Unnecessary Roughness: Clarett v. NFL Blitzes the College Draft and Exemplifies Why Antitrust Law is also 'A Game of Inches'

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I. INTRODUCTION

An oft-repeated cliche labels football 'a game of inches' played on a field measured in yards.\(^1\) The implication is clear - a fraction of the yardstick is potentially the difference between glory and defeat.\(^2\) Antitrust jurisprudence functions in much the same way; expansive standards mark the field, yet individual


proceedings are often decided by minute details. However, a player in a football game has at least one major advantage over an attorney embroiled in an antitrust suit: a playbook. A football team’s playbook is unambiguous and standard for every player on the team. In contrast, the myriad of Supreme Court antitrust approaches to professional sports leagues frequently leaves practitioners in a quandary of confusion. The sheer number of conflicting doctrines employed in factually similar cases has resulted in little continuity among the circuit courts. When star college football player Maurice Clarett challenged the National Football League’s draft rules, he did more than change the face of professional football and the college draft. Clarett v. National


Football League\(^8\) brought attention to the perplexing antitrust standards commonly applied in suits involving professional sports leagues.\(^9\) This article will critically analyze the evolution of certain antitrust and labor law approaches to the plight of professional football players, and propose improved criteria to be used when evaluating future NFL antitrust suits.\(^10\)

II. BACKGROUND

A. The Line of Scrimmage – The Sherman & Clayton Acts

Congress passed the Sherman Antitrust Act\(^11\) in 1890 to prohibit unreasonable restraints on trade.\(^12\) The Act’s sponsor, Senator John Sherman, desired it to be a general guide for American commerce, describing trusts as “inconsistent with our form of government.”\(^13\) Section 1 of the Act proscribes concerted actions that restrain interstate commerce.\(^14\) Section 2 bans monopolization of trade.\(^15\) While on its face the Sherman Act

\(^8\) 369 F.3d 124 (2d Cir. 2004).
\(^9\) See Clarett, 369 F.3d at 124 (stating the interaction of antitrust laws and federal labor legislation is an area of law marked more by controversy than by clarity) (citing Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987)); see also Roberts, supra note 5, at 338 (noting there are many published antitrust decisions involving sports league market restraints that have adopted doctrines that, when followed, have “simply become a formulation by which the blind lead the blind”). See generally Ready For a Fight, Sports Experts Like Clarett’s Chances of Overturning Draft Eligibility Rule, SPORTS ILLUSTRATED, Sept. 17, 2003 (predicting Clarett’s chances of success), available at http://sportsillustrated.cnn.com/2003/football/nfl/09/17/clarett.nfl.ap/index.html (last visited Nov. 6, 2004).

\(^10\) See discussion infra Parts III – V (analyzing antitrust and labor law approaches).


\(^12\) See id. (stating those actions that are illegal); see also Milton Handler, Reforming the Antitrust Laws, 82 COLUM. L. REV. 1287, 1288 (1982) (declaring “no other legislation has continued to command the support and confidence of the American people over so long a period”). See generally Balaklaw v. Lovell, 14 F.3d 793, 795 (2d Cir. 1994) (explaining § 1 of Sherman Act).

\(^13\) See Anderson, supra note 3, at 127 (citing 1721 Cong. Rec. 2457 (1890)) (describing background of the Sherman Act).

\(^14\) See Sherman Act, supra note 11 (stating “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal”); see also Business Electronics Corp. v. Sharp Electronics Corp., 484 U.S. 717, 723 (1988) (positing the Court has always interpreted Section 1 of the Act as intending only to prohibit unreasonable restraints on trade); Anderson, supra note 3, at 127–28 (expanding “concerted actions” to include contracts, combinations or conspiracies).

\(^15\) See Sherman Act, supra note 11, at § 2 (requiring “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony”); Denise Bryant, Note, Brown v.
bans every conspiracy in restraint of trade, the Supreme Court has held that only agreements that “unreasonably” restrain trade fall under the Act. The broad language of the Act has resulted in wide discretion for the courts when examining antitrust allegations. The result being that no less than four (possibly five) different methods have been used by the Supreme Court to analyze the reasonableness of a restraint on trade.

The Sherman Act did not specifically address agreements between employers and unions that interfere with commercial activities. Labor and antitrust policies are often in conflict. Labor unions, naturally, suppress competition in an effort to


17 See Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332, 342–43 (1982) (asserting applicable standard); see also Anderson, supra note 3, at 127 (posing Congress left courts to decide when antitrust violations have occurred); Debra A. Gilmore, The Antitrust Implications of Boycotts by Health Care Professionals: Professional Standards, Professional Ethics and the First Amendment, 14 AM. J.L. & MED. 221, 232–33 (1988) (discussing situations in which courts have discretion to allow certain behaviors with purposes not solely anticompetitive in nature).

18 See discussion infra Part IV.E; see also Kathryn A. Kuske, Note, Refusal to Deal as a Per Se Violation of the Sherman Act: Russell Stover Attacks the Colgate Doctrine, 33 AM. U. L. REV 463, 484 (1984) (discussing two possible approaches courts may use to analyze the reasonableness of restraint on trade); Laura Mirabito, Picking Players in the College Draft Could be Picking Trouble with Antitrust Law, 36 SANTA CLARA L. REV. 823, 827 (1996) (noting multiple approaches have been used to examine reasonableness of restraints of trade). See generally Mackey v. Nat’l Football League, 543 F.2d 606, 620 (1976) (employing various methods in analyzing reasonableness of restraint on trade).

19 See Brown v. Pro Football, Inc., 518 U.S. 231, 260 (1996) (addressing the fact that agreements resulting from union-employer relations are not always exempt from Sherman Act scrutiny); see also Mirabito, supra note 18, at 827 (pointing to broad language of the Sherman Act); Gary R. Roberts, Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints, 75 GEO. L.J. 19, 59–60 (1986) [hereinafter Gary Roberts] (explaining how the Court applied a labor exemption to an agreement so it could apply the Sherman Act to the policy of labor laws).

raise wages.\textsuperscript{21} Federal labor statutes, including the National Labor Relations Act,\textsuperscript{22} favor free and private collective bargaining.\textsuperscript{23} However, union tactics often result in the restraint of trade.\textsuperscript{24} The Supreme Court originally interpreted the Sherman Act as prohibiting labor union activities that impeded trade, including boycotts.\textsuperscript{25} In response, Congress passed the Clayton Act in 1914.\textsuperscript{26} In addition to creating a private cause of action for individuals injured by antitrust violations,\textsuperscript{27} the Clayton Act also exempted certain labor-related activities from antitrust scrutiny.\textsuperscript{28} Section 6 of the Act provides that,

\begin{quote}
\textsuperscript{21} See Brown, 518 U.S. at 234 (citing R. Posner & F. Easterbrook, Antitrust 31 (2d ed. 1981)) (examining the relationship between labor and antitrust law); Victoria Bassetti, Weeding RICO Out of Garden Variety Labor Disputes, 92 Colum. L. Rev. 103, 193 n.175 (1992) (explaining that after the passage of Sherman Antitrust Act in 1890, courts held unions were seeking to decrease competition among workers over wages, and found them in violation of the Act); Michael J. Frank, Accretion Elections: Making Employee Choice Paramount, 5 U. Pa. J. Lab. & Emp. L. 101, 165 n.258 (2002) (asserting the best way to suppress competition is to coerce an employer not to deal with non-union employees).
\end{quote}
The labor of a human being is not a commodity or article of commerce. Nothing constrained in the antitrust laws shall be construed to forbid the existence and operation of labor ... organizations, instituted for the purposes of mutual help ... or to forbid or refrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof.  

The Supreme Court interpreted this section of the Clayton Act, in conjunction with the Norris-LaGuardia Act, as generally waiving antitrust liability for labor conduct. However, the Court limited this exemption by applying it only when labor unions act in their own interest, and not when conspiring with non-labor organizations. Therefore the exemption is conditioned upon the particular actions of the union. These interpretations of the acts have become known as the statutory labor exemption.

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30 29 U.S.C. § 104 (2004), which states:

[W]hereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is a commodity helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restrain, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.


32 See U.S. v. Hutcheson, 312 U.S. 219, 230 (1941) (applying antitrust restrictions to labor organization attempting to persuade other unions to engage in boycott); U.S. v. Brims, 272 U.S. 549, 552 (1926) (holding boycott by all union mills against non-union work was an antitrust violation); Pan Alaska, 621 F. Supp. at 803 (stating there must be a legitimate union goal to qualify for exemption).

33 See Connell, 421 U.S. at 622–23 (explaining that exemption does not apply when union and non-labor party agree to restrain competition); United Mine Workers v. Pennington, 381 U.S. 657, 661 (1965) (outlining scope of statutory labor exemption); Covelli, supra note 25, at 270 (stating that scope is limited to parties directly involved in collective-bargaining relationship).

34 See H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704, 714-15 (1981) (explaining statutory exemption that labor unions enjoy); Anderson, supra note 3, at 135 (discussing statutory labor exemption); Mirabito, supra note 18, at 832 (noting that together the Norris-LaGuardia Act and Clayton Act constitute the statutory labor exemption shielding certain labor activity from antitrust scrutiny).
B. The Non-Statutory Labor Exemption

On the coattails of the statutory labor exemption, the Supreme Court assumed that Congress also implicitly exempted concerted labor activity necessary for collective bargaining. The Court explained this judicially fashioned immunity:

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

Collective bargaining that creates uniform wages and working conditions is encouraged by national labor policy. It has been left to the courts to square this labor policy with antitrust concerns. The Supreme Court recognized the conflict, and stated "it is our responsibility to . . . reconcile [the two policies]." The Court explicitly assumed the mantle of determining when

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35 See Brown, 518 U.S. at 235 (discussing the evolution of non-statutory labor exemption); NBA v. Williams, 45 F.3d 684, 692–93 (2d Cir. 1995) (holding that non-statutory exemption prevented antitrust suit based on terms and conditions of employment); Bryant, supra note 15, at n.41 (relating the non-statutory labor exemption's creation by the Supreme Court).

36 See Connell, 421 U.S. at 622 (explaining reasoning behind establishment of the non-statutory labor exemption); see also Anderson, supra note 3, at 136 (relating development of labor exemptions).

37 See NLRA, supra note 22, at § 158(d) (making wages and working conditions a mandatory subject of collective bargaining process); Local 509, ILGWU v. Annshire Garment Co., No. KC-2307, 1967 U.S. Dist. LEXIS 7768, at *4 (D. Kan. June 30, 1967) (stating collective bargaining agreements are utilized to “implement a National labor policy designed to remove certain recognized sources of industrial strife by encouraging friendly adjustment of industrial disputes as to wages, hours of work and other conditions of employment, upon a plane of equality of bargaining power between employers and employees”); cf. NLRA, supra note 22, at § 159 (“[R]epresentatives 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 representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”)

38 See Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945) (noting conflict between antitrust and labor concerns); Pennington, 381 U.S. at 663 (observing the Court held collective bargaining agreements may violate the antitrust laws); cf. Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers v. United Contractors Assoc., 483 F.2d 384, 392 (3rd Cir. 1973) (agreeing with other court decisions that found collective bargaining agreements may violate Sherman Act).

39 See Allen Bradley, 325 U.S. at 806 (assuming responsibility for integrating federal policies).
the activities favored by one policy counteract the other. With this non-statutory labor exemption, the Court shifted much of the decision-making authority in the realm of collective bargaining regulation from Congress to the courts. Where and when this non-statutory labor exemption applies, however, has been a source of confusion and division among the courts.

Three early Supreme Court cases interpreting the non-statutory labor exemption obscured what was up to that point a straightforward analysis. In *Amalgamated Meat Cutters v. Jewel Tea Co.*, the Court required that the subject matter of employer-employee agreements must be "intimately related to wages, hours and working conditions" in order to qualify for the non-statutory labor exemption. In *Jewel Tea*, a meat workers union entered into agreements with a large trade association to limit the marketing hours of fresh meat. One self-service market chain, Jewel Tea, refused to enter into the agreement containing the limit on marketing hours. When the union threatened to strike, Jewel Tea succumbed and signed the

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40 See id. Specifically, the court noted:
We 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.


42 See Bryant, supra note 15, at n.45 (describing nebulous boundaries of the non-statutory labor exemption); Wood, supra note 41, at 322 (mentioning uncertainty of cases reconciling antitrust and labor policies); cf. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (stating "the Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions").

43 381 U.S. 676 (1965) (announcing application of the non-statutory labor exemption to agreement between a union and trade association regarding operating hours).

44 Id. at 689 (holding the particular hours of the day and days of the week that workers must report are within terms and conditions of employment that unions and employers must negotiate).

45 Id. at 679–80 (noting that representatives of thousands of Chicago meat retailers and seven union petitioners entered into a contract in 1957 outlining working hours).

46 Id. at 680 (explaining that during negotiations Amalgamated Meat rejected all counteroffers made by Jewel Tea and authorized its union members to strike).
Jewel Tea then brought suit against the union, arguing that the limitation on hours in the agreement inhibited its ability to compete in the market. The Court held that the non-statutory labor exemption waived antitrust liability in this case; however, the exemption was not applied automatically because the agreement dealt with working hours. The Court subjectively analyzed the competing labor and antitrust policies implicated by the particular facts. By employing this balancing test, the Court held that labor agreement items like wages, hours, or working conditions, were not perfunctorily exempted from antitrust scrutiny.

In United Mine Workers v. Pennington, the companion case to Jewel Tea, the Court exercised an even greater level of discretion when determining whether the non-statutory labor exemption removed particular labor actions from antitrust scrutiny. In Pennington, the Court examined a collective bargaining agreement struck between a mine worker's union and a number of coal producers. The union agreed to help develop mechanical technology that would have the practical result of job loss for the mine workers, in return for wage increases. The union agreed
to impose the same terms on other small companies as well.\textsuperscript{56} Smaller coal companies, however, had less ability to support the wage increases.\textsuperscript{57} These smaller coal companies brought suit, asserting that the agreement would put them out of business and suppress competition in the coal industry.\textsuperscript{58} The Court held that an agreement among a series of employers could not impose wage and working condition restrictions on another unrelated group of employers.\textsuperscript{59} In its analysis, the Court once again subjectively evaluated the labor policies implicated by the particular set of facts.\textsuperscript{60} Upon deciding that labor law did not conflict with its conclusion, the Court restated the proposition that negotiation over mandatory terms to labor agreements did not imply an automatic labor exemption.\textsuperscript{61} The Court also held that the exemption did not apply to wage agreements imposed on employers who were not party to the original collective bargaining agreement.\textsuperscript{62} In concert, Pennington and Jewel Tea marked the expansion of judicial discretion when applying the non-statutory labor exemption.\textsuperscript{63} The scope of this discretion was which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose terms of 1950 agreement on all operators without regard to their ability to pay\textsuperscript{\textdagger}).

\textsuperscript{56} \textit{See id.} (stating "[the union] ... agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay").

\textsuperscript{57} \textit{See id.} at 664 (describing contention that union and large coal operators had entered into a conspiracy to impose wage-scales upon smaller operators in an effort to drive them from market).

\textsuperscript{58} \textit{See id.} (iterating allegations that imposition of the wage-scale would pre-empt market for large, unionized operators).

\textsuperscript{59} \textit{See id.} at 665 (holding wage scales are integral to collective bargaining but the effect of imposing wage scales would eliminate competition, an act barred by Sherman Act).

