1-1-1982

Legal and Statistical Analysis of the National Football League Player Draft: Chicago, New York, Detroit, It's All the Same Pick

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A LEGAL AND STATISTICAL ANALYSIS OF THE NATIONAL FOOTBALL LEAGUE PLAYER DRAFT: CHICAGO, NEW YORK, DETROIT, IT'S ALL THE SAME PICK[1]

By
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I. INTRODUCTION

The focus of controversy in much of the antitrust litigation in the sports industry has been on the various restraints that limit the movement of players among teams.[2] The amateur player draft is one of these restraints. This article analyzes the National Football League (NFL) player draft, both in terms of the relevant antitrust and labor law issues and in terms of the actual impact of the draft on team performances.

A brief discussion of the draft and its legality under the antitrust laws is presented in section II. The legality of the draft depends on many factors, one of which is whether the justifications for the draft outweigh its anticompetitive effects.[3] Thus, particular attention is given to the League's justifications for the draft.

Collective bargaining has become a dominant force in the NFL. Player restraints such as the draft are now contained in collective bargaining agreements between the National Football League Players' Association (NFLPA) and the National Football League Management

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1. A second study, containing a legal and statistical analysis of the National Football League Scheduling Format, will appear in the next edition of the Entertainment Law Journal.

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2. *See, e.g.*, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *modifying* 407 F. Supp. 1000 (D. Minn. 1975) (Rozelle Rule); Bryant v. National Football League, No. CV 75-2543 (C.D. Cal. July 30, 1975) (Rozelle Rule); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974) (Rozelle Rule, tampering rule); Smith v. Pro-Football Inc., 420 F. Supp. 738 (D.D.C. 1976) (Player Draft).

3. *See infra* note 19.

Council (NFL).[4] Section III explains the purposes and scope of the labor exemption and section IV addresses the issue of whether this exemption can be used to shield the draft from antitrust attack simply because provisions for the draft are contained in a collective bargaining agreement. The discussion in section IV suggests that there may be some situations in which the labor exemption will not be available to immunize the draft from the antitrust laws.

A statistical study that was conducted to test the validity of the owners' justifications for the draft is presented in section V. The results of this study are relevant to any future antitrust litigation involving the NFL player draft.

II. ANTITRUST ISSUES

A. Application of the Antitrust Laws to the NFL Player Draft

Section 1 of the Sherman Antitrust Act of 1890 condemns "every" contract or combination in restraint of trade among the states.[5] Although this language is broad enough to condemn virtually every type of business arrangement,[6] the Supreme Court has ruled that the Act prohibits only unreasonable restraints of trade.[7] This interpretation allows courts to consider, in some situations,[8] justifications for a particular restraint.

The teams in the NFL are bound by a set of agreements that restrict the competition and divide the market for playing talent.[9] Courts have recognized that these restraints may violate section 1 of the Sher-

4. *See* National Football League Collective Bargaining Agreement (1977).

5. 15 U.S.C. § 1 (1970).

6. Burkow and Slaughter, *Should Amateur Athletes Resist The Draft?*, 7 BLACK L.J. 314, 325 (1981).

7. *See, e.g.*, Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

8. The Supreme Court's interpretation of Section 1 has led to the evolution of two standards under which courts scrutinize retraints of trade; the per se standard and the rule of reason standard. The per se standard is extremely rigid. Under this standard, certain types of restraints are conclusively presumed to be unreasonable and, thus, unlawful. Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958). Application of the per se standard precludes any inquiry into the reasonableness of the restraint. 356 U.S. 1, 5 (1958). The rule of reason, on the other hand, is more flexible. Under this standard, a restraint is lawful if it is reasonable and unlawful if it is unreasonable. The determination of reasonableness is based upon a thorough examination of the nature of the business or industry and the purpose and effect of the restraint being scrutinized. *See, e.g.*, Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); Weistart and Lowell, *The Law of Professional Sports* 592-93 (1979) [hereinafter cited as Weistart].

9. The National Football League Player Draft is an example of such an agreement. *See* National Football League Collective Bargaining Agreement Article XIII, § 4 (1977).

man Act.[10] However, in each of the cases involving antitrust attacks on player restraints, the NFL has argued that the peculiar needs of professional football require that individual teams be allowed to engage in certain types of collective behavior that violate the antitrust laws.[11] This argument is based on the fact that there is a direct correlation between fan interest (or gate receipts and television revenues) and the unpredictability of the outcome of individual games and divisional races.[12] Therefore, the League contends, mechanisms or restraints that prevent individual teams from becoming too strong or competing too well, in an effort to accumulate the best talent, are essential to the survival of the League.[13]

B. Structural Analysis of the NFL Draft System

The NFL conducts a draft whereby teams select new players who have not previously signed professional contracts.[14] The draft is one mechanism that the League argues helps achieve the equalization of team strengths.[15]

Perhaps the most prominent feature of the draft system is that it is ostensibly designed to enable the weaker teams to improve themselves each year in relation to the better teams. The present draft consists of twelve rounds, and teams exercise draft rights in reverse order of their playing records so that the team with the worst record receives the first selection in each round. In theory, this gives the weaker teams a rela-

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10. *See*, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (challenge to NFL's rule requiring free agent's new team to compensate former team), *cert. dismissed*, 434 U.S. 801 (1977); Smith v. National Football League, 420 F. Supp. 738 (D.C. Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974) (challenge to, inter alia, NFL's compensation rule, player selection draft, and no-tampering rule), *aff'd in part, appeal dismissed as moot in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

11. Weistart, *supra* note 8, at 595; *See*, Mackey v. National Football League, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C.C. 1976), the NFL made a similar argument in support of the player draft, claiming that the draft "has the legitimate business purpose of promoting 'competitive balance' and playing-field equality among the teams, producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs." *Id.* at 1186. *Cited from* Sobel, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports* 57 N.Y.U. L. REV. 164 n.9 (1982).

12. Demmert, *The Economics of Professional Team Sports* 10-11 (1973) [hereinafter cited as Demmert].

13. *Id.* at pp. 31-33; Weistart, *supra* note 8, at 597.

14. National Football League Collective Bargaining Agreement Article XIII, § 4 (1977).

15. Sobel, *Professional Sports and the Law*, 251 (1977); Smith v. Pro-Football, Inc., 593 F.2d at 1186.

tively greater opportunity for improvement.[16]

This apparent opportunity for improvement is protected by another feature of the draft system. Each team acquires the exclusive right to negotiate with each player it selects in the draft.[17] This right is reinforced by an agreement among the teams to respect the exclusive rights of every other team.[18] Thus, during the period in which teams are granted the exclusive bargaining rights to their draftees, the teams essentially agree not to compete with each other for new players and each player is forced to bargain with one team.

Courts, in considering the reasonableness of particular player restraints, have been concerned with whether the justifications for the restraint outweigh its anticompetitive effects.[19] Critics of the draft argue that the present system affects the distribution of income between the player and team.[20] As each team agrees to respect the exclusive draft rights of every other team, each player is forced to negotiate with only the team that drafts him. The player is essentially prevented from testing the market for his skills.[21] He loses the bargaining advantage that would be gained by using competing offers from other teams to bid up his price.[22] The team, then, can usually be expected to have the upper hand in player-team negotiations. As a result, the player receives a salary that does not approximate his fair market value.[23]

This effect on salaries has been most apparent during periods of inter-league competition for players. A new league emerges, competition for new players develops between one team in each league, and players' salaries rise substantially.[24]

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16. Canes, *The Social Benefits of Restrictions on Team Quality* in *Government and the Sports Business* 86 (R. Noll ed. 1974).

