players.[225]

The Supreme Court in *National Society of Professional Engineers v. United States*,[226] has recently limited the scope of inquiry under the rule of reason by stating categorically that the rule contrary to its name, "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint which may fall within the realm of reason."[227] The inquiry must be "confined to a consideration of [the restraint's] impact on competitive conditions."[228] The purpose of antitrust analysis, the Court concluded, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress."[229] This language, coupled with the Court's statement that 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,"[230] suggests that a group of businessmen could not justify their restrictive conduct on the basis of some noneconomic benefit (for example, the protection of the public health).

B. *Application to Sports Leagues*

Relying on *Professional Engineers*, the D.C. circuit in *Smith v. Pro Football, Inc.*[231] declared that the National Football League draft, as it existed in 1968, was illegal. Using a rule of reason approach, the court found that the draft was anticompetitive both in purpose and effect.[232] Since the purpose of the draft was to restrict

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[225] Smith v. Pro-Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1979); Mackey v. NFL, 543 F.2d 606, 617 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[226] National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1980); *see also* NCAA v. Board of Regents, ___ U.S. ___, 104 S.Ct. 2948, 2962 (1984).

[227] *Id.* at 688.

[228] *Id.* at 690.

[229] *Id.* at 692.

[230] *Id.* at 691 (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

[231] 593 F.2d 1173, 1189 (D.C. Cir. 1978).

[232] *Id.* at 1187.

competition among the NFL clubs for services of college players, it was designed to limit competition. In addition, the draft forced each seller of football services to deal with only one buyer, thus robbing the seller of his bargaining power.

The D.C. circuit court rejected the League's argument that the draft was necessary to maintain competitive balance, stating that while the draft might help to maintain competition on the field, it did not increase competition in the economic sense of encouraging others to enter the market.[233] This being the case, the League's position boiled down to an assertion that competition in the market for entering players would not serve the best interests of the public, the clubs, or the players themselves. This was insufficient because *Professional Engineers* foreclosed such noneconomic justification. The court reasoned that a player draft system could survive scrutiny under the rule of reason only after demonstration of positive, economically pro-competitive benefits that offset its anticompetitive effects, or at least of legitimate business purposes and an insubstantial anticompetitive effect.[234]

The question of whether player restraints in general should be treated as per se illegal or judged under the rule of reason has recently received much attention. In light of the uncertainty embodied in the Supreme Court cases, it is not surprising that the sports cases have not produced a definitive answer. Initially, courts were reluctant to apply the per se rule to the sports cases because of the industry's unique economic position.[235] These cases were followed by a series of decisions which looked more favorably on the per se

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[233] *Id.* at 1184-88.

[234] The Court stated that:

> [U]nder the Supreme Court's decision in *Professional Engineers*, no draft can be justified merely by showing that it is a relatively less anticompetitive means of attaining sundry benefits for the football industry and society. Rather, a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial.*

Id. at 1188-89.

[235] *See, e.g.*, Flood v. Kuhn, 309 F. Supp. 793, 801 n.26 (S.D.N.Y. 1970); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-04 (E.D. Pa. 1972).

approach.[236] It now appears that the pendulum is swinging back toward the rule of reason.[237]

While some authorities have indicated that the approach used to analyze player restraints is immaterial, since "these divergent paths presumably will lead . . . to the same destination,"[238] this is not necessarily the case. In *Professional Engineers* the Supreme Court found that under the rule of reason, a restraint of trade could not be justified by reasons unrelated to the market place.[239] The Court rejected the association's attempt to justify its refusal to discuss prices as necessary to protect the public from poor engineering practices. If this approach to the rule is used to determine the legality of the draft rule, then noneconomic reasons such as insuring that young athletes receive a college education or player safety could not be considered.