\textsuperscript{60} \textit{See id.} at 667 (concluding that national labor policy provided no support for the kind of agreement at bar).

\textsuperscript{61} \textit{See id.} at 666 (stating that national labor policy does not allow one bargaining unit to determine wages or working conditions for other bargaining units or entire industry).

\textsuperscript{62} \textit{See id.} (opining that union's members would derive greater benefit from ability to bargain individually with each bargaining unit on a case by case basis).

\textsuperscript{63} \textit{See id.} at 665 (stating "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units"); Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 714-15 (1965) (holding that a court could subject both unions and employers to antitrust criminal and civil sanctions, if in collective bargaining, it concluded the union "has undertaken to use its best efforts" to have specific wage accepted by other employers in the industry). \textit{See generally} Wood, \textit{supra} note 41, at 331–32 (claiming that Supreme Court began to "infer that agreements between employers and employees concerning terms and conditions of employment implicitly were exempt from antitrust liability").
patently broader than that previously used in statutory labor exemption situations.64

Finally, in Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100,65 the Supreme Court attempted to delineate an appropriate analysis for non-statutory labor exemption cases that would be more analogous to the examination conducted in statutory labor exemption circumstances.66 In Connell, a trade union entered into an agreement with employer contractors that restricted those contractors from hiring subcontractors not affiliated with the union.67 Contractor Connell refused to sign the agreement, and the union caused a work stoppage at a job site.68 Connell signed the agreement under pressure and afterward brought a suit against the union, arguing that the restriction between contractors and subcontractors stifled competition.69 The Court, now formally acknowledging the existence of the non-statutory labor exemption articulated in Jewel Tea and Pennington, determined the outcome by once again subjectively analyzing the conflicting policies at work in the light of the particular facts of

64 See Wood, supra note 41, at 335 (noting that use of the non-statutory labor exemption in Jewel Tea and Pennington increasingly supplanted legislative intent for judicial discretion). See generally Scott A. Rosner, Must Kobe Come Out and Play? An Analysis of the Legality Preventing High School Athletes and College Underclassmen from Entering Professional Sport Drafts, 8 Seton Hall J. Sports L. 539, 547 (1998) (positing that in addition to the statutory labor exemption, courts had created non-statutory labor exemption, attempting to reconcile adverse policies of labor and antitrust laws); Jessica Cohen, Note, Sharing the Wealth: Don't Call Us. We'll Call You: Why Revenue Sharing is a Permissive Subject and Therefore the Labor Exemption Does Not Apply, 12 Fordham Intell. Prop. Media & Ent. L. J. 609, 622 (2002) (stating that non-statutory labor exemption was created by the Supreme Court to "extend the labor exemption to collective bargaining activities not covered in the statutes").

65 421 U.S. 616 (1975) (discussing case where building trades union picketed general contractors who refused to be parties to its collective bargaining agreement and hire only subcontractors affiliated with union).

66 See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975) (holding that agreement was not immune under non-statutory labor exemption and was subject to antitrust scrutiny because "it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions").

67 See id. at 619 (stating that, in 1970, union Local 100 asked general contractor Connell to subcontract work only to firms that had signed contracts with union).

68 See id. at 620 (describing that following Connell's refusal to sign agreement, union staged a picket at one of Connell's major construction sites causing 150 workers to leave site).

69 See id. (noting that Connell signed the agreement demanded by union under protest).
Connell. The Court held that the agreement between the contractor and the union suppressed competition on all labor subjects, and therefore the bargain was not exempted from antitrust scrutiny. In each of the three cases, Jewel Tea, Pennington and Connell, the Court analyzed the facts of each situation by affording weight to the relevant federal policies as it saw fit. This subjective analysis allowed for a great deal more flexibility in the application of the non-statutory labor exemption, as compared to the relatively rigid use of the formal statutory exemption. As such, the elasticity of the exemption does not allow for predictability, and potentially substitutes judicial interpretation for legislative intent.

The non-statutory labor exemption has been applied to collective bargaining in professional sports league employment cases; however, the scope and breadth of the exemption has varied widely. The Sixth and Eighth Circuits have each

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70 See id. at 622 (recognizing non-statutory labor exemption outlined in Jewel Tea and Pennington favoring free competition in business markets); see also United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965) (establishing a non-statutory labor exemption from antitrust laws); Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (stating that there is a statutory exemption for union-employer agreements).

71 See Connell, 421 U.S. at 623 (holding that Local 100 directly restrained market to improve its organizing campaign, and curtailment of competition to aid efficiency is not a goal of labor or antitrust policy).

72 See Wood, supra note 41, at 334 (comparing Justice Powell's analysis in Connell to Justice White's in Pennington and Jewel Tea). See generally Albert Daspin, Note, Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap, 62 IND. L.J. 95, 104 (1986) (explaining the holdings of Jewel Tea, Connell and Pennington); Rosner, supra note 64, at 548 (claiming that in Pennington, Jewel Tea and Connell, the Court was concerned more "with product market restraints than labor market restraints").

73 See Wood, supra note 41, at 335 (noting the use of non-statutory labor exemption allows Court freedom to determine relative importance of competition labor and antitrust policies). See generally Rosner, supra note 64, at 559 (claiming that non-statutory labor exemption has become collective bargaining exemption); Cohen, supra note 64, at 622 (stating that court had created non-statutory labor exemption to extend labor exemptions to collective bargaining activities usually not covered in statutes).

74 See Wood, supra note 41, at 335 (contrasting the strict analysis used in statutory labor exemption cases to unpredictable discretion employed in non-statutory labor exemption cases); see also Cohen, supra note 64, at 614 (recognizing that non-statutory labor laws may be in conflict with each other and require careful scrutiny); Jonathan C. Tyras, Comment, Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc., 1 U. Pa. J. LAB. & EMP. L. 297, 315 (1998) (stating there is significant scholarly and judicial disagreement on when non-statutory labor "exemption expires and the practice again becomes subject to antitrust scrutiny").

75 See Roberts, supra note 5, at 344 (commenting how the application of the statutory and non-statutory labor exemption in sports league cases is in need of elucidation). See generally Wood, supra note 41, at 334–35 (establishing that the Jewel Tea and Pennington holdings created non-statutory labor exemption, use of which allows court to determine "appropriate weight with which to afford any particular policy"); Cohen, supra note 64, at
adopted a three-part test to control the application of the exemption:

First, the labor policy favoring collective bargaining may potentially be given pre-eminence 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 antitrust laws only where the agreement sought to be exempted is the product of bona-fide arm's length bargaining.76

While echoing the rationale alluded to in previous non-statutory exemption cases, these two circuits employ a standard that is much more complicated than the one enunciated by the Supreme Court in Jewel Tea.77 Simply, the Court held that the appropriate test is one that “balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference.”78 However, as the years have progressed, the Supreme Court itself has pushed the limits of the application of the exemption. In a widely criticized 1996 decision, the Supreme Court applied the non-statutory labor exemption to an expired collective bargaining agreement between the National Football League and aggrieved players.79 The holding in Brown v. Pro Football Inc.80 extended

625 (reminding that courts had numerous opportunities to test scope of non-statutory labor exemption in context of professional sports industry).


79 See Brown, 518 U.S. at 250 (holding that labor policy waived antitrust liability for competition restraints achieved through the collective bargaining process so long as those restraints functioned in labor market characterized by collective bargaining). See generally Jeffrey A. Rosenthal, The NBA Lockout: Is Union Decertification the Next Step?, N.Y.L.J., Nov. 20, 1998, at 5 (noting that as a result of Brown “leagues have found
the exemption far beyond predictable boundaries, and potentially opened the door for employers like the NFL to claim the exemption in cases where it would not have been previously implicated.\textsuperscript{81}

In 2004, the NFL claimed such immunity when Maurice Clarett challenged a draft regulation under antitrust law.\textsuperscript{82} Clarett \textit{v. National Football League}\textsuperscript{83} called upon the courts to determine whether the non-statutory exemption applied to the draft eligibility rule unilaterally imposed by the NFL.\textsuperscript{84}

III. CLARETT \textit{v.} NATIONAL FOOTBALL LEAGUE

A. Defensive Formation: The NFL

In 1895, the first professional football game in the United States took place in the town of Latrobe, Pennsylvania.\textsuperscript{85} In themselves virtually immune from antitrust challenge by their players'); \textit{Supreme Court Rules That NFL Teams Did Not Violate Antitrust Laws by Agreeing on Uniform Salary for Practice Squad Players, After Impasse in Collective Bargaining with Players' Association, ENTERTAINMENT LAW REPORTER, July 1996, at 1 (noting that Supreme Court offered no apology for its decision to strengthen the position of employers at expense of employees).}

\textsuperscript{80} 518 U.S. 231 (1996) (describing NFL's unilateral imposition of contract changes on players following impasse in collective bargaining as immune from antitrust scrutiny).

\textsuperscript{81} See discussion infra Part IV.B (discussing far reaches of \textit{Brown} decision). \textit{See generally} Pamela Clark, supra note 20, at 571 (noting Supreme Court's expansion of non-statutory labor exemption's scope to immunize from antitrust liability post impasse contract terms unilaterally imposed by employers); Tony Mauro, \textit{Scrimmaging and Scrapping with the NLRB,} CONN. L. TRIB., Apr. 15, 1996, at 14 (stating the Supreme Court takes an expansive view of exemption which may do more harm than good).

\textsuperscript{82} See discussion infra Part III (discussing Clarett's challenge under antitrust law); Clarett, 306 F. Supp. 2d at 390 n.64 (challenging NFL provision requiring a player to be out of high school for at least three years). \textit{See generally} Lewis Kurlantzick, \textit{An NFL Policy is Challenged as a Matter of Labor Law,} N.Y.L.J., Jan. 22, 2004, at 4 (stating that Clarett took issue with the NFL bylaw that prohibits player from entering the draft until he has been out of high school for at least three years).

\textsuperscript{83} 306 F. Supp. 2d 379 (2004).

\textsuperscript{84} \textit{See id.} at 390 (discussing Clarett's allegations against NFL); Eriq Gardner, \textit{Can the NFL Hold Him?: Pro Football's Lawyers Try to Stop Maurice Clarett from Making an End Run Around its Labor Pact,} CORP. COUNS., Jan. 2004, at 17 (stating Clarett filed suit demanding that he be included in next draft in April 2004); Tom Perrotta, \textit{NFL Draft Rule is Found to Violate Antitrust Laws,} N.Y.L.J., Feb. 6, 2004, at 1 (noting that Clarett sued to join NFL year earlier than he would normally be eligible).

1920, the American Professional Football Association (APFA) formed the first league of professional football teams. The teams pledged not to use any student player who still had college eligibility left, as staunch college support was believed essential to the survival of the fledgling professional league. In 1922, the APFA gave way to the National Football League. The early NFL game was essentially equivalent to college football during that time. Professional football enticed large numbers of excellent college players, and the increased patronage made the league economically viable.

The 1950s brought about increased fan interest and, consequently, greater revenue. This change impacted players' salaries, television coverage and stadium size. Seeing that a


87 See generally American Style, supra note 86 (noting early professional football's dependence on college football); Chronology of Professional Football, supra note 85 (discussing early rule of not allowing players on teams who still had college eligibility); History of the NFL, supra note 86 (noting that student players with remaining college eligibility would not be used).

88 See African American Head Coaches, THE TENNESSEAN, Feb. 19, 2003, at 3C (noting that APFA became the NFL in 1922); Today's History, THE DAYTON DAILY NEWS, Sept. 17, 2000, at 2A (noting that APFA was the precursor of the NFL); American Style, supra note 86 (discussing emergence of the NFL).


90 See American Style, supra note 86 (remarking on the relationship between college football players and revenue growth of professional football); see also NFL History, at http://www.nfl.com/history/chronology/1921-1930 (last visited Nov. 8, 2004) [hereinafter NFL History] (noting that popularity of professional football was growing with crowds as large as 75,000 watching the games); Bob Gill, 1924: Providence Starts Rolling, Prof'l Researchers Ass'n, at http://www.footballresearch.com/articles/frpage.cfm?topic=provroll (last visited Nov. 8, 2004) (stating that college players entered the NFL in return for high salaries).

91 See generally American Style, supra note 86 (noting growth of the NFL); see also NFL History, supra note 90 (stating the introduction of coast to coast broadcasting of NFL games also reinforced popularity and revenues for the NFL); Schnakenberg, supra note 89 (discussing the significant growth in NFL's popularity during the 1950's).

92 See NFL History, supra note 90 (noting that CBS was the first television stations to broadcast regular season games in 1956); Pro Football Draft History, at http://www.profootballhof.com/index.cfm?section=history&cnt_id=187312 (last visited, Apr. 20, 2004) [hereinafter Pro Football Draft History] (discussing increases in wages and coverage of professional football as fan interest increased). See generally Schnakenberg,
profit could be made from professional football, Texas businessman Lamar Hunt formed the American Football League (AFL) in 1960, as a rival to the NFL.93 The two leagues fiercely fought for revenue, players and media attention.94 Following a $10 million dollar antitrust suit brought by the AFL against the NFL in 1966, the two leagues agreed on a merger.95 In 1970, the two leagues merged into two 13-team conferences under the NFL name.96

Throughout the 1970s, NFL viewership continued to rise.97 Super Bowl XII was viewed by more than 102 million people.98 In 1980, when the Pittsburgh Steelers met the Los Angeles Rams in

 supra note 89 (stating the 1958 NFL championship game had set a record by attracting more television viewers than any other sporting event).

93 See Tom Fitzgerald, Top of the Sixth, THE SAN FRANCISCO CHRON., Dec. 7, 1995, at D6 (noting that a rivalry existed between the NFL and AFL); Bill Foley, Jacksonville Had Big Supporter in AFL Quest, FLA. TIMES-UNION, Oct. 27, 1999, at A2 (stating that Hunt decided to organize the AFL after several failed attempts to create his own NFL franchise); Pro Football Draft History, supra note 92 (commenting on NFL competition and rival league development).

94 See Gary Mihoces, Principals Mark Key Moment Quietly, USA TODAY, June 6, 1991, at 10C (positing war existed between AFL and NFL prior to their merger); Bruce Nichols, Making the Call, THE DALLAS MORNING NEWS, Dec. 16, 1995, at 1A (noting that the AFL managed to successfully compete with NFL for players, revenues and fans); Pro Football Draft History, supra note 92 (describing lengths taken by the NFL and AFL to compete for revenue and fan interest).


96 See On This Date, CHICAGO TRIBUNE, May 10, 2000, at 9 (noting that the new NFL consisted of the AFC and NFC conferences); Sportlight: May 10, DESERT NEWS, May 10, 2002, at D7 (stating that after the merger the NFL consisted of two conferences each consisting of thirteen teams). See generally The History of the NFL, at http://www.nflfootballhistory.net/ (last visited Nov. 8, 2004) (discussing post-merger character of the NFL).

97 See Schnakenberg, supra note 89 (noting that NFL popularity was very significant during the 1970's and television viewership increased due to ABC's contract to broadcast Monday Night Football); NFL History, supra note 90 (stating the broadcast of Super Bowl VI was the highest rated telecast ever); The NFL in the 1970's, at http://www.nflfootballhistory.net/70.htm (last visited Nov. 8, 2004) (emphasizing the effect of television and Monday Night Football broadcasts in NFL's popularity).