17. National Football League Collective Bargaining Agreement Article XIII, § 4 (1977).

18. *Id.*

19. *See, e.g.*, Smith v. Pro-Football, Inc., 593 F.2d 1173, 1186-87 (D.C. Cir. 1978) (NFL player draft without procompetitive virtues in an economic sense to offset its anticompetitive purpose and effect); Mackey v. National Football League, 543 F.2d 606, 622 (8th Cir. 1976) (Rozelle Rule more restrictive than necessary to serve its legitimate objectives), *cert. dismissed*, 434 U.S. 801 (1977); Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (perpetual reserve system not justified by any need to protect NFL employers or NFL purposes), *aff'd in part, dismissed as moot in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). *Cited from* 57 N.Y.U. L. REV. 164 n.10 (1982).

20. Demmert, *supra* note 12, at 38.

21. Weistart, *supra* note 8, at 506.

22. *Id.* at 504; Demmert, *supra* note 12, at 38.

23. Robertson v. National Basketball Association, 389 F. Supp. 867, 893 (S.D.N.Y. 1975).

24. Noll, *The U.S. Team Sports Industry: An Introduction in Government and the Sports Business* 5 (R. Noll ed. 1974); Demmert, *supra* note 12, at 22.

This system also has long-range salary implications. Although the draft has a direct impact on the salary only once, it can, and in most cases does, help define the parameters of the athlete's career earning potential. The salary that the athlete receives in the final year of his first contract (or first set of contracts) is the base from which he negotiates his next contract. In practical terms, this base places limits on the salaries he will receive in his second set of contracts.

There is little evidence suggesting that the League denies that the draft system reduces player salaries. Rather, the League has responded that this reduction is an unavoidable consequence of its effort to maintain competitive balance among its teams.[25] Granting weaker teams selection priorities in the draft presumably reduces the disparity in quality between the best and worst teams in the League.

It might be that the League, in order to survive, must adopt some institutional mechanisms to ensure competitive balance. Whether the League's justifications for the draft outweigh its anticompetitive effects depends in part on how close the draft comes to actually realizing this goal. The NFL draft was tested in Smith v. Pro Football Inc.[26] and the court's analysis in that case suggests that the factual information necessary to evaluate the draft had not been gathered. Addressing the claim that the NFL draft preserved competitive balance, the court noted that in the three prior seasons 22 of 24 of the play-off slots had been earned by only nine teams.[27] This fact merely indicated that certain teams were able to maintain their competitive superiority over the three-year period despite the draft.

Although more sophisticated evidence was not used to test the League's justification for the draft, the court in *Smith* concluded that the draft was an illegal restraint of trade under section 1 of the Sherman Act.[28] If the draft is challenged again in court,[29] the owners will presumably argue that, despite the ruling in *Smith*, the labor exemption immunizes the draft from antitrust attack.[30] The purposes and scope of

25. Weistart, *supra* note 8, at 504-05.

26. Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976).

27. *Id.* at 746, cited from Weistart, *supra* note 8, at 615 n.760.

28. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 744-45 (D.D.C. 1976).

29. In 1977, shortly after the decision in Smith v. Pro-Football, Inc., the National Football League Players' Association and the National Football League Management Council signed a five year collective bargaining agreement. *See* Collective Bargaining Agreement between the National Football League Players' Association and the National Football League (March 2, 1977). This agreement provided that the annual amateur player draft, although modified from seventeen rounds to twelve rounds, would still be held.

30. This presumption is based on the fact that the League has previously raised this argument in antitrust cases attacking restraints contained in collective bargaining agree-

this exemption are discussed in the following section.

III. LABOR EXEMPTION

A. Statutory Exemption

The Sherman Antitrust Act of 1890[31] was enacted to regulate the commercial activities of business.[32] As the original version of the Act contained no language exempting the activities of labor unions,[33] labor groups were thereafter prosecuted as "illegal combinations in restraint of trade" under section 1 of the Act.[34] The purpose of the Act, however, was not to restrict labor union activity.[35] Thus, Congress enacted additional legislation to provide an exemption for labor movement activities.[36]

Section 6 of the Clayton Act, adopted in 1914 states that unions are not "illegal combinations or conspiracies in restraint of trade."[37] Section 20 of the Act limits the power of courts to interfere with certain enumerated types of union organizational activities.[38]

The Supreme Court subsequently interpreted these provisions very narrowly and, as a result, left many union activities, such as group boycotts and secondary picketing, vulnerable to antitrust attack.[39] The

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ments. *See, e.g.*, Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975); Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976).

31. 15 U.S.C. § 1 (1970).

32. The Supreme Court has indicated that the dominant purpose of the Sherman Act was the regulation of the commercial activities of business. *See* Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797, 803-06 (1945); *cf.* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489-501 (1940). The legislative history tends to support this conclusion. 51 Cong. Rec. 13663 (1914) (Remarks of Senator Ashurst). *Cited from* Weistart, *supra* note 8, at 528 n.313.

33. 15 U.S.C. § 1 (1970).

34. *See* Select Comm. on Professional Sports, Inquiry into Professional Sports, H.R. Rep. No. 1786, 94th Cong., 2d Sess. 26-27 (1977) [hereinafter cited as 1977 House Report].

35. *Id.*

36. For a general discussion of the legislative history of these Congressional actions *see* T. Kheel, *Labor Law* (18 *Business Organizations* 1971) §§ 4.03-.04. *Cited from* Weistart, *supra* note 8, at 527 n.317.

37. 15 U.S.C. § 17 (1976).

38. 29 U.S.C. § 52 (1976).

39. In Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), the Court read the Clayton Act as exempting only those union activities which were directed against the employees' immediate employers. Union efforts to boycott the employer's products in the hands of other dealers and other secondary activities were said to be still subject to the Sherman Act proscription on trade restraints. Thus, the statutes were applied in a manner significantly limited the types of economic power which a union could exercise in its efforts to promote employee interests. *See* Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797, 805-06 (1945). *Cited from* Weistart, *supra* note 8, at 529 n.320.

Norris-LaGuardia Act, passed in 1932, expanded the classification of protected-union activities.[40]

The labor exemptions in these two acts were enacted to insulate legitimate labor union activity from the reach of the antitrust laws[41] and they continue to be the primary statutory sources of the labor exemption.[42] Yet, the Supreme Court held that these statutory labor exemptions only protect union conduct in furtherance of the union's own interests either undertaken alone or with other labor groups.[43] The two acts do not protect conduct undertaken by a union in concert with a nonlabor group.[44]

Collective bargaining agreements, or agreements between union and nonunion groups, by definition, do not fall within the scope of the statutory exemption. Thus, although the Norris-LaGuardia Act acknowledges the importance of fostering "concerted activity for the purposes of collective bargaining,"[45] neither statute provides standards to test the substance of labor-management agreements under the antitrust laws.[46]

The labor exemption is not simply a tool to protect union activity.[47] It is also a means of accommodating congressional policy favoring collective bargaining under the National Labor Relations Act.[48] Accordingly, the Supreme Court has found that the two statutes imply a separate, nonstatutory labor exemption.[49] The task of defining the scope of this nonstatutory exemption and providing standards to test labor management agreements has been assumed by the courts.[50]

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40. 47 Stat. 70 (1931), as amended 29 U.S.C. §§ 101-15 (1976).