On the other hand, if the *Silver* exception is applied, noneconomic reasons might be considered. As discussed earlier all that is required is that the collective action (1) accomplish an end consistent with the policy justifying self-regulation; (2) is reasonably related to that goal; and (3) is no more extensive than necessary.[240] In *Silver*, the Court pointed out that protection of the public interest in safeguarding investors as well as promotion of the general confidence in the Exchange would justify refusing to deal with an unreliable non-member.[241]

Since it is uncertain which approach might be employed by a court in determining the legality of the draft eligibility rule, it is

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[236] Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

[237] *See, e.g.*, Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 US. 801 (1977); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

[238] 593 F.2d at 1179 n.22.

[239] National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 691 (1980); *see also* NCAA v. Board of Regents, ___ U.S. ___, 104 S.Ct. 2948, 2962 (1984).

[240] *See supra* text accompanying notes 201-05.

[241] Silver v. New York Stock Exch., 373 U.S. 341, 355-56 (1963).

analyzed first under the per se test and then under the rule of reason.

1. *Per Se Illegality*

There have been two professional sports cases outside professional football which have dealt with practices similar to professional football's draft eligibility rule. In both of these cases the courts used a per se approach. In *Denver Rockets v. All-Pro Management, Inc.*,[242] Spencer Haywood successfully challenged the National Basketball Association (NBA) rule which prohibited a qualified player from negotiating with any NBA team until four years after his high school class graduation. The outcome was the same in *Linseman v. World Hockey Association*,[243] in which a nineteen-year-old amateur hockey player challenged the World Hockey Association (WHA) rule prohibiting a player under the age of twenty from playing with any WHA team.

In both cases, the same reasons were advanced for the rule. In *All-Pro*, it was first contended that the four-year rule was a more efficient and less expensive way to train young basketball players than a farm system. Second, the NBA argued that the rule was a financial necessity to the League as a business enterprise. Finally, the League contended that the rule was necessary to guarantee that each professional basketball prospect was given an opportunity to complete college.[244]

The court, in rejecting the first argument, stated that the case did not come within the *Silver* exception since the NBA rule made no provision for even the most rudimentary hearing before the rule was applied.[245] The absolute nature of the rule also troubled the court since it prohibited the signing of not only college players but also those who did not or could not attend college.[246] The court

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[242] 325 F. Supp. 1049 (C.D. Cal. 1971).

[243] 493 F. Supp. 1315 (D. Conn. 1977). Although the court did not specifically use the words "per se" in its opinion, it is clear that this approach was employed since only cases which were decided under the per se doctrine were cited by the court.

[244] 325 F. Supp. at 1066.

[245] *Id.*

[246] *Id.*

summarily dismissed the second contention by stating that "even if this were true, it would not, of course, provide a basis for anti-trust exemption."[247]

With regard to the guarantee of a college education, the court felt that such a justification could not override the objective of fostering economic competition.[248] It is unclear what the court meant by this statement. If *Silver* is truly an exception to the per se rule, then noneconomic reasons that are consistent with the exception should be considered.

In *Linseman*, the WHA contended that the rule was necessary to insure a pool of talented teenagers for the Canadian junior teams, which developed players for the WHA.[249] Without the rule, the Canadian Junior Hockey League would fail, since most talented teenagers would sign with professional teams. The court rejected these arguments and stated that "[t]he anti-trust laws do not admit [any] exceptions due to economic necessity."[250] The court went on to observe that if professional hockey needed a training ground for its players, it should bear the cost of establishing a farm system.

With *All-Pro* and *Linseman* as a backdrop, the draft rule can now be analyzed to determine whether it comes within the *Silver* exception. On its face, the rule is a concerted refusal to deal that restrains competition in the market for the services of college players. Unless it satisfies all three elements of the *Silver* exception, it is illegal per se.

The first element of the *Silver* exception mandates that the industry structure require self-regulation. In the case of professional football, the self-regulation is justified because the nature of the business requires rules that enable it to maintain competitive balance and to function with reasonable efficiency. For example, some form of draft would seem to be necessary to insure that the richest and best teams do not acquire all the best players. The NFL, and by implication the USFL, have at least tacitly been given the right

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[247] *Id.*
[248] *Id.*
[249] 439 F. Supp. at 1322.
[250] *Id.*

of self-regulation. While there is no legislative mandate for self-regulation, judicial approval abounds.[251] Thus, the first element of the *Silver* test has been satisfied.