Super Bowl XIV, more than 35 million homes tuned in. As a result, television and radio contracts continued to grow. In 1980, CBS paid the NFL $12 million for the rights to regular and post season games, and, in 1981, NFL games set all-time ratings highs for both ABC and NBC. In 1989, Paul Tagliabue became the seventh chief executive of the NFL. That same year, the NFL's paid attendance was over $17 million, the highest in NFL history. Currently, the NFL is an unincorporated association of thirty-two teams. While other professional football leagues exist in the form of Arena Football Leagues and the Canadian

99 See Horn, supra note 98 (commenting on Super Bowl XIV); Sports Has Super Impact on TV's Highest Ranking Programs, VARIETY, July 24, 2000 (listing Super Bowl XIV as one of the highest rated television programs); Super Bowl: Facts and Figures, UNITED PRESS INTL, Jan. 26, 1983 at 1 (noting that Super Bowl XIV was the most watched American sporting event).


101 See General History – Chronology, supra note 100 (noting that ABC and CBS experienced all time rating highs in 1981); NFL History 1981 – 1990, supra note 100 (announcing that NFL brought both ABC and CBS all-time rating highs of 21.7 and 17.5, respectively, in 1981). See generally Andrews & Horn, supra note 100, at 1A (describing television ratings in major markets for televised NFL games).


103 See Peter King, Inside the NFL; Maximum Parity, SPORTS ILLUSTRATED, Nov. 20, 1989, at 112 (suggesting that NFL attendance record of 60,745 fans per game from 1981 was endangered by an increased turnout in 1989); see also General History – Chronology, supra note 100 (asserting that $17,399,531 was the “highest total in league history”); NFL History 1981 – 1990, supra note 102 (highlighting increased gate revenue for NFL games).

Football League and the National Indoor Football League, the NFL far and away prevails in size and revenue.\textsuperscript{105} In addition, the NFL has consistently higher revenue than all other professional sports as well.\textsuperscript{106} Specifically, NFL television contract rights, valued at nearly $7 billion, are greater than professional baseball, basketball and hockey combined.\textsuperscript{107} The success of the NFL led players to demand a piece of the action.

Free agency emerged in 1992 following the settlement of a 1987 lawsuit brought by the NFL Players Association.\textsuperscript{108} A salary cap currently accompanies free agency limiting teams to a maximum annual player payroll.\textsuperscript{109} In 2003 the average player salary neared one million dollars,\textsuperscript{110} and the minimum rookie


\textsuperscript{106} See Clarett, 306 F. Supp. 2d at 383 n.6 (declaring that the NFL is worth approximately $18 billion while the NBA, MLB and NHL are valued at roughly $9 billion, $7 billion and $5 billion, respectively); Dave Perkins, It's Just a Fluke that NFL Became a Role Model, TORONTO STAR, Jan. 8, 2003, at E03 (emphasizing that "[r]evenue-sharing, the pooling of the immense network TV fees that all but assure every NFL team operates at a profit before the first ticket is sold, coupled with the NFL's strong salary cap, make the NFL the role model for the rest of the sports world"). See generally Alan Snel, Family Fun Doesn't Come Cheap, TAMPA TRIB. (Florida), Sept. 12, 2004, at 1 (stressing high costs of attending football games and describing several sources of revenue).

\textsuperscript{107} See Clarett, 306 F. Supp. 2d at 383 (comparing football television revenues with revenue of other sports); Nottingham, supra note 6, at 1071 (maintaining that the NFL television contract is much more lucrative than that of the NHL). See generally Gerald R. Scully, Sports, The Concise Encyclopedia of Economics, at http://www.econlib.org/library/Enc/Sports.html (last visited Oct. 31, 2004) (proposing that in particular, football programming is extremely valuable because football games attract large audiences).


\textsuperscript{109} See Clarett, 306 F. Supp. 2d at 383–84 (discussing NFL salaries); Steven Koliak, Offensive Interference: How Communities Have Harnessed Market Forces to Retain NFL Franchises, Eliminating the Need for H.R. 3817's Proposed Antitrust Exemption, 8 SPORTS LAW. J. 43, 45 (2001) (articulating that salary cap "places an upper limit on spending for players' salaries" and thus "prevents big-spending teams from hoarding the best talent . . . [and] enable[s] teams with more modest spending habits to compete"). See generally John Clayton, Salary Cap Status of All 32 Teams, at http://espn.go.com/nfl/columns/clayton_john/1510617.html (last visited Oct. 31, 2004) (disclosing how much each team is under or over the 2004 NFL salary cap of approximately $80.5 million).

\textsuperscript{110} See Clarett, 306 F. Supp. 2d at 383 n.9 (quoting NFLPA research which states the average 2003 salary as $1,258,800); NFL Salary Database, at http://asp.usatoday.com/sports/football/nfl/salaries/default.aspx (last visited May 25, 2004) (listing all NFL player
salary in 2004 is $230,000. The average player salary in the NFL could nearly fund entire teams in competing football associations. Consequently, the NFL affords opportunities for prospective football players unmatched by any other outlet.

B. The Draft

In the early years of the NFL, players were free to sign with any club. In 1935 the league owners adopted a plan for a college player draft. The first draft had nine rounds, which increased over the years from ten in 1937 to twenty rounds in salaries). See generally Ross Siler, Winning Title Not Avengers’ Only Job; After Playoffs, Most Players Will go to Offseason Work, DAILY NEWS OF LOS ANGELES, May 31, 2003, at S1 (proclaiming that the NFL’s average salary of $1.123 million in 2002 was “more than 26 times the average household income of $42,228, as calculated by the Census Bureau and close to the AFL salary cap of $1.63 million for entire 25-man teams”).

See Clarett, 306 F. Supp. 2d at 383 (revealing rookie salaries in 2003); Teneshia L. Wright, Picked Late of Not at All?: The Money is Better for Low-Round Picks, but Undrafted Free Agents Often Have Better Opportunities, FL. TIMES-UNION (Jacksonville), Apr. 21, 2004, at E-1 (recognizing the minimum 2004 NFL rookie salary at $230,000 and also noting that “a player doesn’t see that money unless he makes the regular-season roster”). See generally Rookie Salary Pool, Oakland Raiders, at http://www.vertgame.com/rookie_pool.html (last visited May 27, 2004) (affirming that the minimum 2004 rookie salary is $230,000).


See The NFL Draft, supra note 114 (discussing first NFL draft); Pro Football Draft History: The 1930s, supra note 114 (remarking on organization of first college draft); Brandt, supra note 114 (noting that draft format was first announced in 1935).
1939.116 During the NFL and AFL battle of the 1960s, there was stiff competition to sign important players from the college draft.117 To thwart its competition the NFL held a secret early draft in 1960 to beat the AFL in signing players.118 This secrecy continued throughout the first half of the decade, highlighted by the common practice of "kidnapping" prospects.119 In 1967, two leagues agreed to hold a joint draft as part of the merger agreement that saw the NFL and AFL become one league.120 Players began to improve their labor situation during the late 1980s and, in 1989, the threat of a lawsuit prompted the NFL to change its original policy and allow certain college undergraduates to enter the draft.121 "Juniors and third-year sophomores [were] now eligible, and many college stars turned professional before exhausting their college eligibility."122

116 See Brandt, supra note 114 (accounting for number of rounds in NFL draft in 1937 and 1939); The NFL Draft, supra note 114 (noting fluctuating number of draft rounds over time); Pro Football Draft: The 1930's, supra note 114 (examining evolution and growth of college draft).


118 See The NFL Draft, supra note 114 (noting secret draft held very early in 1960 season); Pro Football Draft History: The 1960s, supra note 117 (stating that NFL held secret draft to sign players before AFL could); See generally Herskowitz, supra note 117 (describing competition and rivalry between leagues prior to first Super Bowl).

119 See Pro Football Draft History: The 1960s, supra note 117 (relating how teams held players in hotel until drafted, thereby increasing chance that their league would sign them); The NFL Draft, supra note 114 (noting how both leagues began drafting players not yet eligible to play professionally, simply to prevent future ability of other league to draft them). See generally Herskowitz, supra note 117 (depicting hostile relations between NFL and AFL in 1960s).


122 See NFL Team History, supra note 85 (noting change in eligibility requirement from four to three years in college and asserting that many college players become professional although still eligible to play in college); see also NFL Draft by the Numbers, SPORTS ILLUSTRATED, Apr. 17, 2001, at http://sportsillustrated.cnn.com/statitudes/news/2001/04/16/nfldraft_btn (stating that 264 college underclassmen were drafted from 1989-
C. The Draft Eligibility Rule

In 1993, the NFL Managers Association (NFLMA) and the NFL Players Association (NFLPA) entered into a collective bargaining agreement (CBA). A side memorandum executed on the same day as the CBA acknowledged that the league constitution and bylaws attached to the memo were referenced in the CBA. Certain provisions of the 1993 NFL bylaws make reference to the eligibility of players. Essentially the bylaws stated that a player was eligible if he was five years removed from his first enrollment in college or four years removed from high school if he never played college football. In addition, a player not eligible could be granted “Special Eligibility.” Specifically:

[Footnotes]


[125] See Clarett, 306 F. Supp. 2d at 383 (discussing current NFL-NFLPA CBA); see also Clarett, 369 F.3d at 127 (noting the entrance of the NFL Management Council, multi-employer bargaining unit and NFLPA into the 1993 CBA). See generally Chris Ballard & Lester Munson, Rush to Judgment; Suspended Ohio State Running Back Maurice Clarett Sees He May Sue the NFL to Gain Early Admission. Can His Lawyer Help Him Crack the Pros?, SPORTS ILLUSTRATED, Sept. 15, 2003, at 23 (emphasizing the absence of eligibility rules in the 1993 NFL collective bargaining agreement’s language).

[126] See COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MGMT. COUNCIL AND THE NFL PLAYERS ASSN 2002-2008 (2002) (providing precise text), available at http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete (last visited May 31, 2004); see also Clarett, 369 F.3d at 127 (specifying that clubs were prohibited from selecting any college football player who had not first exhausted his college eligibility, graduated from college or been out of high school for five football seasons and adding that clubs were further barred from drafting a player who did not attend college or who had attended college but did not play football, unless that person had been out of high school for four football seasons). See generally Clarett, 306 F. Supp. 2d at 385 (describing the eligibility rule as generally prohibiting college underclassmen from participating in the NFL draft).

Such a player has been granted eligibility through special permission of the Commissioner. In order to receive consideration for the League's principal college draft in any year, any application for special eligibility must be in the Commissioner's office no later than January 6 of that year. For college football players seeking eligibility, at least three NFL seasons must have elapsed since the player was graduated from high school.128

In 2003, the league promulgated new bylaws.129 In this version, The Special Eligibility Rule is omitted in its entirety.130 A separate reference to the Commissioner's authority to interpret the bylaws and league constitution to implement policy and procedure appeared in the place of the Rule.131 Therefore, the Rule exists as "policy and procedure" established by the Commissioner.132 Commissioner Tagliabue issued his interpretation of the rule with respect to the 2004 draft:

SPECIAL ELIGIBILITY. Such player has been granted eligibility through special permission of the Commissioner. Any applications for special eligibility must be in the Commissioner's office no later than Thursday, January 15, 2004, if the player is to be considered for inclusion in the League's principal draft scheduled for April 24-25 2004. Applications will be accepted only for college players for whom at least three full college seasons have elapsed since

128 Id. at 385–86 (providing text of Bylaws section 12(1)(E)).
130 See Clarett, 306 F. Supp. 2d at 386 (emphasizing the complete omission of the Special Eligibility Rule); see also Clarett, 369 F.3d at 128 (describing the Special Eligibility Rule's removal). See generally Flumenbaum & Karp, supra note 128, at 3 (commenting on the Special Eligibility Rule omission).
131 See Clarett, 306 F. Supp. 2d at 386 (quoting the Commissioner's memorandum as stating "the Commissioner shall interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof"); see also Clarett, 369 F.3d at 128 (noting issuance of Commissioner's memorandum took place on Feb. 16, 1990). See generally Flumenbaum & Karp, supra note 129, at 3 (highlighting Commissioner's retention of authorization to grant special eligibility after 2003 amendments).
132 See Clarett, 306 F. Supp. 2d at 386 (adding that Commissioner's authority to enact policy and procedure is documented in bylaws). Clarett, 369 F.3d at 128 (reiterating that granting of special eligibility now falls under Commissioner's authority to enact "policy and procedure"). See generally Flumenbaum & Karp, supra note 129, at 3 (describing special eligibility grant after the 2003 amendments as a "practice" of the Commissioner).
their high school graduation. Players will not be permitted to elect to bypass the January 15 deadline in order to seek eligibility for a later supplemental draft, and no supplemental draft will be held to accommodate such an election.\textsuperscript{133}

D. Offensive Formation: Maurice Clarett

Maurice Clarett, Ohio State freshman star running back, led his team to the NCAA national collegiate football championship in 2002.\textsuperscript{134} Prior to his sophomore season, Ohio State and the NCAA suspended Clarett pending investigation of numerous violations of NCAA regulations.\textsuperscript{135} Unable to play college football, Clarett petitioned to be declared eligible for the 2004 NFL collegiate draft.\textsuperscript{136} His petition was denied by the NFL under the authority of the three-year draft eligibility rule.\textsuperscript{137} As a result, Clarett brought suit against the NFL in the Southern District of New York, alleging violations of §1 of the Sherman Antitrust Act and §2 of the Clayton Act.\textsuperscript{138} Clarett claimed that the teams engaged in a group boycott of a broad class of players from the NFL labor market and created an illegal restraint of trade.\textsuperscript{139}

\textsuperscript{133} See Clarett, 306 F. Supp. 2d at 386 (providing the text of the Commissioner’s release).
\textsuperscript{135} See Clarett, 306 F. Supp. 2d at 388 (clarifying that Clarett was suspended by OSU and the NCAA for the entire 2003-2004 season). See also Associated Press, Fitzgerald Draft Status Could be Key, ESPN, at http://sports.espn.go.com/nfl/news/story?id=1712813 (last visited Nov. 2, 2004) (explaining that Clarett was suspended before the 2003-2004 season because he accepted money from a family friend and lied about it to university and NCAA investigators).
\textsuperscript{137} See Clarett, 306 F. Supp. 2d at 385 (discussing NFL player draft eligibility rules).
\textsuperscript{138} See Clarett, 306 F. Supp. 2d at 388 (noting part of Clarett’s motivation for bringing suit is the potential he will not be able to play football elsewhere); Ballard & Munson, supra note 125 (discussing the NCAA infractions that lead to Clarett’s suspension from playing football at Ohio State); Munson, supra note 136 (describing the NCAA violations Clarett committed in order to be suspended for his sophomore season).
\textsuperscript{139} See Clarett, 306 F. Supp. 2d at 389 (asserting Clarett’s allegations against the NFL).
Both Clarett and the NFL moved for summary judgment. The district court granted Clarett's motion, and ordered him eligible for the 2004 NFL Draft. The NFL then requested a stay, but the district court denied the motion.