41. Strauss, *Sport In Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 U.C.L.A. L. REV. 252, 270 (1980).

42. Weistart, *supra* note 8, at 529.

43. Allen Bradley Co. v. Electrical Workers Local 3, IBEW, 325 U.S. 797 (1945).

44. *Id.*; Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975).

45. 29 U.S.C. § 102 (1976).

46. Weistart, *supra* note 8, at 529.

47. *Id.* at 526-27.

48. 29 U.S.C.A. §§ 151-169 (West 1973, 1978, Supp. 1981 & 1980 Laws Special Pamphlet). Section 1 of that Act, 29 U.S.C. § 151 (1976), provides in pertinent part: 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 and to mitigate and eliminate these obstructions when they have occurred 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 and conditions of their employment or other mutual aid or protection. *Cited from* 57 N.Y.U. L. REV. 164, 174-84 n.24 (1982).

49. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

50. *See, e.g.*, Connell Constr. Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622 (1975). *Cited in* Weistart, *supra* note 8, at 529 n.325.

B. Nonstatutory Exemption

One of the purposes of the nonstatutory labor exemption is to harmonize the policies of the Sherman Act with the policies of the federal labor statutes fostering collective bargaining between unions and employers.[51] Application of the antitrust laws to terms included in collective bargaining agreements would threaten the finality of bargained-for provisions and thus disrupt the collective bargaining process.[52] If bargained-for provisions could subsequently be invalidated on antitrust grounds, the bargaining parties would be less willing to make concessions.[53] For example, management would be less willing to increase medical or pension benefits in exchange for the continuation of a particular restraint (such as the draft) if there was a possibility that the union could later secure judicial review of that restraint. Collective bargaining agreements would certainly be more difficult to achieve if concessions won at the bargaining table could subsequently be lost in court.[54] In fact, judicial review of the terms of collective bargaining agreements undermines the national labor policy favoring collective bargaining.[55] As a result, the nonstatutory judicially created exemption is often applied by the courts to protect the terms of collective bargaining agreements from antitrust attack.[56]

C. Scope of the Nonstatutory Exemption

The federal labor law policy favoring the collective bargaining process has prompted some legal scholars to suggest that those matters that are the subject of collective bargaining agreements should never be open to antitrust challenges by disappointed members of the bargaining units.[57] Such challenges, it is argued, whether or not successful,

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51. 1977 House Report, *supra* note 34, at 26. *Cited in* Strauss, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 U.C.L.A. L. REV. 252, 268 (1980).

52. Weistart, *supra* note 8, 559, 561.

53. *Id.* at 560.

54. *See generally* Wellington, *Labor and the Legal Process* 26-30, 49-63 (1968) [hereinafter cited as Wellington]; Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 7-9 (1971). *Cited from* Weistart, *supra* note 8, at 561 n.485.

55. 29 U.S.C. § 151 (1976). *See supra* note 48 for relevant portion of statute.

56. Mackey v. National Football League, 543 F.2d 606, 611-12 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

57. Jacobs and Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). For an expansion upon Jacobs' and Winter's thesis *see* Lowell, *Collective Bargaining and the Professional Team Sports Industry*, 38 LAW & CONTEMP. PROBS. 3 (1973). *Cited from* 7 BLACK L.J. 314, 330 (1981).

would effectively destroy the collective bargaining process by undermining the authority of the bargaining representative.[58]

The Supreme Court has acknowledged that a proper accommodation between policies favoring collective bargaining and policies favoring free competition in business markets requires that some union-management agreements be accorded a limited nonstatutory exemption from the antitrust laws.[59] Thus, if the union interest involved is immediate and direct and relates to wages, hours, and other conditions of employment, and there is no evidence of a conspiracy,[60] the provision may be exempt from antitrust scrutiny.

The nonstatutory labor cases have not, however, held that collective bargaining agreements are automatically immune from antitrust review. The cases suggest, for example, that the exemption is not available where unions and employers conspire together to injure the employers' competitors.[61] In fact, it is not clear that employers may bargain collectively with immunity even in situations where the targets of their conspiracy are their current or potential employees rather than their competitors.[62]

In United Mine Workers v. Pennington[63] where the union, in return for higher wages and fringe benefits, agreed to impose uniform industry wage scales on operators outside the bargaining unit, the Court said: "A collective bargaining agreement resulting from union-employer negotiations is not automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement."[64] The court went on to state that there are limits to what the parties may offer or extract in the name of wages.[65] Simply because they must bargain does not mean that the agreement may disregard other laws.[66]

The Supreme Court decisions that address the issue of the nonstatutory labor exemptions indicate two things. First, the precise limits of

58. 81 YALE L.J. 1, 27 (1971). *Cited from* 7 BLACK L.J. 314, 330 (1981).

59. Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975).

60. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (plurality opinion).

61. Allen Bradley v. Local Union 3, IBEW, 325 U.S. 797 (1945); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965).

62. 7 BLACK L.J. 314, 331 (1981).

63. 381 U.S. 657 (1965).

64. *Id.* at 664.

65. *Id.* at 665.

66. *Id.*

the exemption are unclear. Second, the scope of the exemption must be determined in light of the competing labor and antitrust policies.

IV. Application of the Labor Exemption to Collective Bargaining Agreements in Professional Sports

A. Nonstatutory Exemption

In the context of professional sports, the leagues have often argued that the player restraints should be protected from antitrust attack because they are incorporated into collective bargaining agreements.[67] Although the exemption has actually been applied only once,[68] most courts have recognized that the labor exemption could be available under certain circumstances to immunize player restraints from the antitrust laws.[69] The issue, then, is to what extent the labor exemption applies.

The collective bargaining agreements in professional sports fail by definition to qualify for the statutory exemption. In order to survive antitrust attack, then, they must fall within the nonstatutory exemption. Before applying the nonstatutory exemption to immunize a particular collective bargaining agreement, a court must conclude that the federal labor law policy fostering collective bargaining deserves preeminence over the federal antitrust policies favoring free competition.[70] Several factors relevant to the balance between competing labor and antitrust concerns have emerged from the sports cases.[71]

The Eighth Circuit in Mackey v. National Football League[72] con-

67. For a summary of the recent history of collective bargaining in professional sports, *see* Weistart *supra* note 8 at 777, § 6.01.

68. McCourt v. Calif. Sports, Inc., 600 F.2d at 1193 (6th Cir. 1979).

69. *See, e.g.*, Reynolds v. National Football League, 584 F.2d 280, 288 (8th Cir. 1978) (dictum); Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976) (exemption available but not applied under the circumstances), *cert. dismissed*, 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 518 (E.D. Pa. 1972) (exemption available but not applied under the circumstances). *Cited from* 57 N.Y.U. L. Rev. 164, 169 n.13 (1982).

70. Mackey v. National Football League, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *see* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975); UMW v. Pennington, 381 U.S. 657, 664-69 (1965); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965). *Cited from* 57 N.Y.U. L. Rev. 164, 179 n.51 (1982).