Under the second element of the *Silver* exception, the rule must further the goal of self-regulation. As in *All-Pro*, the leagues can be expected to argue that their rule is consistent with self-regulation since it is intended to ensure that all prospective players at least have the opportunity to obtain a college degree, an important factor because a professional football career is temporary at best.[252]

The goal of ensuring a college education, while commendable, bears no clear relationship to the reasons for allowing the leagues to regulate themselves. It does not aid in maintaining competitive balance[253] or in protecting the leagues' integrity.[254] Moreover, even if it could be said that the rule does further some relevant goal, it is certainly more extensive than necessary. The rule applies to all players including those who do not want to go to college and those who are intellectually or financially unable to do so.

Without college football there would be no organized system for the development of a pool of talented prospects. Since college players are the primary source of talent, it is necessary that the leagues maintain good relations with the colleges. The rule also benefits the colleges since many teams rely heavily on one or two athletes. Thus, the real reason for the rule is that, as a practical matter, the use of college-developed talent is a more efficient and less expensive way to train new players.

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[251] In Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979), the court noted that the Justice Department acknowledged that professional sports teams needed some joint agreements to assure continued viability, and also that Congress had, through various actions, recognized this need. *Id.* at 79 n.3, 80 n.4. *See also* Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[252] *See* Comment, Herschel Walker v. National Football League: *A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act*, 9 PEPPERDINE L. REV. 603, 631 (1982).

[253] In Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979), the court affirmed the district court's finding that there was no correlation between the draft and maintaining competitive balance. *Id.* at 1183.

[254] *Accord* Molinas v. NBA, 190 F. Supp. 241, 244 (S.D.N.Y. 1961).

If the goal of the rule is to insure an uninterrupted flow of talent to the leagues so that they can efficiently engage in competition, then its purpose is consistent with the policy justifying self-regulation. This is even more true if, as in *All-Pro*, the leagues argue that their financial survival is at stake. What is unclear, however, is whether the rule is reasonably related to this goal. Considering the number of professional football teams (forty-six) it is unlikely that the loss of a few talented players from some college teams would have any great impact on college football. Certainly the loss of a superstar (for example, Walker) by a school (for example, Georgia) will have a more severe impact on the championship prospects of a particular team and thus cause a certain loss of goodwill.[255] The drafting of Walker by the USFL has lead to a great deal of animosity between the USFL and the colleges.[256] Nevertheless, it is unlikely that such "raiding" would destroy college football as a pool of potential professional players since there are relatively few athletes who are capable of playing professional football without the benefit of four years of college competition. Moreover, the elimination of the rule may also have the effect of restoring amateurism and academic integrity to college football. For many colleges, athletics is big business.[257] Many schools fiercely compete for star high school athletes who will fill their stadiums and coffers to overflowing. This mad pursuit of talent has led to many abuses, such as paying college players[258] and admitting students who lack the motivation or intellectual tools to succeed academically.[259] If the rule were eliminated, then those athletes who are either unwilling or unable to attend college will be eligible to play professional football. Some of the temptation for colleges to commit recruiting violations would be removed.

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[255] S. GALLNER, PRO SPORTS: THE CONTRACT GAME 5-6 (1974).

[256] Most college coaches reacted with anger when Walker turned pro. U.S.A. Today, Feb. 24, 1983, at 3C.

[257] *See* Comment, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?* 15 NEW ENG. L. REV. 573, 591 n.84 (1981).

[258] For example, Digger Phelps, Notre Dame basketball coach, stated that a number of colleges across the country are paying a standard rate of $10,000 a year to outstanding players. Detroit Free Press, Mar. 27, 1982, at 7D.

[259] *See generally* Waucukauski, *The Regulating of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79.