Following the NFL's appeal to the Second Circuit Court of Appeals, a three-judge panel stayed the district court's order, thereby preventing Clarett entrance to the 2004 draft. Clarett immediately sent emergency appeals to the Supreme Court, and both Justice Ginsburg and Justice Stevens refused to entertain the appeal. Neither justice ruled on the merits of the case. Ginsburg stated that Clarett could still get to the NFL as the league has expressed a willingness to promptly hold a Supplemental Draft if Clarett prevailed in his lawsuit. However, the NFL Draft was held in April of 2004, and did not include Clarett or other college players similarly seeking early admittance. In order to be included in a Supplemental Draft,

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140 See id. at 389 (describing both parties' motions for summary judgment).
141 See id. at 411 (ordering Clarett eligible for 2004 NFL Draft).
142 See id. (denying NFL petition for a stay of the district court's Feb. 5th order allowing Clarett entrance into the NFL draft); see also Lawyer: Clarett Will Be in Draft, ESPN, Feb. 11, 2004, at http://sports.espn.go.com/ncf/news/story?id=1732768 (reporting that the district court refused to stay its earlier decision).
143 See Clarett, 369 F.3d at 143 (reversing and remanding the District Court and ordering them to enter judgment for the NFL, vacating the order declaring Clarett eligible for the draft); see also Supplemental Draft Remains an Option, ESPN, Apr. 20, 2004, at http://sports.espn.go.com/nfldraft/draft04/news/story?id=1785560 (announcing Second Circuit decision to stay the district court's summary judgment in favor of Clarett); Supreme Court Turns Down Appeal by Clarett, ESPN, April 22, 2004 [hereinafter Supreme Court Turns Down Appeal], at http://sports.espn.go.com/espn/wire?section=nfl&id=1787668 (noting that the Supreme Court turned down Clarett's appeal from the Second Circuit decision).
145 See Clarett v. Nat'l Football League, 2004 U.S. LEXIS 3231 (2004) (denying Clarett's application for an emergency appeal without discussing the merits); Clarett Loses Pair of Emergency Appeals, supra note 144 (discussing the denial of both appeals without reaching the merits of the issue); Supreme Court Turns Down Appeal, supra note 143 (stating the Supreme Court denied the appeals without deciding the ultimate issue).
146 See Clarett to Appeal Three-Judge Ruling Against Early Entry, ESPN, May 24, 2004 [hereinafter Clarett to Appeal Three-Judge Rulings], at http://sports.espn.go.com/nfl/news/story?id=1808438 (noting the disposition of the case upon reaching the Supreme Court); Clarett Loses Pair of Emergency Appeals, supra note 144 (quoting Justice Ginsburg); Supreme Court Turns Down Appeal, supra note 143 (discussing the Supreme Court's reasoning in denying the appeal).
147 See Clarett Loses Pair of Emergency Appeals, supra note 144 (discussing the denial of both appeals without reaching the merits of the issue); Clarett to Appeal Three-
Clarett appealed the Second Circuit’s decision to stay the district court’s order.\textsuperscript{148} The Second Circuit once again revisited the case in May of 2004, and ruling on the merits, reversed and vacated the district court’s order.\textsuperscript{149} Clarett’s attorneys publicly stated they would continue to appeal the decision.\textsuperscript{150} Following the rulings, the NFL Players Association stated a willingness to include the draft eligibility rule in the next collective bargaining agreement, due in 2007, to put an end to the controversy.\textsuperscript{151} In deciding in favor of Clarett, the district court held that two affirmative defenses offered by the NFL failed as a matter of law.\textsuperscript{152} First, the NFL argued that the three-year eligibility rule was exempt from anti-trust scrutiny under the non-statutory labor exemption, as the rule was a product of the collective bargaining agreement between the league and the Players Association.\textsuperscript{153} Second, the NFL claimed that the rule was a reasonable restraint of trade.\textsuperscript{154} The district court held that the

\textit{Judge Ruling Against Early Entry, supra note 146} (noting the disposition of the case upon reaching the Supreme Court rendered Clarett ineligible); \textit{Supreme Court Turns Down Appeal, supra note 143} (stating the Supreme Court denied the appeals without deciding the ultimate issue, leaving the Second Circuit decision in place).


\textsuperscript{149} See \textit{Clarett}, 369 F.3d at 143 (sustaining prior ruling that barred Clarett from the NFL).

\textsuperscript{150} See \textit{Clarett to Appeal Three-Judge Ruling, supra note 146} (quoting Clarett attorneys as promising to continue the appeals process).


\textsuperscript{152} See \textit{Clarett}, 306 F. Supp. 2d at 410–11 (holding that the NFL could not preclude Clarett from entering the 2004 NFL draft).

\textsuperscript{153} See id. at 393 (quoting the NFL’s lawyers as arguing that “if the draft itself is protected by the non-statutory labor exemption, it follows a fortiori that rules governing eligibility for the draft . . . are also protected by the exemption”).

\textsuperscript{154} See id. at 407 (rejecting the NFL’s argument that Clarett had not established the contours of the relevant market).
rule was not exempt under the non-statutory labor exemption because it: (1) was not a mandatory subject of bargaining; (2) governs only non-employees; and (3) did not result from arm’s length negotiations. The court was not satisfied that the rule enhanced competition. Applying the “quick look” approach, the court concluded that the rule was an unreasonable restraint of trade by virtue of its effect as a complete bar against Clarett’s entry into the market of professional football players. The court went so far as to say that “Clarett has alleged the very type of injury . . . that the antitrust laws are designed to prevent.”

IV. ANALYSIS

A. Monday Morning Quarterback: Clarett v. NFL Decided Correctly

The district court reached the correct result when it ruled in favor of Maurice Clarett’s motion for summary judgment. However, this article will argue that the decision was premised on a hodgepodge of antitrust standards that are inherently flawed. The standards frequently contradict one another when taken into consideration concurrently. The fault lies not with the district court, but rather with sixty years of antitrust jurisprudence that has granted an ever-increasing amount of discretion to the courts. Increased discretion allowed the judiciary the opportunity to promulgate “yardsticks” based on purely subjective policy decisions. First, I will examine the Supreme Court’s unsound decision in Brown v. Pro Football,

155 See id. at 382 (rejecting the NFL’s non-statutory labor exemption arguments).
156 See id. (stating that Clarett’s alleged injury was, in actuality, “a complete bar to entry into the market for his services”).
157 See id. at 407–08 (explaining that “a ‘quick look’ analysis, as the Supreme Court has recently explained, is appropriate where ‘the great likelihood of anticompetitive effects can easily be ascertained,’ and ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect’”) (quoting Cal. Dental Ass’n v. FTC, 526 U.S. 756, 770 (1999)).
158 See id. at 409 (deciding that “[b]ecause the League has failed to offer any legitimate procompetitive [sic] justifications for the Rule, Clarett must prevail”).
159 See id. at 382 (quoting Learned Hand as stating the antitrust laws will not endure a contract “which unreasonably forbids anyone to practice their calling”).
160 See id. at 410 (holding that “Clarett’s motion for summary judgment is granted and the NFL’s motions are denied”).
161 See discussion infra Parts B-C.
which significantly broadened the scope of the non-statutory labor exemption by extending it to include multi-employer bargaining units like the NFL. Second, I will discuss the five contradictory approaches adopted by the Supreme Court when it examined the “reasonableness” of a restraint on trade in antitrust cases. Lower courts have either (1) unsuccessfully attempted to reconcile the contradictory methods, or (2) created a useless mélange of the approaches in an attempt to justify the subjective policy choice they have made in a particular case. In either instance, the result is inadequate under the doctrine of stare decisis. Finally, I will propose a more workable standard that will simplify the “reasonableness” analysis.


In Clarett, the district court held that the NFL’s affirmative defense asserting the three-year draft rule was immune from antitrust scrutiny failed as a matter of law. The NFL argued that the authority by which it could even claim the non-statutory labor exemption is found in a series of cases culminating in the 1996 Supreme Court decision Brown v. Pro Football Inc. The majority in Brown held that the NFL was immune from antitrust

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163 See id. at 234 (applying non-statutory labor exemption to NFL); see also Nat’l Basketball Ass’n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995) (holding in circuit court that antitrust laws were inapplicable to collective bargaining situation between basketball teams and players as a result of exemption), cert. denied, Williams v. Nat’l Basketball Ass’n, 518 U.S. 1016 (1996); Powell v. Nat’l Football League, 930 F.2d 1293, 1304 (8th Cir. 1989) (announcing in circuit court that antitrust laws are inapplicable to restraints in collective bargaining agreement involving pro football teams and players because exemption extends beyond stage of impasse between two sides), cert. denied, Powell v. Nat’l Football League, 498 U.S. 1040 (1991).
164 See discussion infra Part F.
166 See id. at 393 (discussing history of Brown upon which NFL relies); see also Brown, 518 U.S. at 234 (concluding exemption applicable in suit between football teams and union); Nat’l Basketball Assoc., 45 F.3d at 693 (concluding antitrust laws inapplicable to collective bargaining situation between teams and players); Powell, 930 F.2d at 1304 (holding that exemption applies beyond impasse); Wood v. NBA, 809 F.2d 954, 956–57 (2d Cir. 1987) (stating that college draft and prohibition of player corporations are exempt from Sherman Act). But see Smith v. Pro Football, 420 F. Supp. 738, 741–42 (D.D.C. 1976) (deciding that exemption did not bar plaintiff recovery even though player draft was mandatory subject of bargaining between two parties). See generally McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1202 (6th Cir. 1979) (declaring whether exemption applies is governed by developed and applicable standards of labor law).
liability when it unilaterally imposed a wage scale on a class of players after the expiration of the collective bargaining agreement, and negotiations for a new agreement had reached an impasse.\textsuperscript{167} The imposition of a salary cap on the particular class of players was challenged as anticompetitive, and but for the existence of the non-statutory labor exemption, would most likely be deemed an illegal restraint of trade.\textsuperscript{168} The Court's analysis began with an affirmation of the non-statutory labor exemption as articulated in the \textit{Jewel Tea-Pennington-Connell} triumvirate.\textsuperscript{169} However, the similarity between the prior cases and the Court's analysis in \textit{Brown} ended there. The majority defined the collective bargaining process as "ongoing" and encompassed the time period both before and after the finalization of the actual agreement.\textsuperscript{170} Prior to \textit{Brown}, the Court had never extended the non-statutory labor exemption beyond the expiration of a collective bargaining agreement and negotiation impasse.\textsuperscript{171} Furthermore, \textit{Brown} was the first application of the exemption to a multi-employer unit like the NFL.\textsuperscript{172} Prior cases had each afforded the exemption to only

\begin{footnotesize}

\textsuperscript{167} See \textit{Brown}, 518 U.S. at 250 (holding that conduct at issue directly related to lawful operation of collective bargaining process).

\textsuperscript{168} See id. (discussing how issue arose from and was directly related to subject of mandatory bargaining and that sports is not distinct from other areas of multiemployer collective bargaining).

\textsuperscript{169} See id. at 235–36 (stating "[t]he immunity before us rests upon what this Court has called the 'nonstatutory' [sic] labor exemption from the antitrust laws"); see also \textit{Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 636 (1975)} (concluding agreement between union and general contractor was not exempt from antitrust laws because of direct restraints on competition resulting from wage and working condition differences); \textit{Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965)} (deciding marketing-hours restriction and distinct prices were directly related to wages, hours, and working conditions, thus exempting union's attempt to obtain such provisions through arm's-length negotiations from the Sherman Act); \textit{United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965)} (holding agreement between labor union and employer to obtain industry wide uniform labor standards did not fall under exemption).

\textsuperscript{170} See \textit{Brown}, 518 U.S. at 236 (discussing nature of collective bargaining at issue).

\textsuperscript{171} See \textit{Connell}, 381 U.S. at 636 (determining exemption inapplicable to wage and working conditions within existing agreement); \textit{Jewel Tea}, 381 U.S. at 689-90 (holding that exemption applied to wage provisions within existing collective bargaining agreement); \textit{Pennington}, 381 U.S. at 669 (deciding on uniform industry labor standards discussed in current bargaining agreement).


\end{footnotesize}
single-unit employers.\(^{173}\) Finally, the Court rejected the argument that the exemption should not be applicable to professional sports because of its unique bargaining process.\(^{174}\) The Court specifically stated that it could not "find a satisfactory basis for distinguishing football players from other organized workers" in terms of collective bargaining.\(^{175}\)

In reaching its determination, the Court discussed its rationale for not "interfering" with the collective bargaining process.\(^{176}\) The Court posited that judicial antitrust scrutiny of the bargaining process would afford courts the dangerous power to substitute their own discretion for congressional labor policy.\(^{177}\) It feared that such a result would become a "web of detailed rules spun by many different non-expert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board."\(^{178}\) Ironically, the very mechanism by which the Court attempted to effectuate this restriction of judicial discretion was by significantly broadening the scope of a judicially created exemption, from what is otherwise a clearly articulated statutory mandate.\(^{179}\) The exemption, by its very

\(^{173}\) See H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704, 723 (1981) (deeming that exemption applied to independent theatrical agents who placed actors and actresses into positions of employment); Jewel Tea, 381 U.S. at 689-90 (noting that single employer at issue was entitled to exemption). See also Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995) (applying exemption to multi-employer unit at circuit court level).

\(^{174}\) See Brown, 518 U.S. at 248 (commenting that football players are no different from any other type of organized employees even though teams are somewhat dependent on each other for economic survival, players have individual skills and players often negotiate their own contracts).

\(^{175}\) See id. at 249 (refuting dissent's points on "unique features" of collective bargaining relationship).

\(^{176}\) See id. at 250 (noting that conduct involved took place immediately after negotiation period, was mandatory and directly related to negotiations, and concerned only parties to collective bargaining relationship).

\(^{177}\) See id. at 250 (explaining that intent of Congress was to have Board answer multiemployer bargaining questions).

\(^{178}\) Id. at 231 (reasoning that implicit exemption was applicable).

nature, calls upon the courts to interject subjective weight to competing federal antitrust and labor policies.\textsuperscript{180} Congress enacted a specific statutory labor exemption from antitrust law.\textsuperscript{181} By creating an ever-broadening judicial role in the application of antitrust restrictions to particular sets of facts, the Court is not deferring to congressional intent, but thwarting it. Moreover, the \textit{Brown} Court explicitly refused to delineate the "outer boundaries" of the non-statutory labor exemption, thereby providing no guidance as to the furthest reaches of the exemption to the lower courts.\textsuperscript{182}

In his dissent, Justice Stevens argued that the application of the non-statutory labor exemption to the facts of \textit{Brown} was inappropriate.\textsuperscript{183} First, he asserted that the majority failed to give proper weight to the fundamental difference between professional sports and other labor-related situations.\textsuperscript{184} Specifically, Justice Stevens noted that professional football is a unique industry in which employers, not employees, strive for a non-competitive uniform salary, and would thereby seek the

\textsuperscript{180} See Steven D. Bucholz, Comment, \textit{Run, Kick, and (Im)passe: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment After Impasse in Brown v. Pro Football}, 81 MINN. L. REV. 1201, 1224 (1997) (indicating that balancing test is involved between labor and antitrust laws and policy concerns); Carson, \textit{supra} note 172, at 1156–58 (noting that exemption is required in certain bargaining relationships to account for conflicting congressional antitrust policies); Jonathan P. Heyl, \textit{Note, Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity Over the Entire Playing Field and Leaving the Game}, 75 N.C. L. REV. 1030, 1049–54 (1997) (pointing out policy differences between labor and antitrust law requires weighing of exemption's impact upon both areas of law to see whether or not sufficient protection exists).


\textsuperscript{182} See \textit{Brown}, 518 U.S. at 250 (1996) (declining to determine how far exemption extends); \textit{see also} Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004) (finding that most guidance as to boundaries of exemption derives mostly from cases where agreements between employer and union allegedly extinguished competitor in marketplace at issue); \textit{Wood v. NBA}, 809 F.2d 954, 963 (2d Cir. 1987) (stating that limits of exemption do not need to be determined based on issue at hand).