71. *See* Mackey v. National Football League, 543 F.2d 606, 613-15 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc., v. Philadelphia National Football League 351 F. Supp. 462, 496-500 (E.D. Pa. 1972); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 267-68 (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972). *Cited from* 57 N.Y.U. L. Rev. 164, 180 n.53 (1982).

72. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

solidated these factors into a concise three-pronged test that accurately reflected the major concerns of the prior nonsport cases involving the nonstatutory labor exemption[73] and the prior sports cases that considered the labor exemption in the context of challenges to player restraints.[74] This test was later adopted by the district and circuit courts in McCourt v. California Sports, Inc.[75] The Eighth Circuit's discussion of the nonstatutory exemption provides insight into the standards an agreement must meet to qualify for the exemption. In the absence of new case law, it is appropriate to examine current restraints against this three-pronged standard.[76]

The circuit court in Mackey v. National Football League[77] suggested that provisions contained in a collective bargaining agreement might be immunized from antitrust attack where the challenged practice is a mandatory subject of collective bargaining, the agreement is the product of bona fide arm's-length negotiations, and the restraints primarily affect only the parties to the collective bargaining agreement.[78] The question of whether the current NFL draft system meets the standards of this test and thus qualifies for the exemption has not been satisfactorily resolved.

Three related issues are discussed below. The first issue addressed is whether the nonstatutory labor exemption absolutely shields the draft from antitrust attack by potential draftees. This discussion focuses on the requirements of the *Mackey* test. The next issue considered is whether the union, by agreeing to the draft, breaches its duty of fair representation to potential draftees. A breach of this duty would enable amateur athletes to challenge the player draft on antitrust grounds, despite the labor exemption. The final issue discussed is the availability of the nonstatutory labor exemption upon expiration of the collective bargaining agreement.

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73. *Id.* at 609 n.1. *Cited from* 57 N.Y.U. L. REV. 164, 180 n.61 (1982).

74. Weistart, *supra* note 8, at 575-82 (analyzing the *Mackey* test). *Cited from* 57 N.Y.U. L. REV. 164, 180 n.56 (1982).

75. 600 F.2d 1193, 1197-98 (6th Cir. 1979), *rev'g* 460 F. Supp. 904 (E.D. Mich. 1978).

76. 7 BLACK L.J. 314, 334 (1981).

77. 543 F.2d at 606, 614.

78. *Id.* at 614.

B. Application of the Mackey Test to Amateur Athletes and the Player Draft

1. Mandatory Subject of Bargaining Requirement

The National Labor Relations Act[79] requires that employers and unions bargain over wages, hours, and other terms and conditions of employment.[80] The *Mackey* requirement that the challenged practice be a mandatory subject of collective bargaining[81] guarantees that the practice is important enough to justify overriding the policies of the antitrust laws.[82]

A difficult question to answer is whether the amateur player draft is a mandatory subject of collective bargaining. Addressing this question it must be noted that every practice or provision that vitally affects the terms and conditions of present workers' employment is not necessarily a mandatory subject of bargaining.[83] More importantly, the player draft has a significant impact on the wages and terms and conditions of employment of the drafted athlete. In other words, the draft rules apply primarily to parties outside the collective bargaining unit[84] and do not vitally affect the terms and conditions of players in the league.[85] The real issue, then, is whether it is mandatory for the parties to negotiate an agreement which includes a system primarily limiting where and how potential and future athletes can work.[86]

2. Bona Fide Arm's-Length Agreement Requirement

The requirement that the agreement is the product of bona fide arm's-length negotiations has surfaced as the most difficult issue in the sports cases.[87] To foster the collective bargaining process, courts have

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79. 29 U.S.C.A. §§ 151-169 (West 1973, 1978, Supp. 1981 & 1980 Laws Special Pamphlet).

80. *Id.* § 158(d).

81. 543 F.2d at 614 (*citing* UMW v. Pennington, 381 U.S. 657 (1965); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965)).

82. 57 N.Y.U. L. REV. 164, 182 (1982).

83. Vaca v. Sipes, 386 U.S. 171 (1967).

84. 543 F.2d at 614; Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959).

85. Terry, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules* 46 MO. L. REV. 797, 812-13 (1981).

86. 7 BLACK L.J. 314, 334 (1981).

87. *See, e.g.*, McCourt v. Calif. Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979); Mackey v. National Football League, 543 F.2d 606, 615-16 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Smith v. Pro-Football, Inc., 420 F. Supp. 738, 743 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173, Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey

expressed a willingness to apply the labor exemption as long as union acceptance of anticompetitive restraints is evidenced by an agreement reached through serious, good-faith negotiations.[88] Yet, mere incorporation of restraints in a collective bargaining agreement will not immunize the restraints from antitrust challenges unless those restraints are the product of bona fide arm's-length bargaining.[89] Courts have discussed several factors in defining the contours of bona fide arm's-length bargaining, one of which is the relative strength and experience of the union and the league.[90] Courts have carefully considered the bargaining history between the parties and, where the restraint was "thrust upon a weak players' union by the owners,"[91] have been unwilling to assume that its inclusion in a collective bargaining agreement necessarily evidenced the existence of a bona fide arm's-length agreement.[92] Indeed, the *Mackey* court, showing concern over agreements unilaterally imposed due to the weak bargaining position of the union,[93] recognized that genuine bargaining cannot take place when one party is in a position of superior strength.[94] If courts are skeptical about agreements unilaterally imposed on an existing party to a collective bargaining agreement, it seems likely that this skepticism would extend to agreements unilaterally imposed on potential employees who were not parties to the agreement. In this context, any agreement reached would truly be thrust upon potential employees.

3. Impact Primarily on Parties to Agreement Requirement

The requirement that the restraints primarily[95] affect only parties

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Club, Inc., 351 F. Supp. 462, 499 (E.D. Pa. 1972); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 267-68 (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972). Even in Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), in which the court rejected a proposed test for application of the labor exemption essentially comprised of only the first two prongs of the *Mackey* test, *id.* at 886-89, the court stressed the critical nature of the inquiry as "whether the challenged restraints were ever the 'subject of serious, intensive, arm's-length collective bargaining,' " *id.* at 895 (*citing* Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc., 351 F. Supp. at 499). *Cited from* 57 N.Y.U. L. REV. 164, 183 n.75 (1982).

88. *See* cases cited in note 87.

89. Weistart, *supra* note 8, at 586. *See also* N.Y.U. L. REV. 164, 184 n.79 (1982).

90. 57 N.Y.U. L. REV. 164, 184-85 (1982).

91. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 743 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

92. *See* Mackey v. National Football League, 543 F.2d at 616.

93. 543 F.2d at 616.

94. *Id.* at 617. *Cited in Sport in Court: The Legality of Professional Football's System of Rescue and Compensation*, 28 U.C.L.A. L. REV. 252, 286.

95. The word "primarily" reflects the recognition that some incidental effects on outsiders are inevitable when competition between members of a multiemployer bargaining unit—

to the collective bargaining agreement reflects a position taken by the Supreme Court in the nonsport cases.[96] Where the effects of an agreement are primarily internal, the relevant legal framework is provided by the labor laws.[97] The antitrust statutes will come into play, however, when the parties attempt to extend the influence of their collective bargaining agreement beyond the immediate concerns of their employment relationship[98] to parties who are not part of the bargaining process.[99] Thus, it is necessary to distinguish between collective bargaining provisions that impose restraints on existing players and those, such as the draft, that affect new entrants.