It should be noted that in *Linseman*, the court rejected this argument by stating that "the anti-trust laws do not admit of exceptions due to economic necessity."[260] Yet, if *Silver* truly allows for an exception to the per se rule, then the justification of economic necessity, provided it is consistent with the policy underlying self-regulation, should be permitted. As a practical matter, however, economic necessity will not be a serious issue in any case involving the NFL and probably not in the case of the USFL. It is unlikely that the signing of a few exceptional players will endanger the existence of college football.[261]

The leagues might also argue that the rule is necessary to protect a young player who has not yet reached full physical development. There is no question that football is a violent, dangerous sport.[262] Certainly, a rule protecting the safety of players would be an end consistent with a policy justifying self-regulation.[263] In its present form, however, the rule is overly broad since it bars all players without regard to their physical prowess.[264] It is difficult to believe that any player with physical attributes similar to Walker, who stands six feet tall and weighs 200 pounds, is in any physical danger when he steps onto the playing field. If, in fact, there is

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[260] Linseman v. WHA, 439 F. Supp. 1315, 1322 (D. Conn. 1977).

[261] Since 1976 an average of fewer than eight players a year have applied for the NBA draft. Fifty-nine players have applied, forty-three were drafted, fifteen were not drafted and one withdrew. Letter from National Basketball Association (April 18, 1984). The trend appears to be for players to stay in school. Kirkpatrick, *Hello, America, We Came Back*, SPORTS ILLUSTRATED, December 1, 1980, at 36.

[262] The seriousness of the violence problem can best be analyzed through injury statistics. From 1969-1974 . . . NFL players suffered an estimated 5,110 injuries. A followup study of serious sports injuries reported that serious football injuries in 1974 increased 25 per cent over the previous season. During that year, a survey of NFL team trainers revealed that injuries increased to an estimated record 1,638. That is, 12 injuries for every 10 players.

R. HORROW, SPORTS VIOLENCE 7-8 (1980) (citations omitted).

[263] In Neeld v. NHL, 594 F.2d 1297 (9th Cir. 1979), a one-eyed player challenged a League rule preventing him from competing in the League. The court found that the rule's primary purpose was the promotion of safety and that there was no anticompetitive purpose.

[264] While this point was not expressly addressed in Linseman v. WHA, 439 F. Supp. 1315 (D. Conn. 1977), it appears that the court, by implication, has rejected such an argument since it struck down the National Hockey League's 20-year-old rule allowing a 19-year-old player to compete.

concern for the safety of individual players, each candidate could be required to undergo an extensive physical examination prior to his eligibility for the draft.

The third element of the *Silver* exception requires that the association provide procedural safeguards to assure the restraint is not arbitrary and furnish a basis for judicial review.[265] A search of the NFL's Constitution and By-Laws does not reveal any provision which even remotely satisfies this requirement. To the contrary, the League rules give the commissioner "the power, without a hearing, to disapprove contracts between a player and a club, if such a contract has been executed in violation of or contrary to the Constitution and By-Laws of the League. . . ."[266] With one exception, the draft eligibility rule has been uniformly applied to exclude all prospective players.[267] Even in the one case in which a player was allowed to play before his class graduated, the decision was reached because of an antitrust suit rather than under procedural rules established by the league.[268]

The lack of any procedural safeguards, coupled with an almost rigid application of the rule, is fatal. It was just such a situation which led the court, in *All-Pro*, to strike down an identical NBA rule.[269] In response to the court's ruling, the NBA adopted a "hardship rule"[270] that permitted the Commission to allow an athlete who is suffering severe economic hardship to be drafted prior to graduation. This rule was applied so liberally in the NBA that, as a practical matter, anyone who merely claimed hardship was drafted. Finally, in 1976, the NBA relaxed its eligibility rules so that a player whose high school class has graduated may become eligible for the draft by giving the League written notice forty-five days before renouncing his college eligibility.[271] Even if the leagues adopted a hardship rule, it could still be too strict. In *All-Pro* the

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[265] *See supra* note 205.

[266] NFL CONST. AND BY-LAWS art. VIII, § 8.14(A) (1976).