\textsuperscript{183} See \textit{Brown}, 518 U.S. at 254–55 (Stevens, J., dissenting) (arguing that neither policies underlying relevant statutes at issue nor narrower focus on exemption's purpose justify exemption here).

\textsuperscript{184} See id. at 252 (Stevens, J., dissenting) (noting that ability of players to negotiate individual contracts separates league from other organized labor because employers are attempting to set uniform standards rather than employees).
protection of the exemption. Professional football employers, in particular, impose restrictions on movement of players within the monopolistic industry. Next, he highlighted that the imposition of the salary cap was a unilateral action by the NFL, and did nothing to “facilitate the collective bargaining process.” In essence, a deed that was decidedly adverse to the settled labor policy of free bargaining did not deserve to be afforded the protection of an exemption that was purported to protect labor policy objectives. Particularly persuasive on this point was the league admission that the imposition of the wage cap was “to save money” by affecting the labor market directly. Finally, Justice Stevens noted that the majority contradicted well-established precedent for not extending the non-statutory labor exemption, and that the decision “dangerously” broadened what was intended to be a narrow judicially-crafted exemption to

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185 See id. at 256 (Stevens, J., dissenting) (emphasizing there is something special about professional sports that should affect the framework of labor negotiations).

186 See id. (Stevens, J., dissenting) (stating that employers seek to impose wage restraints by unilaterally forbidding players from individually competing in the labor market).

187 See id. at 257 (Stevens, J., dissenting) (noting that the extent of the bargaining involved “amounted to nothing more than the employers’ notice to the union that they had decided to implement a decision to replace individual salary negotiations with a uniform wage level for a specific group of players”).

188 See id. (Stevens, J., dissenting) (claiming employers should not be entitled to a judicially crafted exemption from antitrust liability, which “has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions” when there is “no similarly strong labor policy that favors the association of employers to eliminate a competitive method of negotiating wages that predates collective bargaining and that labor would prefer to preserve”); see also Pamela Clark, supra note 20, at 580 (highlighting Justice Stevens’ explanation that “the origin of the nonstatutory [sic] exemption is in the ‘strong labor policy favoring the association of employees to eliminate competition over wages and working conditions’” and that “no policy favors the association of employers for the purpose of eliminating a competitive method of negotiating wages before collective bargaining takes place”); Michael G. Langan, Comment, Why a Fixed Salary for Development Squad Players Does Not Hurt the Game: Defending the Decision Not to Argue Consumer Injury in Brown v. Pro Football, 5 GEO. MASON L. REV. 559, 575 (1997) (noting that Justice Stevens “concluded that the Court was expanding, for employers’ benefit, a limited exemption that the Court had created to benefit only labor”).

189 See Brief for Petitioners at 8, Brown v. Pro Football, 518 U.S. 231 (1996) (No. 95-388) (arguing “[t]he primary purpose of the fixed-salary concept was ‘to save [the clubs] money,’ as respondents ‘frankly admitted’”); Chris L. Dickerson, Note, Brown v. Pro Football, Inc., — The Nonstatutory Exemption from Antitrust Liability Becomes a Management Weapon, 1997 WIS. L. REV. 1047, 1060 (1997) (stating “[t]he NFL admitted that the primary purpose of fixing the developmental squad players salaries was ‘to save money’”). See generally Brown, 518 U.S. at 254–56 (Stevens, J., dissenting) (arguing that what is at stake in this litigation is exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level that would be produced in a free market).
federal antitrust law.\textsuperscript{190} Recalling \textit{Jewel Tea} and \textit{Pennington}, Justice Stevens argued that simply because an antitrust action "touches on an area of labor law contained in collective bargaining," it does not automatically implicate the exemption.\textsuperscript{191} While the majority contended that the NFL's action in \textit{Brown} "grew out of, and was directly related to, the lawful operation of the bargaining process,"\textsuperscript{192} Justice Stevens argued that the standard of \textit{Pennington} required much more than such a cursory link.\textsuperscript{193} Specifically, \textit{Pennington} directed the court to make a "detailed examination into whether the policies of labor law so strongly supported the agreement struck by the bargaining parties that it should be immune from antitrust scrutiny."\textsuperscript{194} The failure of the majority to undertake this analysis, Justice Stevens concluded, resulted in the "unprecedented expansion" of the non-statutory labor exemption.\textsuperscript{195}

\textbf{C. Fumble: The Impact of the Non-Statutory Labor Exemption's Expanded Scope}

The practical adverse effects of expanding the scope of the non-statutory labor exemption to professional football were seen

\textsuperscript{190} See \textit{Brown}, 518 U.S. at 258 (Stevens, J., dissenting) (arguing that "[a]lthough exemptions should be construed narrowly . . . the Court provides a sweeping justification for the exemption that it creates today. The consequence is a newly minted exemption that . . . the Court crafts only by ignoring the reasoning of one of our prior decisions").

\textsuperscript{191} See id. at 259 (Stevens, J., dissenting) (arguing that the majority concludes that "almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the Nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place"); \textit{see also} \textit{Amalgamated Meat Cutters v. Jewel Tea Co.}, 381 U.S. 676, 700 (1965) (noting that although \textit{Pennington} involved mandatory subjects of bargaining, the workers' activity was held subject to an antitrust action by two lower courts); United Mine Workers v. Pennington, 381 U.S. 657, 657 (1965) (holding that an agreement among large companies to eliminate small coal mining companies to decrease overproduction of coal and raise wages violated antitrust law).

\textsuperscript{192} \textit{Brown}, 518 U.S. at 250.

\textsuperscript{193} See id. at 260 (Stevens, J., dissenting) (noting that the majority's argument that "the exemption applies because the employers' action 'grew out of, and was directly related to, the lawful operation of the bargaining process,' . . . 'was said and rejected in \textit{Pennington}").

\textsuperscript{194} Id. at 260 (Stevens, J., dissenting).

\textsuperscript{195} See id. at 260 (Stevens, J., dissenting) (concluding "the Court's analysis . . . constitute[s] both an unprecedented expansion of a heretofore limited exemption, and an unexplained repudiation of the reasoning in a prior, nonconstitutional [sic] decision that Congress itself has not seen fit to override").
The NFL, able to enjoy an overbroad antitrust immunity, was able to impose unilateral decisions without union consent or fear of suit. As a result, lockouts, strikes and de-certification of the Players Association were threatened. Even prior to Brown expanding the exemption, de-certification of the union occurred throughout the early 1990s so that players were free to bring antitrust suit. In essence, players were forced to abandon the protection and benefits of unionized activities in order to bring antitrust actions. This result does not serve to further any federal labor policy.

\[196\] See generally Pamela Clark, supra note 20, at 590 (arguing that the effects of the restraint were felt by parties other than the developmental squad players and the league, including the entire roster, the market and fans); Covelli, supra note 25, at 289 (noting that collective-bargaining is inhibited by an overbroad extension of the non-statutory labor exemption); Michael C. Harper, Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 WM & MARY L. REV. 1663, 1720 (1997) (stating that the Brown holding will result in more strikes and lockouts).

\[197\] See generally Covelli, supra note 25, at 290 (arguing that shielding management from anti-trust attack will lead to unilateral imposition of anti-competitive player restraints, labor strife and union decertification); Dickerson, supra note 189, at 1072 (noting that "the Court's decision ... potentially allows employers to unilaterally impose any bargaining term they wish as long as labor contract negotiations are ongoing"); Heyl, supra note 180, at 1066-67 (stating that the decision allows employers to implement new or different terms after impasse and engage in hard bargaining without fear of antitrust sanctions).


\[199\] See, e.g., Levine, supra note 198, at 187 (stating that, until its decertification in the early 1990s, the NFLPA negotiated on behalf of the players for issues such as salaries, grievance policies and free agency); Dan M esseloff, Note, The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 547 (2000) (explaining how the players' only alternative to challenge an existing trade restraint is to decertify their union); Ty ras, supra note 74, at 326 (discussing the 1989 decision of the NFLPA to renounce its position as collective bargaining agent for the NFL players, thereby allowing several players to recover for the league's violation of antitrust laws).

\[200\] See Brown v. Pro Football, 50 F.3d 1041, 1057 (D.C. Cir. 1995) (asserting that if employees wish to seek the protections of the Sherman Act, they must forgo unionization or decertify their unions); see also Eric D. Scheible, Note, No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game, 73 U. DET. MERCY L. REV. 73, 99 (1995) (stating the court implies, in dicta, that if unions want to protect themselves with antitrust laws, such as the Sherman Act, they must either forgo unionization or decertify an existing union); Weintraub, supra note 198, at 314 (explaining that, by extending the non-statutory exemption beyond impasse to the point where the NFL can unilaterally alter the terms, management retains all the advantages of antitrust immunity without giving the employees any parallel benefit).
The practical legal effect of the non-statutory labor exemption's expanded scope also lends weight to the argument that the Supreme Court's decision in *Brown* was unsound.\(^{201}\) *Brown* expressed concerns that by not applying the exemption to the facts, "un-expert" courts would have wide discretion to determine the applicability of antitrust laws and establish "detailed rules" that would act to frustrate congressional labor policy.\(^{202}\) Not only did the circuits articulate multi-factored tests to control the application of the non-statutory labor exemption, the tests themselves varied from circuit to circuit.\(^{203}\) As discussed in Part I, both the Sixth and Eighth Circuits adopted a three step analysis examining the parties, subject and nature of the bargaining in a particular instance.\(^{204}\) The Second Circuit acknowledged the existence of the Eighth Circuit test, but declined to adopt it.\(^{205}\) Instead, reaching back to the Supreme

\(^{201}\) See Coolidge, supra note 179, at 842 (asserting that the irony of *Brown* is that extending the non-statutory exemption actually thwarts the NLRA's goal of maintaining a level playing field); Scheible, supra note 200, at 101 (stating that the *Brown* court used folly instead as wisdom in suggesting that decertification was a viable alternative to the collective bargaining process); Weintraub, supra note 198, at 313 (purporting that despite the fact that the *Brown* court sought to maintain a level field in employer-employee relations, its decision instead contradicts the congressional mandate of favoring the collective bargaining process as the primary means of resolution in labor disputes).

\(^{202}\) See *Brown*, 518 U.S. at 242 (explaining the difficulty in allowing courts to make evaluations regarding employer-employee relations, in that such practice results in a myriad of detailed rules set forth by many different non-expert judges and juries, instead of an established set of rules implemented by one expert administrative body).

\(^{203}\) See Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1052 (1994) (proposing that courts have applied the exemption inconsistently by making determinations with no defined congressional guidance); Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks The National Football League Players Association*, 67 DENV. U.L. REV. 135, 140 (1990) (stating that the scope of the non-statutory labor exemption is not clearly defined, as there is no general standard for applying the exemption to employer-union agreements); Tyras, supra note 74, at 340 (purporting that neither federal trial nor appellate courts who have addressed the exemption issue have offered a definitive solution).

\(^{204}\) See Mackey v. Nat'l Football League, 543 F.2d 606, 614 (1976) (outlining the three step analysis); see also McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1997 (6th Cir. 1979) (relying on the principles stated by the *Mackey* court to determine whether the non-statutory labor exemption applies to a given provision of a collective bargaining agreement); Shawn Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, In the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955, 964 (1996) (demonstrating the Eighth Circuit's utilization of the three prong test to determine whether exemption from antitrust scrutiny applies to an agreement).

\(^{205}\) See Local 210 Laborers' Int'l Union of N. Am. v. Labor Relations Div. Associated Gen. Contractors of Am., 844 F.2d 69, 79 (2d Cir. 1998) (quoting *Jewel Tea*, the court acknowledges that the test to determine whether an agreement is protected by the non-statutory exemption considers "not the form of the agreement... but its relative impact on the product market and the interests of union members").
Court's analysis in *Jewel Tea*, the Second Circuit opted for the simpler balancing test. However, balancing the competing antitrust and labor policies implies that the courts must insert a subjective determination of the importance of particular principles over others. Not only does this controvert the concern of the Supreme Court as to the latitude of discretion appropriately exerted by the judiciary in these instances, it also makes the determination itself primarily fact-based. As such, it is difficult to reconcile an analytical approach that necessitates dependence on small fact discrepancies with the broad and far-reaching congressional mandate stated in the Sherman Act.

The district court in *Clarett* demonstrated how this approach to the non-statutory labor exemption is at its core an impermissibly discretionary and fact-dependent determination.

In holding that the NFL's three-year draft eligibility rule was not subject to the non-statutory labor exemption, the district court in *Clarett* first made three determinations. First, the rule did not address the mandatory subject of bargaining.

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206 See id. at 80 (holding the appropriate test is "one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference").

207 See *Brown*, 518 U.S. at 242 (stating that antitrust laws allow judges and juries to base liability upon little more than uniform behavior among competitors). See generally *Lock*, supra note 203, at 142 (discussing the consequence of judicial review of labor relations); Abstract, 19 BERKELEY J. EMP. & LAB. L. 159 (1998) (questioning the role of the judiciary in employer relations).

208 See *Brown*, 518 U.S. at 242 (holding that subjecting the practice at issue to antitrust law is to require antitrust courts to answer important questions regarding collective bargaining which is the very result labor exemption seeks to avoid); see also *Lock*, supra note 203, at 142 (stating that Congress clearly intended to limit judicial involvement in labor disputes when it enacted the federal labor statutes). See generally Abstract, 19 BERKELEY J. EMP. & LAB. L. 159 (1998) (questioning the role of the judiciary in employer relations).

209 See Sherman Act at § 1 (declaring the Sherman Act's broad applicability encompassing "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States"); see also Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 772 (1992) (discussing broad applicability of the Sherman Act). But see *Local 210*, 844 F.2d at 79 (declaring "the test is one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference").

210 See *Clarett*, 306 F. Supp. 2d at 405 n.164 (defining the limits of the non-statutory exemption and then using courts discretion in the balancing test). See generally *Local 210*, 844 F.2d at 79 (discussing the balancing test); Durie & Lemley, supra note 209, at 772 (applying the Sherman Act).

211 See *Clarett*, 306 F. Supp. 2d at 392 (stating that "policies inherent in labor law serve[as] the first point of reference").

212 See id. at 393 (noting that the NFL's rule does not discuss wages or hours). See also *NBA v. Williams*, 45 F.3d 684, 684 (2d Cir. 1995) (involving a dispute between league
Second, Maurice Clarett was a stranger to the bargaining agreement.\textsuperscript{213} Third, the rule itself did not arise from bona fide arms-length negotiations.\textsuperscript{214}

The district court first found that the rule made no particular mention of wages, hours, or conditions of employment, the generally accepted mandatory subjects of bargaining.\textsuperscript{215} In order to arrive at this determination the district court first had to distinguish two recent Second Circuit cases involving professional sports employment, and the draft in particular.\textsuperscript{216} This forced the district court to draw a very narrow difference between employment eligibility and employment restrictions that would apply to potential employees.\textsuperscript{217} In \textit{Wood v. National Basketball Association},\textsuperscript{218} Wood, a college basketball player and first-round draft choice, challenged an agreement between the NBA and the players' union that restricted draftees from negotiating salary with any other teams.\textsuperscript{219} The Second Circuit barred Wood's action by applying the non-statutory labor exemption.\textsuperscript{220} The district court in \textit{Clarett} stated the controlling reason for applying the exemption was the fact that Wood was drafted first and then challenged the draft practices.\textsuperscript{221} In \textit{National Basketball Association v. Williams},\textsuperscript{222} players sought removal of provisions limiting salary and employment negotiation with multiple teams following the draft, as part of a new collective bargaining agreement with the league.\textsuperscript{223} After an

players and a salary cap); \textit{Wood}, 809 F.2d at 956 (holding that basketball player's claims raised no antitrust concerns because they were subjects of collective bargaining).