It would be difficult to argue that the draft primarily affects only parties to the agreement. Essentially, it limits the employment opportunities of draftees. Thus, the draft clearly affects individuals who are not part of the bargaining unit and who had no control over the substance of the ultimate agreement.

The question of whether the labor exemption should immunize the draft from antitrust attack by potential union members or those outside the bargaining unit depends at least in part on the manner in which the range of interests of the bargaining unit employees is defined.[100] Existing nonsport precedents suggest that a union may properly seek to control outsiders' access to employment opportunity within the relevant bargaining unit.[101] More specifically, courts have held that unions have the right to press demands concerning the operation of hiring halls to allocate employees among various employers.[102] The relevant cases acknowledge the direct and unavoidable relationship between new and existing employees.[103] New entrants compete for jobs with

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competition based on differences in the wages, hours, and terms and conditions of employment each individual employer provides to its employees—is eliminated through collective bargaining. *See* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975); UMW v. Pennington, 381 U.S. 657, 664 (1965). *Cited from* 57 N.Y.U. L. REV. 164, 181 n.64 (1982).

96. The *Mackey* court cited Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975); UMW v. Pennington, 381 U.S. 657 (1965); and Local 189, Amalgamated Meat Cutters, v. Jewel Tea Co., 381 U.S. 676 (1965). *See* 543 F.2d at 614.

97. Weistart, *supra* note 8, at 549.

98. *Id.*

99. *Id.* at 548.

100. *Id.* at 554.

101. *Id.*

102. *See* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). Morris, *Developing Labor Law*, 712-715 (1971) [hereinafter cited as Morris].

103. *See, e.g.*, NLRB v. Houston Chapter, Assoc. Gen. Contractors of America, Inc. 143 NLRB 409, *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966). *Cited from* Weistart, *supra* note 8, at 554 n.450.

existing employees and thus undermine existing employee job security. It is recognized, therefore, that the union may extend its sphere of influence to affect new employees who have not yet had opportunities to participate in union decision-making.[104]

The argument has been made that a concern over imbalances in team strengths and the resulting impact on fan interest has prompted player unions to accept restraints on the mobility of existing players.[105] Although this same consideration might also cause the union to seek restraints on the ability of new entrants to choose their own employers,[106] it is not clear for several reasons that this argument can be applied to immunize the draft.

First, this justification is valid only if the draft does, in fact, help equalize team strengths. More importantly, the significance of the precedents in the hiring hall cases to the sports industry, is questionable. Hiring hall procedures are not absolutely analogous to the amateur player draft. The union members in a hiring hall often possess roughly equal skills to perform similar functions, and therefore often receive equal pay.[107] The union members in the NFLPA neither possess equal skills nor receive equal pay.[108] Finally, restrictions on the movement of players (and hiring halls) have an impact on existing as well as new or potential employees. Restraints of this nature, that directly affect those in the relevant bargaining unit, would seem to be less objectionable than restraints such as the draft that primarily affect potential employees outside the bargaining unit.

C. Duty of Fair Representation Owed to Amateur Athletes

Even if the requirements of the Mackey test were satisfied, the draft could still be attacked by draftees if the player union failed to fulfill its duty of fair representation.[109] The union's duty to represent each employee fairly originates from its status as the exclusive bargaining agent for its members.[110] A union breaches its duty when its con-

104. *See generally* Morris 726-56 (1971). *Cited from* Weistart, *supra* note 8, at 554.

105. *See, e.g., Comment, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HAR. L. REV. 418, 420-23 (1967); *Comment, Player Control Mechanisms in Professional Sports*, 34 U. PITT. L. REV. 645, 651-52 (1973). *Cited from* Weistart, *supra* note 8, at 554.

106. Weistart, *supra* note 8 at 554.

107. 7 BLACK L.J. 314, 338 (1981).

108. Upon expiration of the 1977 Collective Bargaining Agreement in 1982, the NFLPA did bargain for a wage scale under which all players would receive a base salary based on their years in the League. No wage scale was previously employed by the League.

109. 7 BLACK L.J. 314, 334-335 (1981).

110. Steele v. Louisville & Nashville R.R., 323 U.S. 1982 (1944).

duct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith.[111] The union also has a duty of "honest disclosure" in situations where it is the exclusive agent of two or more groups with potentially conflicting interest.[112]

Although little attention has been given to the situation where an individual employee or group of employees claim that the union failed to properly represent their economic interests at the bargaining table,[113] the general trend indicates that the union enjoys a broad range of discretion in representing the members of its unit.[114] Nonetheless, a union, in reconciling the interests of two or more employee groups, might breach its duty if its motives in reaching a settlement were aimed at maintaining intra-union power or satisfying the majority of affected employees.[115]

In the context of a players union, the union might well agree to a draft and sacrifice the freedom of new players to contract in return for increased pension benefits and job security for veteran athletes.

The issue in this context is whether the union discriminated against potential draftees who benefited little from what was negotiated.[116] Regardless of whether the union's conduct in this type of situation would be considered arbitrary or in bad faith, an argument could be made that the union, in failing to give potential draftees an opportunity for input, also failed to maintain a neutral posture with respect to subjects affecting draftees.[117]

D. Availability of Nonstatutory Labor Exemption Upon Expiration of the Collective Bargaining Agreement

While the above analysis suggests that the labor exemption might not insulate the amateur player draft from antitrust attack by draftees or potential draftees, the courts have generally recognized that a collective bargaining agreement containing player restraints that are the product of arm's-length negotiations could be shielded from antitrust

111. Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n), 148 NLRB 897, 899-900, 57 LRRM 1083 (1964), *enforced*, 368 F.2d 1010, 63 LRRM 2559 (5th Cir. 1966).

112. Barton Brands Ltd., 213 NLRB No. 71, 87 LRRM 1231 (1974), reversed in part and remanded, 91 LRRM 2241 (7th Cir. 1976). *Contra*, Brauer v. IBEW, Local 45, 86 LLRM 2390 (C.D. Cal. 1973).

113. Wellington 155-63. *Cited in* Weistart, *supra* note 8, at 546.

114. *See* Wellington 145-63. *Cited in* Weistart, *supra* note 8, at 546.

115. Morris v. Werner-Continental, Inc. 78 LRRM 2654 (S.D. Ohio, 1971).

116. 7 BLACK L.J. 314, 336-337 (1981).

117. *Id.* at 337.

attacks by existing players.[118] Where the union has had a significant impact on the substance of the agreement, the labor policies favoring the exemption outweigh antitrust concerns.[119] The sports cases that have considered this issue, however, have involved restraints that were part of unexpired collective bargaining agreements.[120] No court has considered the availability of the labor exemption in a situation where the collective bargaining agreement containing the restraints has expired.[121]

To allow the exemption to survive an expired collective bargaining agreement arguably raises the objection that the restraints were no longer the product of a bona fide bargain. Nonetheless, it might be argued that to automatically terminate the exemption upon expiration of the agreement would both create a distortion of bargaining power in favor of the players' union and impede the bargaining process. These arguments are discussed below.