[267] L. SOBEL, *supra* note 11, at 466.

[268] *Id.*

[269] Denver Rockets v. All-Pro Management, Inc., 235 F. Supp. 1049 (C.D. 1971). *See also* Cooney v. American Horse Shows Ass'n, 495 F. Supp. 424, 430 n.3 (S.D.N.Y. 1980).

[270] *All-Pro*, 325 F. Supp. 1049 (C.D. Cal. 1971).

[271] L. SOBEL, *supra* note 11, at 248.

court stated:

> In addition, it is uncontested that the rules in question are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college and even those who lack the mental and financial ability to do so. As such they are overly broad and thus improper . . . .[272]

The court's statement implies that a draft eligibility rule may be applied to those who enroll in college, provided they may become a professional if hardship required, but may not be applied to those who elect not to be enrolled in college at all. Such a rule might make an unfair distinction between those high school graduates who decide to turn professional immediately and those who choose to attend college. In any event, the rule still would violate the antitrust laws since it would not satisfy the first and second elements of the *Silver* exception.

2. *Rule of Reason*

To justify the draft eligibility rule under the rule of reason the leagues would have to establish that the restraint merely regulates and perhaps promotes competition rather than suppresses it.[273] As stated previously, a court in applying the rule of reason will first look at the alleged restraint to determine whether it has any legitimate business purpose. It will then balance this purpose against the burdensome competition to ascertain whether the former outweighs the latter. A restraint is unreasonable if it has the net effect of substantially impeding competition.[274]

In most, if not all, of the prior litigation in which the NFL was involved, the League argued that the restraint it had imposed was necessary to insure competitive balance.[275] Generally, the courts

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[272] *All-Pro*, 325 F. Supp. at 1066.

[273] National Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 691 (1980) (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

[274] Smith v. Pro-Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1979).

[275] *Id.* at 1179; Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir.

have accepted this as a legitimate business purpose in light of the League's unique position.[276]

If, however, the courts follow the lead of the *Smith* decision, the competitive balance argument will be of little benefit. In *Smith* the Court stated that a restraint could be justified only by demonstrating that it had positive, economically pro-competitive benefits that offset anticompetitive effects[277] or, in the alternative, accomplished some legitimate business purpose while having only an insubstantial anticompetitive effect.[278] The authors have been unable to construct any argument which would satisfy this version of the rule of reason.

The leagues might contend that the rule is necessary to protect their source of talented football players.[279] If college football were to be severely injured or completely destroyed by elimination of the rule, the leagues' continued existence might be jeopardized. They would be faced with the alternatives of either investing huge sums of money to develop farm systems or drafting less experienced high school players. It appears, however, that no such dire consequences would flow from the abolition of the rule. There are over 1,700 colleges and universities in the United States,[280] most of which have football teams. The loss of a few players to the draft each year would have little impact. Since the NBA's draft eligibility rule was abolished in 1976, very few basketball players have joined the professional ranks prior to expiration of their college eligibility.[281] Thus, while the rule is convenient for the leagues, it appears that its overall competitive benefits are slight. Moreover, elimination of the rule may go a long way toward restoring amateurism to college football. Each season college teams are penalized for recruiting violations, most of which involve paying students to

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1978), *cert. denied*, 441 U.S. 907 (1979).

[276] *See, e.g.*, Smith v. Pro-Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1979).

[277] *Id.* at 1188-89.

[278] *Id.* at 1189.

[279] This contention was summarily dismissed in *Linseman* and *All-Pro* where the per se approach was used. Linseman v. WHA, 439 F. Supp. 1315, 1322 (D. Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

[280] INFORMATION PLEASE ALMANAC 755 (35th ed. 1981) (list of accredited schools).

[281] *See supra* note 261.

play football.[282] If the rule is eliminated, those players who are more interested in the financial rewards available as a professional could declare themselves eligible for the draft.