\textsuperscript{213} See \textit{Clarett}, 306 F. Supp. 2d at 395 (declaring "[t]he labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit").

\textsuperscript{214} See \textit{id.} at 396 (holding the NFL is not entitled to summary judgment for failure to show arms length negotiations).

\textsuperscript{215} See \textit{id.} at 393 (requiring discussion of these factors for a rule to address mandatory subject of bargaining).

\textsuperscript{216} See \textit{id.} at 394 (distinguishing \textit{Williams} and \textit{Wood}).

\textsuperscript{217} See \textit{id.} at 395 (stating that the rule's terms apply to those not yet employed by the NFL).

\textsuperscript{218} 809 F.2d 954 (2d Cir. 1987).

\textsuperscript{219} See \textit{Clarett}, 306 F. Supp. 2d at 393–94 (discussing \textit{Wood}); \textit{See also Wood}, 809 F.2d at 956 (introducing the plaintiff's arguments).

\textsuperscript{220} See \textit{Clarett}, 306 F. Supp. 2d at 393–94 (discussing the courts holding in \textit{Wood}).

\textsuperscript{221} See \textit{id.} (distinguishing the plaintiff in \textit{Wood} as being already employed).

\textsuperscript{222} 45 F.3d 684 (2d Cir. 1995).

\textsuperscript{223} See \textit{Clarett}, 306 F. Supp. 2d at 390–91 (explaining the NFL is not regulated by antitrust laws in order to promote collective bargaining between employers and unions
impasse in the negotiation, the league successfully won a declaratory judgment that the agreement, including these provisions, was not subject to antitrust scrutiny under the non-statutory labor exemption. The Clarett district court explained:

Following Wood, the [Second Circuit] held that each of the disputed terms governed players who are or would be employed by the league, and addressed the players' rights to negotiate over the team they will play for and the salary they will earn. These topics, by definition, concern the terms and conditions of employment that attach once a player is drafted.

Distinguishing these two cases from Clarett, the district court stated that neither Wood nor Williams involved "job eligibility," reasoning that mandatory subjects of collective bargaining only apply to current employees or potential employees. Conversely, the three-year draft rule had the effect of "mak[ing] a class of potential players unemployable" and "thus affects wages only in the sense that a player subject to the rule will earn none." While the result is fair, and the distinction between potential and eligible employees plausible, this is the same type of microanalysis that the Supreme Court attempted and failed to prevent in Brown. Another court could presumably determine that "eligibility" of potential employees came within the gamut of the overall "draft" process of employment, affecting wages in the most extreme way — by

over wages, hours, and working conditions). See also Williams, 45 F.3d at 687 (arguing salary caps suppress salaries and prevent competition among basketball teams).

See Williams, 45 F.3d at 688 (holding antitrust laws do not prohibit labor unions from bargaining with employers over terms and conditions of employment).


See id. at 395 (stating the non-statutory labor exemption does not cover wages, hours, or conditions of employment and subsequently does not govern un-drafted players).

See id. (declaring collective bargaining unquestionably applies to current and prospective employees).

See id. at 393–95 (arguing a class of potential players are unemployable because the Rule requires three college seasons to pass before player is eligible for the draft).

See Brown, 518 U.S. at 250 (holding unilateral contract implementation is subject to non-statutory antitrust exemption because the conduct took place immediately after negotiations, was related to the bargaining process and involved an issue that needed to be negotiated); see also Bryant, supra note 15, at 87 (noting the Brown holding that owners could impose unilateral restrictions on players); Note, Releasing Superstars from Peonage: Union Consent & the Nonstatutory Labor Exemption, 104 HARV. L. REV. 874, 877 (1991) (discussing statutory labor exemptions in antitrust law).
negating them altogether. However, this would lead such a court to a different result than the district court in *Clarett*.

The district court found that Clarett was a stranger to the bargaining agreement, and therefore the exemption would not apply. However, the court once again distinguished “potential” employees from “ineligible” employees by stating:

There is no dispute that collective bargaining agreements, and therefore the non-statutory labor exemption, apply to both prospective and current employees. Newcomers to an industry may not object to provisions of collective bargaining agreements that speak to wages, hours, or conditions of employment on the grounds that they were not present for the bargaining sessions... Clarett’s situation is very different. He is not permitted to be drafted—allegedly because the NFL and the union agreed to exclude players in his class. But Clarett’s eligibility was not the union’s to trade away. Indeed, the Rule does not deal with the rights of any NFL players or draftees. That the non-statutory labor exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions.

This analysis once again relies on the subjective judgment that found the distinguishable characteristic between *potential* and *eligible* employees discussed earlier. In addition, the rationale provided by the last sentence for this second determination begs the question, i.e., that the non-statutory labor exemption does not apply, because the court determined that the exemption did not apply earlier in its analysis on a different subject. Therefore, the analysis of this second factor does not provide any supplementary support for the decision because it is wholly premised on the same rationale previously articulated.

Finally, the district court found that the non-statutory labor exemption did not apply because the three-year rule was not the

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230 See *Clarett*, 306 F. Supp. 2d at 395 (explaining labor laws cannot be used to protect those who are not a party to the bargaining relationship).

231 See *Clarett*, 306 F. Supp. 2d at 395 (second emphasis added).

232 See id. (distinguishing potential from eligible employees); see also *Williams*, 45 F.3d at 686 (stating NBA has right to negotiate with eligible players in the college draft); *Mirabito*, supra note 18, at 845 (noting only certain players can challenge the draft on antitrust violations).
result of bona fide arm's length negotiation.\textsuperscript{233} The court noted that the historical record of the rule was particularly meager, and stated that "what the record omits speaks louder than what it contains."\textsuperscript{234} The first version of the three-year draft rule arose prior to the first collective bargaining agreement entered into between the league and a players association.\textsuperscript{235} Furthermore, the CBA at issue never mentioned the rule itself.\textsuperscript{236} However, it contained a provision "waiv[ing] the right to bargain over any provision of the Constitution and Bylaws . . . [and] to resolve any dispute . . . involving interpretation or application of the Constitution and Bylaws in accordance with the dispute resolution procedures of the CBA."\textsuperscript{237} The Bylaws referenced by this provision did, in fact, contain a provision of the three-year rule.\textsuperscript{238} The district court drew the distinction between actual bargaining over the rule and the waiver to challenge it, stating that while the Bylaws containing the rule demonstrate "that the union agreed not to bargain over or challenge the rule, they in no way demonstrate that the rule itself arose from, or as agreed to during, the process of collective bargaining."\textsuperscript{239} Once again, this factual anomaly required the court to make a subjective determination: that the bargain not to bargain over a specific provision constituted a lack of "bargaining" sufficient to bring the rule within the scope of the non-statutory exemption.\textsuperscript{240} This

\textsuperscript{233} See Clarett, 306 F. Supp. 2d at 395–96 (stating three-year rule could only be subject to the non-statutory labor exemption if it was negotiated at arm's length).

\textsuperscript{234} See id. (explaining rule was not the result of collective bargaining).

\textsuperscript{235} See id. (stating rule was adopted prior to NFLPA becoming a part of collective bargaining process); see also Itri, supra note 151, at 312 (noting three-year draft rule is now a part of collective bargaining agreement); Pasquarelli, supra note 123 (stating the three-year draft rule does not mention collective bargaining).

\textsuperscript{236} See Clarett, 306 F. Supp. 2d at 396 (stating union agreed not to challenge rule); Itri, supra note 151, at 312 (stating collective bargaining is never mentioned in the drafting rule); Pasquarelli, supra note 123 (stating the three-year drafting rule never mentions collective bargaining).

\textsuperscript{237} Clarett, 306 F. Supp. 2d at 396.

\textsuperscript{238} See Clarett, 306 F. Supp. 2d at 385 (noting that when the CBA became effective a side letter was executed acknowledging that the bylaws were referenced in the CBA).

\textsuperscript{239} Id. at 396.

\textsuperscript{240} See id. (looking to the history of the Rule, and to the notion that the parties agreed not to bargain over the rule itself, and concluding that this was not sufficient to satisfy this element of the exemption requirements). See also Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499 (D. Pa. 1972) (finding that since a contract clause had not been bargained over and its mere historical presence caused the clause to not meet exemption requirements); Itri, supra note 151, at 336-37 (equating the bargaining that occurred in Clarett, with respect to the Rule, with "surface
analysis implicates the irreconcilability of the early decision of the Supreme Court in Jewel Tea with its later decision in Brown. In essence, the Jewel Tea balancing of competing antitrust and labor policies, while necessitating subjective determinations by the examining court, explicitly declined to establish a complicated and narrow set of factors to apply to a particular set of circumstances, preferring instead a "forest for the trees" approach.\textsuperscript{241} Brown, in contrast, stated that only a bargaining term that "grew out of, and was directly related to, the lawful operation of the bargaining process"\textsuperscript{242} would implicate the exemption. The district court paraphrased this Brown approach in its above finding, and implied that an examining court must find that the term in question was specifically and irrefutably birthed during the bargaining process of an agreement.\textsuperscript{243} Problematically, the district court began the initial stages of its overall analysis by expressly adopting the Jewel Tea approach used by the Second Circuit.\textsuperscript{244} Yet, in this circumstance, the court made the switch to a Brown hair-splitting scrutiny to justify the distinction it found.\textsuperscript{245} 

In summary, the convoluted standards promulgated by the Supreme Court throughout the history of the non-statutory labor exemption have led to the distortion of the very purpose of the

\textsuperscript{241} See Jewel Tea, 381 U.S. at 700 (balancing competing interests of organized labor negotiations against antitrust policies of the Sherman Act); see also Brown, 518 U.S. at 234 (citing Jewel Tea for the proposition that the exemption "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict"); 3-54 ANTITRUST LAWS AND TRADE REGULATION, SECOND EDITION § 54.03 (2004) (stating that Jewel Tea's analytical approach was a broad balancing of competing interests).

\textsuperscript{242} Brown, 518 U.S. at 250.

\textsuperscript{243} See Clarett, 306 F. Supp. 2d at 391 (stating that "[t]he Supreme Court has implied this ... exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, which require good-faith bargaining over wages, hours, and working conditions ...") (quoting Brown, 518 U.S. at 236) (emphasis in original)).

\textsuperscript{244} See Clarett, 306 F. Supp. 2d at 392 (citing Jewel Tea as the decision which defined the scope of the non-statutory labor exemption).

\textsuperscript{245} See Clarett, 306 F. Supp. 2d at 393 (citing Brown for the proposition that the exemption only applies to subjects that arose from a collective bargaining process and deciding on the facts of Clarett that this requirement was not met and so the exemption could not apply to the Rule); see also Brown, 518 U.S. at 250 (exempting a bargaining term only when that term "grew out of, and was directly related to, the lawful operation of the bargaining process"). See generally In the News, 25 ENT. LAW REPORTER 9 (2004) (summarizing the Clarett opinion and making clear that the case was decided on narrow factors unlike the broad balancing of interests exercised in Jewel Tea).
exemption: the preservation of congressional intent when confronted with cases implicating both antitrust and labor policies.\footnote{See \textit{Clarett}, 369 F.3d at 131 (holding that the "Supreme Court has never delineated the precise boundaries of the exemption . . ."); Heyl, \textit{supra} note 180, at 1054 (stating that "following \textit{Pennington, Jewel Tea,} and \textit{Connell,} the interplay between labor law and antitrust law was at best uncertain. There is some merit in the argument that the philosophy behind those three decisions conflicts with congressional intent to keep antitrust law out of labor issues"); \textit{Leading Cases}, 110 HARV. L. REV. 327, 328 (1996) (noting the Court has struggled to reconcile anti-trust laws with federal labor laws and that its doctrine remains unsettled).} Expansion of the scope of the exemption in particular has been problematic, resulting in the judiciary having wide subjective discretion to afford weight to a particular policy, making discretion completely dependent upon the limited facts of a particular case.\footnote{See \textit{Clarett}, 369 F.3d at 390–93 (attempting to reconcile the various interpretations of the Court’s opinions); \textit{Sheet Metal Div. v. Local Union 38 of the Sheet Metal Workers Int'l Ass'n}, 45 F. Supp. 2d 195 (N.D.N.Y. 1999) (reconciling Supreme Court cases and Circuit court cases with respect to the non-statutory exemption); \textit{see also} Pamela Clark, \textit{supra} note 20, at 571 (criticizing the Court’s inconsistency with respect to the non-statutory exemption).} As illustrated by the district court in \textit{Clarett}, courts have struggled to reconcile the conflicting opinions of the Supreme Court, resulting in splits among the circuits. This reconciliation often fails, resulting in both a cursory and unsound analysis.\footnote{See \textit{Clarett}, 369 F.3d at 390–93 (attempting to reconcile the various interpretations of the Court’s opinions); \textit{Sheet Metal Div. v. Local Union 38 of the Sheet Metal Workers Int'l Ass'n}, 45 F. Supp. 2d 195 (N.D.N.Y. 1999) (reconciling Supreme Court cases and Circuit court cases with respect to the non-statutory exemption); \textit{see also} Pamela Clark, \textit{supra} note 20, at 571 (criticizing the Court’s inconsistency with respect to the non-statutory exemption).} A limitation on the scope of the non-statutory labor exemption by the Supreme Court in future cases would serve to remedy this problem.\footnote{See \textit{Clarett}, 369 F.3d at 390–93 (attempting to reconcile the various interpretations of the Court’s opinions); \textit{Sheet Metal Div. v. Local Union 38 of the Sheet Metal Workers Int'l Ass'n}, 45 F. Supp. 2d 195 (N.D.N.Y. 1999) (reconciling Supreme Court cases and Circuit court cases with respect to the non-statutory exemption); \textit{see also} Pamela Clark, \textit{supra} note 20, at 571 (criticizing the Court’s inconsistency with respect to the non-statutory exemption).} A strong curtailing of the exemption would prevent employers like the NFL in \textit{Clarett} from even claiming immunity in many instances, thereby avoiding the situation where lower courts apply the very "un-expert" antitrust
discretion that the Supreme Court feared would subvert congressional labor policy. 250

E. Off-sides - The Evolution of the "Reasonableness" Defense in Antitrust Suits

The NFL claimed a second defense in Clarett, arguing that the three-year draft eligibility rule was a reasonable restraint of trade. 251 Clarett, in contrast, claimed that the rule is harmful to competition as it provides for a complete bar from market entry by a specified class of players, notwithstanding their ability to compete in the market. 252 The district court said that under § 1 of the Sherman Act, Clarett would prevail if he could "first establish a combination or some form of concerted action between at least two legally distinct economic entities. . . [The complaint] must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade. . ." 253 As the concerted action by the NFL teams was undisputed, the court was left to determine whether the three-year rule is an unreasonable restraint of trade. 254

To determine whether the rule was an unreasonable restraint of trade, the district court employed what is called the "quick

250 See Clarett, 306 F. Supp. 2d at 407 (describing plaintiff's claim of exemption); Consolidated Express, Inc. v. N.Y. Shipping Ass'n., 602 F.2d 494, 512 (3d Cir. 1979) (providing an example of litigation to determine exemption availability that might be prevented if a clear set of standards for exemption application were present), vacated, 448 U.S. 902 (1980); U.S. Info. Sys. v. IBEW Local Union No. 3, No. 00 Civ. 4763, 2002 U.S. Dist. LEXIS 1038, *8-13 (S.D.N.Y. 2002) (giving an example of present confusion regarding what to allege for successful pleading of non-statutory labor exemption).