1. Does Survival Violate the Bona Fide Bargain Requirement?

The Courts have indicated that the labor exemption will not be available to shield player restraints from antitrust attack in situations where there is a lack of bona fide arm's-length bargaining.[122] Thus, the exemption has been withheld where restraints, unilaterally imposed by the league before the advent of the players union, were included in a subsequent collective bargaining agreement but were not the product of good faith negotiations.[123]

If courts are unwilling to immunize those restraints contained in collective bargaining agreements that were not bargained for, it seems unlikely that they would continue to protect restraints that were bargained for after the agreement in which they were contained has expired, or, in other words, at a point in time in which there is no collective bargaining agreement in existence.

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118. *See supra* note 69.

119. *See* cases cited in note 87; *see also* Weistart, *supra* note 8, at 586.

120. *See, e.g.*, 600 F.2d at 195; 543 F.2d at 616 n.18.

121. In professional sports significant periods of time have often elapsed between the expiration of one collective bargaining agreement and the start of a new agreement. In the NFL, for example, the first agreement between the NFL and the National Football League Players Association (NFLPA) expired on February 1, 1970, and a new collective agreement was not signed until June 17, 1971. Mackey v. National Football League, 543 F.2d at 610. The second agreement expired on January 30, 1974, *id.*, and a new one was not executed until March 1, 1977. *Cited from* 57 N.Y.U. L. REV. 164, 170 n.19 (1982).

122. Weistart, *supra* note 8, at 584, 586; *see also* cases cited in note 87 *supra*.

123. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 615-16; Smith v. Pro-Football, Inc., 420 F. Supp. at 743.

The requirement of a good faith bargain suggests that at the very least there must be some quid pro quo. The union, then, is expected to be strong enough to exact benefits from management roughly equal to those concessions that it makes. For example, union leaders might feel that the costs to players associated with a twelve round draft are roughly equal to $x. The union, then, might be willing to agree to a twelve round draft for three years in return for $3x or the equivalent thereof in other benefits. Immunizing the draft from antitrust attack in year 4 (or after the expiration of the collective bargaining agreement) gives management a benefit for which there was no bargained-for exchange. Had the union anticipated this result, it would have demanded $3x + ($x)(P) ($x being the costs associated with an additional draft and (P) being the probability that no new collective bargaining agreement would be reached by the year 4 draft). In fact, the costs associated with the year 4 draft might be greater than ($1x)(P). It is possible in the above hypothetical that at the time the union valued each of the three drafts at ($x) it contemplated a much greater value for the year 4 draft. For example, assume that the union knew that the television contract in effect in year 1 expired at the end of year 3 and that the league was planning to expand in year 4. If these two factors were to double team revenues, the union may well have correlated this increase with an increase in the costs associated with the draft.

There is authority to suggest that an employer, as long as he first gives notice and a reasonable opportunity to bargain, is free to abolish a contractually derived right after the agreement expires.[124] Even if, however, management were to continue to provide in year 4 the benefits that it bargained away in the prior agreement, the above hypothetical suggests that it cannot simply be assumed that the year 4 draft was the product of good faith negotiations. Judicial reluctance to enforce restraints "thrust upon" players' unions,[125] suggest that an expired collective bargaining agreement should not protect restraints that violate the antitrust laws.

2. Does Termination Create a Distortion of Bargaining Power?

The nonstatutory labor exemption exists to foster collective bar-

124. *See* Richardson v. Communications Workers, 443 F.2d 974, 978-79 (8th Cir. 1971) (job security and seniority), *cert. denied*, 414 U.S. 818 (1973); Hinson v. NLRB, 428 F.2d 133, 139 (8th Cir. 1970) (trust fund agreement); NLRB v. Cone Mills Corp., 373 F.2d 595, 598-99 (4th Cir. 1967) (superseniority rights).

125. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 616.

gaining.[126] Thus, despite the above analysis, it is important to determine if there are circumstances in which the collective bargaining process will be furthered by application of the labor exemption after an agreement has expired. Both employers and unions have a duty to bargain in good faith over wages, hours, and other terms and conditions of employment.[127] This duty requires that the parties bargain in good faith before altering a mandatory subject of bargaining and continues even after the collective bargaining agreement expires.[128] The question can be posed whether the obligation to bargain before acting unilaterally means that mandatory subjects "survive" the expiration of the collective bargaining agreement. Because parties to a collective bargaining agreement generally contemplate an ongoing contractual relationship and an employment relationship beyond the expiration of the agreement, provisions in collective bargaining agreements have not always been nullified when the agreements have terminated.[129] The argument has been made that to withdraw the labor exemption upon expiration of the collective bargaining agreement produces an unjustifiable distortion of bargaining power by enabling unions to enjoin the enforcement of restraints that were earlier subject to meaningful union input.

This argument is not convincing. Enabling players to enjoin the enforcement of unreasonable restraints after the agreement expires does not create an unjustifiable distortion in bargaining power. Upon expiration of collective bargaining agreements, the policy reasons for giving the labor laws preeminence over the antitrust laws are less compelling than while the agreement is still in existence. A shift in bargaining power, to the extent that it occurs, is mandated by deference to and compliance with the policies of the antitrust laws. Forcing an employer to comply with the antitrust laws in this context seems appropriate. The fact that the restraint was previously subject to good faith negotiations should not be controlling. Presumably, the concessions the union received were equal in value to the costs associated with

126. *See supra* note 51.

127. NLRA § 8(a)(5),(d), 29 U.S.C. § 158(a)(5),(d) (1976); *see* NLRB v. Katz, 369 U.S. 736, 742-43 (1962); Hinson v. NLRB, 428 F.2d 133, 139 (8th Cir. 1970).

128. *See* Hinson v. NLRB, 428 F.2d 133, 137 (8th Cir. 1970) (employer's unilateral improvement in wages and benefits); *see also* NLRB v. Katz, 369 U.S. 736, 747-48 (1962).

129. 61 COLUM. L. REV. 1363, 1364 (1961) (notes omitted): Since parties to a collective bargaining agreement normally contemplate a subsisting contractual relationship of indefinite duration with regular renewals or renegotiations and since the employment relationship generally continues beyond expiration of the agreement, rights created by collective bargaining agreements have not always been nullified when the agreements have been terminated. *Cited from* 57 N.Y.U. L. REV. 164, 196 n.142 (1982).

agreeing to the restraints for the life of the agreement, but not for a longer period of time.

3. Does Termination Impede the Bargaining Process?

The argument is also made that enjoining the enforcement of restraints in this context impedes the bargaining process.[130] Presumably, a union will be reluctant to bargain seriously toward a new agreement if it knows that when an agreement expires it can seek to enjoin enforcement of previously agreed upon restraints.[131]

It is not clear that preserving the exemption after the agreement's expiration furthers the policies of the federal labor laws fostering the collective bargaining process. If the exemption is preserved, management, instead of labor, would likely be reluctant to bargain seriously. In addition, withdrawing the exemption and enabling players to challenge the restraints seems consistent with the antitrust laws.

The above discussion suggests that there may be some situations in which the labor exemption will not be available to immunize the NFL player draft from antitrust attack. As a result, courts may in the future be forced to consider again whether the justifications for the draft outweigh its anticompetitive effects. The evidence presented in the *Smith* case failed to adequately address this issue. The information necessary to properly evaluate the effects of the draft on team strengths is presented in the statistical study referred to below.