Even if competitive balance were a legitimate factor in a rule of reason analysis, it is far from clear how the four-year rule can possibly advance the cause of competitive balance.[283] Unlike the draft, which insures that weaker teams are permitted to select first so that they can obtain the best players, the four-year rule restricts all teams equally.

The draft eligibility rule has a severe anticompetitive impact on the market for player services. The career of a professional athlete is relatively short.[284] Thus, the loss of even one or two years of playing time can be very detrimental.[285] Moreover, if the player is forced to remain in college to play football, there is the ever-present threat of incurring a serious injury that would end his career.[286] Finally, the fact that a player might compete in the Canadian Football League or some semi-professional league would not lessen the anticompetitive impact of the rule. In *Smith*, the court rejected the alternative of playing in the Canadian Football League, citing the factors of that League's hiring preference for Canadian players, low salaries, and few promotional opportunities.[287]

On balance, the rule is manifestly unreasonable. It bars all players, regardless of intelligence or financial capability, from playing professional football without advancing competition in any signifi-

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[282] *See supra* note 258.

[283] During the 1960's some stronger clubs drafted "red shirts" (college players who did not play in a particular year but who were eligible to play in the future). By doing this, they could stockpile future players. *Rights of Professional Athletes: Hearings on H.R. 2355 and H.R. 694 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 51 (1975) (testimony of Pete Rozelle, Commissioner, National Football League).

[284] Both because of injury and age, the length of the average career of an NFL player is just 4.6 years. R. HORROW, *supra* note 262, at 9.

[285] In *Linseman* the court stated that the plaintiff hockey player would suffer irreparable injury if he were prevented from playing for even one year. Linseman v. WHA, 439 F. Supp. 1315, 1319 (D. Conn. 1977).

[286] *See supra* note 22 and accompanying text.

[287] Smith v. Pro-Football, Inc., 593 F.2d 1173, 1185 n.48 (D.C. Cir. 1979).

cant way. Even if a hardship draft were instituted, it is unlikely that it would withstand scrutiny since there are no real competitive benefits from the rule.

IV. Conclusion

Professional football's draft eligibility rules are an unreasonable restraint of trade.[288] The NFL's rule cannot be legitimized by its inclusion in the collective bargaining agreement between the League and the players' association. The circuit courts considering the circumstances under which collectively bargained player restraints will be immunized under the labor exemption to the antitrust laws, have formulated a three-prong test for making this judgment. This test represents a shorthand method for balancing the anticompetitive effects of the rule against its importance to labor—a balance which must be struck in favor of labor for the exemption to apply. The draft eligibility rule, in its present form, fails each prong of this test. In the broader view, the anticompetitive effects of the rule far outweigh its importance to the players' association of its members and, therefore, tip the balance in favor of antitrust application.

Examined under substantive antitrust principles, the rules violate section 1 of the Sherman Act since they unreasonably restrain competition for the services of talented young football players. If the rules are categorized as a group boycott, they are illegal per se unless the *Silver* exception is applicable. The draft eligibility rules, however, are not subject to the exception since they are overbroad and do not further any goal or purpose reasonably necessary to the leagues' need for self-regulation. Furthermore, under existing league procedures, there are no provisions for any hearing for those players who wish to enter the leagues.

If the rules are analyzed under the rule of reason, as many courts have done with other player restraints, they also violate antitrust laws. On balance, the rules effectively deny an entire class of able amateur football players an opportunity to play professionally

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[288] Boris v. USFL, No. CU 83-4980 (C.D. Cal. Feb. 28, 1984).

while aiding neither on-field nor off-the-field competition. There being no legally cognizable justification for them, the draft eligibility rules are unlawful. The eligibility of college undergraduates to be drafted and employed is clear.

Some may argue that the rules promote college education or avoid the overreaching of young athletes. These considerations, however, are not sufficient legal justifications. Furthermore, given the current state of college athletics, it is doubtful that the draft eligibility rules have furthered these purposes. The invalidation of the rules, it is hoped, will lead to clearer distinctions between professionalism and amateurism and promote the keenly felt need for the latter in college athletics.