251 See Clarett, 306 F. Supp. 2d at 389 (noting the NFL's demand for a trial to determine if the league's contested rule is a reasonable restraint of trade).

252 See Clarett, 306 F. Supp. 2d at 382 (stating Clarett's argument that the NFL's rule is void as in contrast with antitrust law).


254 See Clarett, 306 F. Supp. 2d at 404-10 (analyzing whether the NFL's rule is an unreasonable restraint on trade). See generally Muko 670 F.2d at 428-32 (discussing elements of unreasonable restraints on trade); Darren Rovell, Legal Eagles Explain What's Next, ESPN, Sept. 23, 2003, at http://sports.espn.go.com/nfl/news/story?id=1622080 (discussing the NFL rule, the court's holding and unreasonable restraints of trade).
look” approach for analyzing the claim. This approach, however, is one of five doctrines applied by the Supreme Court to antitrust claims over the years. Due to the numerous options, lower courts have had the unfortunate discretion to determine which approach they will utilize in their analysis, or worse, amalgamate one or more of the approaches, thereby losing the benefits of each. This range of standards has lead to widespread confusion and misapplication, resulting in lengthy litigation and judicial inefficiency. The quandaries these multiple doctrines present necessitate the promulgation of a simpler approach to determining the reasonableness of a restraint of trade.

F. The Playbook – Five Standards

To determine whether a practice is an unreasonable restraint of trade, the Supreme Court has applied five doctrines: (1) the ancillary restraints doctrine; (2) the per se rule; (3) the rule of

257 See Roberts, supra note 5, at 346 (defining the Ancillary Restraints doctrine). Compare Int’l Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989) (applying the Rule of Reason doctrine as requiring a five factor analysis) with Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 191 (7th Cir. 1985) (applying the Rule of Reason doctrine such that analysis of market power is the first step to application of the non-statutory labor exemption).
reason; (4) the "quick look"; and (5) the less restrictive alternatives doctrine. At common law, the ancillary restraints doctrine stated that particular ancillary restraints on commerce deemed lawful at common law were not restraints of trade subject to the Sherman Act. In United States v. Addyston Pipe & Steel Co., the Sixth Circuit articulated the doctrine in terms of its benefits to commerce, stating "it became apparent to . . . the courts that it was in the best interest of trade that certain covenants in restraint of trade should be enforced." The Court believed that certain anticompetitive practices were necessary and beneficial to business. Examples of these acceptable practices included joint decisions between tradesmen in regard to the location of their business, the scope of production and the product price. The doctrine acknowledges that businesses would operate more efficiently without the continual threat of antitrust restrictions impeding such internal decisions.

The per se approach determines whether a restraint on trade can be conclusively presumed unreasonable given its necessary effect. In Northern Pacific Railroad Company vs. United...
States, the Supreme Court stated that a restriction is considered a violation per se when it is lacking in redeeming virtue or can be "conclusively presumed to be unreasonable" caused by a "pernicious effect on competition." Under this standard, justifications for the challenged conduct are not entertained. Examples of conduct deemed unreasonable per se include horizontal price fixing and "group boycotts." In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the Court noted that:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. Even when they operated to lower prices or temporarily to stimulate competition they were banned. [We have] said that such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.

In addition, under this approach the Court must first determine if the conduct falls within a category of activity
previously labeled *per se* barred. Should it fall within a category of deeds traditionally believed anticompetitive, there is little need for detailed analysis.

*Board of Trade of the City of Chicago v. United States* outlined the "rule of reason" approach. In essence, the Court held that some restraints on commerce may promote competition, and are therefore reasonable. Restraints that suppress competition are unreasonable. A list of factors to be considered when determining whether a restraint is reasonable under this standard include: (1) the type of business in question; (2) the effect of the restraint on the business; (3) the type of restraint; (4) the reason for adopting the restriction; (5) the end desired by imposition of the restriction; and (6) whether the restraint is actual or probable. Unlike the *per se* analysis, the rule of reason examines the justifications for a particular restraint and its pro-competitive effects. Pro-competitiveness is proven by a showing that the activity: (1) has redeeming features; (2) has

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275 See *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984) (stating that *per se* rules are employed to determine the significance of the restraint based on the nature or character of the contract); *see also Klor's*, 359 U.S. at 211 (noting that § 1 of the Sherman Act prohibits acts which under common law were deemed, by their "character," to be unduly restrictive); *Standard Oil*, 221 U.S. at 60 (discussing that the standard to be used in determining whether prohibitions had been violated was the "standard of reason" applied at common law that dealt with subjects of character).

276 See *NCAA*, 468 U.S. at 104 (noting that *per se* rules are invoked when the probability of anticompetitive conduct is such that further examination by the court is unwarranted); *see also Klor's*, 359 U.S. at 211 (stating that it is not for the courts to decide whether injury has occurred when the action falls into a class of restraint that is traditionally restrictive); *Standard Oil*, 221 U.S. at 65 (discussing that once the effect and character of the conduct was considered a restraint of trade, the court could not substitute its own reasoning to take it out of the statute).

277 246 U.S. 231 (1918).

278 See *id.* at 238 (discussing the test to determine if the conduct in question is a reasonable regulation of business consistent with Anti-Trust law).

279 See *id.* at 238–41 (describing how the restraint in question actually shortened the working day and promoted competition within the industry).

280 See *id.* at 238 (noting that if the restraint imposed suppresses or destroys competition, it does not pass the test of "legality").

281 See *id.* (listing relevant factors in determining if the restraint suppresses competition); *see also Choslovsky*, *supra* note 16, at 304 (listing the factors used in the rule of reason analysis); *Yancey*, *supra* note 267, at 675 (enumerating the factors necessary to determine the legality of a particular restraint).

282 See *Nat'l Soc. of Prof'l Eng's v. U.S.*, 435 U.S. 679, 692 (1978) (differentiating the *per se* from the rule of reason analysis); *see also Chicago Bd. of Trade*, 246 U.S. at 240–41 (discussing the pro-competitive effects as justification for upholding the restraint); Lance McMillian & James Ponsoldt, *The Judicial Legitimization of Horizontal Price-Fixing Among Partially Integrated Health Care Providers: An Antitrust/Health Care Case Study*, 50 Ala. L. Rev. 465, 474 (1999) (stating that the rule of reason analysis should be employed over the *per se* analysis to give consideration to the competitive effects).
benefits that outweigh the negatives involved in the restraint of trade; and (3) is the least restrictive alternative to achieve the redeeming benefits.283 The rule of reason approach involves the most lengthy fact finding inquiry by the court, and the extensive balancing of the numerous factors articulated above.284 However, the rule of reason is the standard applied by the greatest number of courts when determining the reasonableness of a restriction.285 Succinctly articulating the standard, Justice Brandeis stated 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."286

The two "quick look" approaches287 recognize that some restraints that would traditionally be held per se illegal may have pro-competitive benefits.288 In NCAA v. Board of Regents,289 the Court applied the quick look approach to an allegation of price

283 See Chicago Bd. of Trade, 246 U.S. at 240–41 (discussing how the effects of the restraint promoted business and competition in the industry more than before it was implemented); see also Choslovsky, supra note 16, at 304 (noting that parties must prove that efficiencies outweigh the threats to competition); Yancey, supra note 267, at 676 (discussing the factors defendant must prove in justification of the restraint).


285 See Cont. T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (holding the rule of reason was the preferred standard since the early 1900's); see also Comerford, supra note 284, at 657-58 (discussing the historical judicial preference for the rule of reason analysis); Yancey, supra note 267, at 674 (noting that most cases utilize the rule of reason analysis). But see McMillian & Ponsoldt, supra note 282, at 477 (stating that the per se rule is the primary rule governing horizontal price-fixing cases).

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

287 The second “quick look” approach enunciated in United States v. Brown University, 5 F.3d 658, 669 (3rd Cir. 1993), is outside the scope of this analysis, but may be of interest to those looking for a deeper understanding of the topic. See also Yancey, supra note 267, at 671-706, discussing the two “quick look” approaches, and Alan J. Meese, Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason, 68 Antitrust L. J. 461 (2001), arguing against conventional wisdom and positing the “quick look” approach hinders free trade.

288 See U.S. v. Topoco Assoc., 405 U.S. 596, 610 (1972) (holding that per se illegal restriction of competition in one area may promote healthy competition in another area). See generally, Meese, supra note 287, at 461 (discussing the similarities of reasoning in Topoco and NCAA); Alan J. Meese, Price Theory, Competition, and the Rule of Reason, 2003 U. Ill. L. Rev. 77, 78-79 (2003) (discussing cooperation and competition and how both forms of interaction can enhance competition).

fixing by the NCAA.290 The Board of Regents of the University of Oklahoma brought an antitrust suit against the NCAA for fixing the price networks paid to schools for television rights to sporting events.291 The networks agreed to pay a "minimum aggregate compensation" to schools and generally all teams received the same fee for television rights without regard for the ratings.292 The Supreme Court examined both the findings and holding of the district court and the Tenth Circuit in making its determination.293 The district court had made a full fact-finding inquiry, and applying many of the "rule of reason" factors, determined the practice was anticompetitive.294 In contrast, the Tenth Circuit decreed the price-fixing practice illegal per se.295 The Supreme Court relied on the findings of the district court, and not the Tenth Circuit, to come to its conclusion.296 While the Court did not hold that the district court's findings were presumptive of anticompetitive activity, it affirmed the district court's holding.297 Following this determination, the Court took a "quick look" at the commercial objectives sought by the anticompetitive activity, and determined that they were legitimate.298 However, upon examining the justifications offered by the NCAA for the conduct, the Court resolved that price-fixing did not achieve the NCAA's goals, and that less restrictive alternatives existed to reach the same ends.299 In essence, the "quick look" approach consisted of two steps. First, the Supreme Court took a quick look at the NCAA's justifications to determine

290 See id. at 88 (noting the respondents had alleged that the NCAA had unreasonably restrained trade in the area of televising football games).
291 See id. at 88–96 (summarizing the background controversy of the televised plan at issue and the prior plans).
292 See id. at 92–93 (explaining the particulars of the NCAA plan).
293 See id. at 95–99 (summarizing the lower court's findings and rationales).
294 See id. at 114 (noting that the District Court found that the television plan did not create any "procompetitive efficiencies," rather televised football could be marketed just as efficiently without the plan).
295 See id. at 97–98 (addressing the holding and rationale of the Court of Appeals decision).
296 See id. at 98–120 (discussing the district court's findings throughout the opinion).
297 See id. at 120 (holding "only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life").
298 See id. at 118–22 (declaring that "maintaining a competitive balance among amateur athletic teams" is a legitimate commercial purpose).
299 See id. at 119 (noting that other sports have found ways to maintain competitive balances "without resort to a restrictive television plan").
whether further inquiry was necessary. When answered in the affirmative, the Court then reviewed the facts of the case and made a determination whether the activity was anticompetitive. The "quick look" approach has been characterized as an intermediate standard between the per se and rule of reason approaches.

The less restrictive alternatives doctrine has never been "formally" recognized by the Supreme Court, but has been applied by many lower courts in determining the reasonableness of a restraint of trade. The circuits have each developed their own formulation of the doctrine, frequently as the third prong of the three-tiered rule of reason analysis. The Second Circuit articulated the doctrine in Clorox Co. v. Sterling Winthrop, Inc.

[E]stablishing a violation of the rule of reason involves three steps. First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on the competition as a whole of the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the pro-competitive effect could be

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300 See id. at 96 (stating District Court rejected NCAA's gate attendance justification).
301 See id. at 99 (determining that these facts are similar to those where anticompetitive practices were found).
302 See Yancey, supra note 267, at 679 (noting that "quick look" approach is used when per se approach is inappropriate and where entire industry analyses are not required); see also United States v. Brown University, 5 F.3d 658, 669 (3rd Cir. 1993) (stating that courts sometimes apply the "quick look" standard rather than the rule of reason and per se rule); James Murphy Dowd, Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets, 76 B.U. L. Rev. 1075, 1108 (1996) (explaining that judicial resources are saved when using "quick look" analysis).
303 See Grewe, supra note 6, at 227 (stating that courts differ on how many restrictive alternatives must be present for the doctrine to apply); Jeffrey Gordon, Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?, 26 FORDHAM URB. L.J. 1201, 1241 (1999) (positing courts could rule in favor of less restrictive alternatives when deciding whether relocation rules are restraints of trade); Konsky, supra note 6, at 1588 (noting that most courts have considered less restrictive alternatives in rule of reason analyses).
304 See Grewe, supra note 6, at 231 (noting that circuit courts have four opinions on how to apply less restrictive alternatives doctrine); see also U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 559, 596 (1st Cir. 1993) (holding that less restrictive alternatives are only one consideration in weighing whether restraint of trade has occurred); Smith v. Pro Football, Inc., 593 F.2d 1173, 1215-16 (D.C. Cir. 1978) (holding that there is no restraint of trade just because less restrictive alternatives exist).
305 Clorox v. Sterling Winthrop, Inc., 117 F.3d 50 (2d Cir. 1997).
achieved through an alternative means that is less restrictive of competition.\textsuperscript{306}

Under this doctrine, the burden is on the plaintiff to demonstrate that activities less restrictive of trade would accomplish the pro-competitive justifications offered by the defense.\textsuperscript{307}

\section{G. Interception – Applications of Different Doctrines to Draft Restrictions}

In the context of professional sports, and draft eligibility particularly, courts have used a number of the approaches discussed above to determine whether certain employment practices used by professional sports leagues are unreasonable restrictions of trade.\textsuperscript{308} In 1978, the D.C. Circuit declared that the NFL draft – as it existed in 1968 – was an illegal restraint of trade.\textsuperscript{309} In \textit{Smith v. Pro-Football},\textsuperscript{310} the court applied the rule of reason to make its determination.\textsuperscript{311} In so doing, the court found that the purpose of the draft was to restrict competition among teams for the market of college players, and forced players to negotiate with only a single team.\textsuperscript{312} The effect was the suppression of competition.\textsuperscript{313} The court declared that the college draft would only survive the rule of reason examination upon a

\textsuperscript{306} Id. at 56.

\textsuperscript{307} See id. at 56 (declaring that determining harm to consumers is paramount); see also Capital Imaging v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993) (deciding that individual injuries to competitors “will not suffice”); Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (holding that restraint must be of “significant magnitude”).

\textsuperscript{308} See Clarett, 369 F.3d at 138 (holding that the NFL’s actions were not \textit{per se} violations); \textit{Smith}, 593 F.2d at 1188 (noting the league had adopted less restrictive terms for player negotiations); Banks v. NCAA, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (stating the rule of reason must be applied in this draft eligibility case).

\textsuperscript{309} See \textit{Smith}, 593 F.2d at 1184–85 (noting that, even though NFL’s purpose was not unreasonable, restraint of trade existed in 1968).