V. STATISTICAL ANALYSIS OF THE NFL DRAFT SYSTEM

A. Introduction

The following study attempts to measure the extent to which the draft has historically balanced team strengths. More specifically, an attempt was made to determine whether a team's priority position in the draft in one year was related in any significant way to its actual changes in winning percentage in that year. Because the draft can affect team performances both in the current and future years, the relationship between a team's draft position in one year and its winning percentage in subsequent years was also considered.

Team selection positions in the draft, numbered one through twenty-eight, were used to measure the relative advantage given to teams under the current draft system. In theory, a team's relative advantage in the draft increases as its draft position approaches the

130. 57 N.Y.U. L. REV. 164, 197 (1982).
131. *Id.*

number one. Likewise, a team's relative advantage decreases as its position in the draft approaches the number twenty-eight.

If the draft accomplishes what the owners say that it accomplishes, it should gradually strengthen the weaker teams (or those drafting in the lower positions) and gradually weaken the stronger teams (or those drafting in the higher positions). Theoretically, the middle teams (for example those drafting in positions 13 through 16) should experience little change in relative strength as a result of the draft.

B. Methodology

The purpose of this analysis is to estimate the relationship between the position in which a team drafts each year and the change in that team's relative competitive strength in future years. In order to determine this relationship, variables that reflect both a team's advantage (or disadvantage) because of its position in the draft and a team's change in relative strength over time must be isolated.

Since teams draft in reverse order of their previous year's relative performance, a team's draft position (1 through 28) was used to measure its advantage of selecting players in any given year.[132] A team's advantage in the draft increases as its draft position approaches the number 1. The *change* in winning percentage was selected to reflect how a team improves or decreases its competitive position relative to all other NFL teams.

The position in which a team drafts in a given year reflects more than just a priority selection position. The draft position also approximates the team's quality from the previous year, relative to the other NFL teams. This base year quality restricts the extent to which a team can change its relative draft position in either direction in future years. For example, the team with the first selection can only change its draft position in an upward direction (i.e. the worst team can only improve its relative position). Likewise, the team drafting in the fifth position

132. A team's priority position or the advantage it receives in the draft is the variable that most accurately isolates the impact of the current draft system on team performances. While it is true that some teams actually trade away their draft selection in certain rounds, the value received in exchange for that selection should reflect the value of that team's priority position. For example, the value that the team selecting first receives in exchange for its first round pick should theoretically be greater than the value received by the Super Bowl winner for its first selection. Admittedly, one team may receive more in a trade than it gives up. But this result is not a function of the draft. The importance of the draft is in the advantage that it gives to a team, not in what a team does with that advantage. One of the major arguments presented in this paper is that that draft advantage can be neutralized by other factors such as inferior managerial expertise.

can change four places in a downward direction and 23 places in an upward direction.

This restriction was filtered out in order to isolate the advantage/disadvantage gained by a specific position in the draft. Thus, each model includes a base year winning percentage to reflect a base year quality. An analysis of variance was conducted on different models to measure how much variation in a team's change in relative strength can be attributed to past draft positions with that team's winning percentage from a base year already in the model. The following function summarizes the models analyzed:

$$WP_{ij} = f(WP_O, \sum_{k}^{4}{}_{1} D_{j-k})$$

where WP_{ij} is the change in winning percentage from year i to j, WP_0 is the base year winning percentage, and D_{j-k} is the draft position in year j-k.[133] The functions that were analyzed and definitions of the corresponding variables are provided in Appendix A.

Data were collected for the period between 1970-1981 and an analysis was conducted to determine the relationship between draft position and a change in comparative team strength.[134] The dependent variables represent a change in a team's relative strength and can be classified into two groups. The first group of dependent variables simply measure the cumulative impact of successive drafts on a single year's change in winning percentage. However, a team might not realize immediate benefits from a particular draft.[135] Therefore, a second group of dependent variables was included to measure the cumulative impact of successive drafts on a longer run change in relative comparative strength.

These two groups represent ways of viewing a team's change in comparative strength over different time frames. The different time frames represent different perspectives of change. For example, the

133. Chronologically, the draft position in any given year precedes that year's winning percentage. However, since draft position is determined by the prior year's winning percentage, the subscript of each year's draft position was matched with the subscript of the previous year's winning percentage.

134. Two ways to measure a change in comparative team strength were considered: A change in draft position and a change in winning percentage. Neither measure completely explains how a team changes its comparative strength. For example, a team could conceivably have a change in winning percentage without changing its position in the draft and vice versa. The change in winning percentage was selected because the addition of Tampa Bay and Seattle in 1976 automatically resulted in two additional draft positions. Thus, the change in winning percentage is a more consistent measure over the 12 year period.

135. Many draftees serve a one or two year apprenticeship as a substitute player, depending on their position. For example: Quarterbacks and offensive linemen often do not become first string players in their rookie seasons.

base year quality of a team might not differ from its quality four years in the future even though that team changed drastically on a year to year basis during that four year period. That team's change in comparative strength from year to year would be large while its longer run change would be negligible. Likewise, a team could improve its relative strength slightly from year to year. That team's longer run change could be substantially greater than any of the individual year to year changes.

All models include a dependent variable that measures a change in winning percentage. Equations 1, 3, 5, 7, 9, and 11 include only a base year winning percentage as the independent variable. Equations 2, 4, 6, 8, 10, and 12 include a base year winning percentage and one, two, or three prior years' draft positions as independent variables. The difference between the coefficient of determination of equations 1 and 2, 2 and 3, . . . and 11 and 12 isolates the effects of one or more of the previous three drafts. This difference was calculated to filter out the effects of a team's base year quality.

C. Results of Statistical Analysis

The first group of dependent variables (WP12, WP23, and WP34) all measure a one year change in a team's relative strength. Each variable is included in a model that contains an increasing number of previous years' draft positions to reflect the cumulative effect of several drafts plus the winning percentage from a base year to reflect an initial quality. For example, the model containing the change in a team's performance from year 3 to year 4 includes the team's draft position in years 3, 2, 1, 0, and the winning percentage in year 0.[136]

The analysis of variance conducted on models 5 and 6 indicates that approximately 22% of the change in winning percentage between years 3 and 4 can be explained by a team's (priority) selection position in the three preceding drafts (years 3, 2, and 1). The inclusions of a base year winning percentage and the year 0 draft position result in a 1% increase in explanation. Thus, only 23% of the change in winning percentage between years 3 and 4 can be explained by equation 6. Between years 2 and 3, approximately 19.4% of the change in winning percentage can be explained by the variables representing a team's advantage/disadvantage in the two preceding drafts. Finally, between

136. A team's winning percentage in a base year 0 largely determines its draft position in year 0. As a result, the team's draft position in 0 and its base year 0 quality are inseparable. However, a team's draft positions in year 1, 2 and 3 can be separated from its base year quality.

years 1 and 2, approximately 18.5% of the change in winning percentage can be explained by the preceding draft.

The longer run change in relative strength is measured by the remaining dependent variables: WP02, WP03, and WP04. These variables represent a change in winning percentage from year 0 to year 2, 0 to 3, and 0 to 4. Approximately 14.5% of the change in a team's winning percentage between a base year 0 and year 4 can be explained by the variable that represents the draft positions in year 1, 2, and 3. Between base year 0 and year 3, 13% of the change in winning percentage can be explained by the variable that represents the draft positions in years 1 and 2. Finally, between base year 0 and year 2, 11% of the change in winning percentage can be explained by the variable that represents the draft position in year 1. The results of the analysis conducted on all of the equations are summarized in Table 1 and Table 2.[137]

TABLE 1

Dependent variables measure a 1 year change in winning percentage

(1)	(2)	(3)	(4)	(5)	(6)
Model Number	First Year of Measurement i	Last Year of Measurement j	# of Previous Draft Years in Model	Explained Variation r^2	Variation Explained by Draft(s)*
(1)	1	2	0	.0383	
(2)	1	2	1	.2229	.1846
(3)	2	3	0	.0450	
(4)	2	3	2	.2392	.1942
(5)	3	4	0	.0090	
(6)	3	4	3	.2269	.2179

*The r^2 for the odd numbered models (those models that contain 0 previous drafts) is the amount of variation in team strengths explained by a team's base year quality. The even numbered models include both this base year quality plus one or more draft years. The difference between the r^2 in the even and odd model in each pair of models is shown in column (6) and represents the actual amount of variation explained by one or more years' drafts.

137. This discussion is not intended to suggest that the draft will never have a greater impact on team performances. Admittedly, there might become isolated situations in which an unusually great player will have a significant impact on a team's performance. The results indicate, however, that these situations are exceptions.

TABLE 2

Dependent variables measure more than a 1 year change in winning percentage

(1)	(2)	(3)	(4)	(5)	(6)
Model Number	First Year of Measurement i	Last Year of Measurement j	# of Previous Draft Years in Model	Explained Variation r^2	Variation Explained by Draft(s)*
(7)	0	2	0	.3442	
(8)	0	2	1	.4537	.1095
(9)	0	3	0	.4250	
(10)	0	3	2	.5544	.1294
(11)	0	4	0	.4609	
(12)	0	4	3	.6061	.1452

*The r^2 for the odd numbered models (those models that contain 0 previous drafts) is the amount of variation in team strengths explained by a team's base year quality. The even numbered models include both this base year quality plus one or more draft years. The difference between the r^2 in the even and odd model in each pair of models is shown in column (6) and represents the actual amount of variation explained by one or more years' drafts.

Those variables that represent draft position have an impact on the change in team strengths that is significantly different from zero. However, the analysis indicates that much of the change in a team's comparative strength (both from year to year and over a longer time frame) cannot be accounted for by that team's draft position in prior years. For example, the model that contained four previous drafts and measured a one year change in a team's comparative strength (Model 6) reflected the greatest impact on the change in team strength. That model explained 23% of the change. Thus, seventy-seven percent of the change cannot be accounted for by those four previous draft positions.

In addition, there are two reasons why it is possible that the above results overstate the amount of variation in team strengths explained by the draft. First, the current scheduling format in the NFL is ostensibly designed to help achieve competitive balance. Under this system, both a team's draft position and its schedule are functions of its prior season strength. For example, the worst team in the League not only receives the first selection in the draft but also a weaker nondivisional schedule

than the other teams in its division.[138] This raises the possibility that a team's change in performance could be partly due to its schedule.[139] Second, the variation in team strength that is explained by the draft position variables in all models includes more than just the priority advantage gained by a particular draft position and a base year quality. Regardless of a team's priority position in the draft and its initial quality, all teams secure rights to new players each year. The twenty-eighth player selected in the draft will likely have less of an impact on the Super Bowl winner than the twenty-ninth player selected will have on the weakest team, even though those two players should be of comparable quality. Thus, even a random selection process over time will theoretically have more of an impact on weaker teams than on stronger teams. This suggests that the amount of explained variation in the above analysis could be overstated.

D. Possible Explanations for Statistical Results

There are several factors that might account for much of the unexplained variation in changes in team strengths. For example, scheduling, injuries, organizational changes, and managerial expertise all could affect a change in team performance.

There are also several factors that might account for the relatively small amount of explained variation. First, the argument that the reverse order of the draft promotes some degree of team equality rests on a very large and disputable assumption: that the players chosen by weaker teams are significantly better athletes than those chosen by stronger teams. Because college performance indicators are imperfect predictors of future potential, expert scouting and evaluation systems are at least as important to teams as their relative position in the draft.[140] The fact that many players are released, only to later succeed with other teams indicates that managerial skills are different for different teams.

Second, the team that receives the first selection in the draft will have picks 1, 29, 57, 85, 113, 141, 169, 197, . . . etc. while the Super Bowl winner will have picks 28, 56, 84, 112, 140, 168, 196. The only significant difference between the draft for the weakest team and the Super Bowl winner is a single player, the first player selected.[141] All

138. *National Football League 1981 Media Information Book*, pp. 8-9.

139. The relationship between the strength of a team's schedule and its change in performance will be analyzed in a later article.

140. Demmert, *supra* note 12, at 37.

141. Demmert, *supra* note 12, at 36-7; Hearings on § 2372 before the Subcommittee on

other picks are of comparable quality. The last place team then improves itself by one player compared to the Super Bowl winner. Even assuming that the teams all possess equal managerial capabilities, it seems unlikely that this one player alone can significantly close the gap between the weaker and stronger teams. It is even more unlikely that the draft will enable mediocre teams to improve their comparable strength. Their position in the draft will give them an even smaller advantage over the better teams.[142]

Finally, the overall quality of the draft changes from year to year. In addition, the difference in quality between the first and second players drafted (or any players selected in sequence) in any given year might be larger or smaller than the difference in quality between the second and third players drafted (or any other sequential picks). As a result, the advantage that a team gains from its draft position, and thus the impact of that draft position on team performance, will vary from year to year and within any given year. In some years, this advantage might be very small.

VI. CONCLUSION

Some type of process by which teams obtain new players each year is necessary to maintain the quality of play in the NFL. Likewise, competitive balance is a legitimate concern for the League. The present draft system does appear to have some impact on the change in comparative team strengths. However, this system also prevents a player from receiving a salary which approximates his fair market value. The impact of the current NFL draft system on the equalization of team strengths does not appear substantial enough to justify this suppression of player salaries.

APPENDIX A

Variables

WP_{ij} = change in winning percentage between year i and j.
WP_O = winning percentage in base year O.
D_{j-k} = draft position year j − k.

Antitrust and Monopoly of the Senate Committee on the Judiciary, 92nd Congressional 2nd Session 1296 (1971-1972). *Cited in* Sobel, *Professional Sports and the Law*, 253-254 (1977).

142. Demmert, *supra* note 12, at 37.

(1) $WP_{12} = f(WP_0, D_0)$
(2) $WP_{12} = f(WP_0, D_0, D_1)$
(3) $WP_{23} = f(WP_0, D_0)$
(4) $WP_{23} = f(WP_0, D_0, D_1, D_2)$
(5) $WP_{34} = f(WP_0, D_0)$
(6) $WP_{34} = f(WP_0, D_0, D_1, D_2, D_3)$

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(7) $WP_{02} = f(WP_0, D_0)$
(8) $WP_{02} = f(WP_0, D_0, D_1)$
(9) $WP_{03} = f(WP_0, D_0)$
(10) $WP_{03} = f(WP_0, D_0, D_1, D_2)$
(11) $WP_{04} = f(WP_0, D_0)$
(12) $WP_{04} = f(WP_0, D_0, D_1, D_2, D_3)$