\textsuperscript{311} See id. (holding that because less restrictive alternatives existed, the rule of reason was inapplicable to the NFL draft).

\textsuperscript{312} See id. at 745 (stating that “restrictions comprising the draft ‘are naked restraints of trade with no purpose except stifling of competition’”) (quoting White Motor Co. v. U.S., 372 U.S. 253, 263 (1963)).

showing of economically pro-competitive benefits that outweighed its anticompetitive effects.\(^\text{314}\)

In contrast, other courts have employed the *per se* approach. In *Denver Rockets v. All Pro Management, Inc.*,\(^\text{315}\) an underclassman successfully challenged the NBA draft eligibility rule.\(^\text{316}\) The rule banned any player from the college draft who was not four years removed from high school.\(^\text{317}\) The court determined that the NBA's justification for the rule, namely, that it was a less expensive alternative to a farm system to train younger players, was without merit.\(^\text{318}\) In particular, the court noted that the rule was "absolute" and made no accommodation to evaluate players seeking to enter the draft but for the existence of the ban.\(^\text{319}\) Similarly, a World Hockey Association ("WHA") rule prohibiting any player under the age of twenty from playing with any league team was struck down in *Linseman v. World Hockey Association*.\(^\text{320}\) The court again struck down the rule by applying the *per se* standard, rejecting the WHA's contention that the maintenance of this free farm system was essential to the economic viability of the league.\(^\text{321}\) The court responded succinctly that there is no antitrust exception for economic necessity.\(^\text{322}\) In addition, the court noted that should

\(^{314}\) See Smith, 420 F. Supp. at 738 (stating that the court would have to declare the draft a "reasonable way of pursuing legitimate business interests" or that it strikes what the defendants call a "competitive balance" for it to be lawful).


\(^{316}\) *Denver Rockets*, 325 F. Supp. at 1049.

\(^{317}\) See id. at 1059 (quoting section 2.05 of the NBA bylaws which describe the ineligibility of high school players).

\(^{318}\) See id. at 1066 (rejecting the NBA's argument claiming collegiate athletics as "a more efficient and less expensive way of training young professional basketball players").

\(^{319}\) See id. at 1066 (noting the impropriety of the overly broad and absolute rule).

\(^{320}\) 439 F. Supp. 1315 (1977) (holding that the NHL rule was an "unreasonable restraint on trade," which violated the Sherman Act).

\(^{321}\) See *Linseman*, 439 F. Supp. at 1322 (applying the *per se* standard, which holds restraints of trade illegal regardless of any justification, despite the argument that the NHL did not have a farm system of its own to develop hockey players); Robert D. Koch, 4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule, 24 LOY. L.A. ENT. L.J. 291 (2004) (commenting on the court's refusal to adopt WHA's economic necessity argument); Robert A. McCormick & Matthew C. McKinnon, Professional Football's Draft Eligibility Rule: The Labor Exception and the Antitrust Laws, 33 EMORY L.J. 375, 431 (1984) (describing the court's rationale in rejecting the WHA's economic necessity argument).

\(^{322}\) See *Linseman*, 439 F. Supp. at 1322 (noting the fact that it was not economically feasible for the NHL to create its own farm system was not a valid excuse to restraining trade).
the WHA desire a training ground for its players, it would need to fund a farm system for that purpose.  

H. Overtime – Clarett v. NFL Illustrates the Need for a Simplified Approach

When Maurice Clarett challenged the three-year draft eligibility rule, even legal analysts found it difficult to predict the particular approach that the district court would employ to evaluate the reasonableness of the rule's restraint on trade. Whereas Smith's draft challenge was evaluated under the rule of reason, the almost identical NBA draft eligibility provision was struck down per se in Denver Rockets. In addition, Clarett alleged that the rule constituted a group boycott by the league teams, a category traditionally found per se illegal. However, the court in NCAA v. Board of Regents categorized horizontal restraints on competition (i.e., group boycotts) in professional sports leagues as essential to the existence of the industry. This placed professional sports in a special category of business entities. The district court eventually applied a combination of the rule of reason, quick look and less restrictive alternatives

323 See Linseman, 439 F. Supp. at 1322 (pointing to the free market system, which determines that if the World Hockey Association wants its own farm system, it should incur the cost of creating it).

324 See Roberts, supra note 5, at 337-38 (citing various sports league cases using different tests and rules leaving no guidance for court to rule on similar cases); see also Grewe, supra note 6, at 246 (noting that district courts apply two rules in various ways); McCormick & McKinnon, supra note 321, at 418-19 (highlighting court's use and application of both Rule of Reason and per se unreasonableness).

325 See Smith, 420 F. Supp. at 745 (evaluating draft under Rule of Reason); Denver Rockets, 325 F. Supp. at 1066 (concluding that NBA rules subject to per se rule applicable to group boycotts); see also Roberts, supra note 5, at 358 (discussing six similar lower court decisions, two upheld under rule of reason while other four held as per se violations).

326 See Clarett, 306 F. Supp. 2d at 390 (analyzing Clarett's claim that the NFL's rule constitutes illegal "group boycott"); see also Grewe, supra note 6, at 240-41 (mentioning that group boycotts are normally analyzed under per se rules); McCormick & McKinnon, supra note 321, at 419 (stating that principle of per se is applied to boycotts).


328 See id. at 104 (determining whether challenged restraint enhanced competition).

329 See McCormick & McKinnon, supra note 321, at 421 (applying general anti-trust and boycott rules to professional football); see also Bryant, supra note 15, at 98 (commenting that professional sports create a challenge to antitrust law); Mirabito, supra note 18, at 858 (arguing that current statutory scheme is inadequate due to unique nature of professional sports).
approaches to determine whether the three-year draft rule was an unreasonable restraint of trade.\footnote{See \textit{Clarett}, 306 F. Supp. 2d at 405–06 (applying three step burden-shifting test); see also \textit{Capital Imaging v. Mohawk Valley Med. Assocs.}, 996 F.2d 537, 542-43 (2d Cir. 1993) (discussing the doctrines used to shift the burden. \textit{See generally Chicago Bd. of Trade v. United States}, 246 U.S. 231, 238 (1918) (articulating how the rule of reason analysis should be undertaken).} The district court first acknowledged that \textit{NCAA v. Board of Regents} took “into account the realities of the [football] industry’s regulatory landscape,” and thereby found that “group boycotts” in the context of professional football are unique circumstances not subject to immediate dismissal \textit{per se}.\footnote{See \textit{Clarett}, 306 F. Supp. 2d at 405 (discussing Supreme Court’s Rule of Reason and application).} Ironically, the district court’s recognition that professional football should not be treated as equivalent to any other industry is directly contradictory to the Supreme Court’s express holding in \textit{Brown} that professional football should not be afforded any special treatment.\footnote{See \textit{Brown v. Pro Football, Inc.}, 518 U.S. 231, 265 (1996) (refusing to shield NFL from antitrust liability imposed on every other union); \textit{Clarett}, 306 F. Supp. 2d at 411 (holding antitrust laws as inapplicable and Clarett was therefore not precluded from NFL draft); Bryant, supra note 15, at 110 (stating court’s holding that professional sports is not unique to labor law and should not be treated differently).} Recall that the Court expressed it could not “find a satisfactory basis for distinguishing football players from other organized workers.”\footnote{See \textit{Brown}, 518 U.S. at 249–50.} While the Supreme Court’s holding in this instance was in reference to the collective bargaining process, the district court in \textit{Clarett} relied on that reasoning.\footnote{See \textit{Clarett}, 306 F. Supp. 2d at 390 (applying case to antitrust, business and labor laws); see also Bryant, supra note 15, at 114 (criticizing \textit{Brown} for failing to recognize purpose of non-statutory labor exemption); Covelli, supra note 25, at 284–85 (critiquing \textit{Brown} as bringing labor law and antitrust law into conflict).} This demonstrates an internal inconsistency in the treatment of professional football as a business entity in the context of the court’s overall analysis.\footnote{See \textit{Clarett}, 306 F. Supp. 2d at 405 (clarifying that under the three-step burden shifting test the plaintiff bears the initial burden of showing that the challenged action} 

Second, the district court cited the rule of reason three-step burden shifting test as articulated above in \textit{Clorox v. Sterling Winthrop Inc.}\footnote{See \textit{Clarett}, 306 F. Supp. 2d at 406 (applying three step burden-shifting test); see also \textit{Capital Imaging v. Mohawk Valley Med. Assocs.}, 996 F.2d 537, 542-43 (2d Cir. 1993) (discussing the doctrines used to shift the burden. \textit{See generally Chicago Bd. of Trade v. United States}, 246 U.S. 231, 238 (1918) (articulating how the rule of reason analysis should be undertaken).} The court first reasoned that a group boycott denying market entry in this instance is:
Precisely the sort of conduct that the antitrust laws were designed to prevent: 'whatever other conduct the Acts may forbid, they certainly forbid all restrains of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling.'

The court then examined the Denver Rockets case, and although rejecting the per se approach, determined that its eligibility rule analysis was sound. However, when the NFL argued that Clarett did not make out his prima facie case by failing to sufficiently define the relevant "market," the district court switched to a quick look approach. The court held that the draft eligibility rule "is the perfect example" of a restriction appropriately analyzed under the quick look method due to its "blatantly anticompetitive" policy. Following this articulation, however, the court moved back to examine the remaining two prongs of the rule of reason approach, holding that the rule had no legitimate pro-competitive justification. Finally, the court held that "even if pro-competitive justification for the Rule existed [thereby satisfying that prong of the rule of reason approach], summary judgment for Clarett would be appropriate because an alternative to the Rule exists that is less prejudicial to competition."

has had an actual adverse effect on competition as a whole in the relevant market, then after the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive redeeming virtues of their combination, if the defendant comes forward with such proof, the burden then shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives; see also Clorox v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) (holding that under the rule of reason analysis the court must determine whether the restraints in the agreement are reasonable in light of their actual effects on the market and their pro-competitive justifications); Capital Imaging v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993) (explaining that in most cases plaintiff must prove an antitrust injury under the rule of reason).

337 Clarett, 306 F. Supp. 2d at 406 (citing Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1948)).

338 See Clarett, 306 F. Supp. 2d at 406 (concluding that age-based eligibility restrictions in professional sports are anticompetitive because they limit competition in the player personnel market by excluding sellers).

339 See id. at 407 (stating that Clarett had sufficiently defined the relevant market and discussing the quick look approach as an alternative when the conduct does not clearly fit into the per se category).

340 See id. at 408.

341 See id. at 409 (holding that Clarett must prevail because there is no legitimate pro-competitive justification for the rule).

342 See id. at 410.
While the district court’s analysis of the reasonableness of the draft rule’s restraint on trade seems logically cogent, the case highlights the uncertainty inherent in determining the controlling approach to this issue. The court in *Clarett* created an analysis that included elements of three particular approaches: the rule of reason, the quick look, and the less restrictive alternatives doctrine.\(^\text{343}\) It also cited decisions as support for its analysis that employed completely different approaches to a factually similar issue.\(^\text{344}\)

Each approach has its drawbacks. For example, the rule of reason approach consists of lengthy fact finding exercises that may protract litigation and waste judicial resources.\(^\text{345}\) The *per se* approach may dismiss a facially restrictive practice as illegal, whereas a more than cursory analysis would show the activity to be pro-competitive.\(^\text{346}\) The “quick look” approach, particularly at the trial court level, may result in little more than a *per se* analysis with a passing recognition that some justifications are offered, depending on the court’s diligence.\(^\text{347}\) Finally, the least

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\(^{345}\) See Cont. T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (stating that fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint of trade); Va. Vermiculite, Ltd. v. W.R. Grace & Co., 108 F. Supp. 2d 549, 570–71 (W.D. Va. 2000), aff’d 307 F.3d 277 (4th Cir. 2002) (deciding that rule of reason requires elaborate inquiry into the actual conditions of the market); Dowd, *supra* note 302, at 1198 n.158 (positing that rule of reason potentially generates tremendous waste of judicial resources by forcing the plaintiff to conduct extensive market analysis and present resultant evidence to the court).

\(^{346}\) See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1979) (noting previous court decisions that held certain agreements so plainly anticompetitive that they presume illegal without further examination under the rule of reason generally applied in Sherman Act cases); see also Brown & Burns, *supra* note 343, at 167–68 & n.21 (discussing per se rule as a rule that looks to whether the business practice facially appears to be one that tends to restrict competition thus resulting in presumption of illegality); Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 U. MIAMI BUS. L. REV. 585, 602 n.86 (2002) (stating that courts prefer the rule of reason approach over the per se approach because the league may employ facially restrictive practices that have redeeming qualities for competition).

\(^{347}\) See *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 206 (E.D. Mich. S. Div. 2002) (stating that in a quick look approach the focus is on defendant’s proffered pro-competitive justifications); Meredith E. B. Bell & Elena Laskin, *Antitrust*
restrictive alternatives doctrine’s fatal flaw is both a lack of formal recognition from the Supreme Court, and the subjective determination courts must employ to determine whether an alternative is truly less restrictive.\textsuperscript{348} When courts hear factually similar cases yet employ markedly different approaches, this practice nullifies the stare decisis value of any of the analyses.\textsuperscript{349} Predictability is the foundation of the American judicial system and a necessary element to a body of law with such a far-reaching impact.\textsuperscript{350}

V. QUARTERBACK SNEAK – A PROPOSAL TO ALLOCATE REASONABLE RESTRAINT APPROACHES

The “quick look” approach applied by the Supreme Court in \textit{NCAA v. Board of Regents} was hailed as an attractive alternative

\textit{Violations}, 36 AM. CRIM. L. REV. 357, 363 (1999) (discussing the quick look approach as combining the efficiency of the per se rule with the more in depth informational inquiry of the rule of reason as the court can consider the pro-competitive justifications submitted by the defendant); Yancey, \textit{supra} note 267, at 706 (concluding that quick look approach is often reduced to a veiled per se ruling).

\textsuperscript{348} See American Motor Inns, Inc. v. Holiday Inns, Inc. 521 F.2d 1230, 1249 (1975) (noting that the Supreme Court has never indicated that the presence of a less restrictive alternative to further a legitimate purpose was a decisive factor in its rule of reason analysis); see also Alan J. Meese, \textit{Don’t Disintegrate Microsoft (Yet)}, 9 GEO. MASON L. REV. 761, 788 n.132 (2001) (arguing that the application of the least restrictive alternative test can have the “counter intuitive result” of “penaliz[ing] restraints not for reducing competition, but for failing to increase it enough”). See generally Grewe, \textit{supra} note 6, at 235–36 (noting that the Ninth Circuit has changed its standard of review, and the relative weight of the factors in the balancing test based on differing fact situations, and that the Supreme Court has never formally recognized the least restrictive alternatives test).

\textsuperscript{349} See Ashutosh Bhagwat, \textit{Separate But Equal?: The Supreme Court, Federal Courts, and the Nature of the “Judicial Power”}, 80 B.U. L. REV. 967, 975–76 (2000) (noting the difficulty that federal courts have in following the recent Supreme Court antitrust decisions while being bound by stare decisis to follow the “undermined – but – not-expressly-overruled antitrust decisions issued by the Warren Court”); see also James C. Rehnquist, \textit{The Power that Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court}, 66 B.U. L. REV. 345, 347 (1986) (discussing the importance of stare decisis in ensuring that “like cases will be treated alike”); Roberts, \textit{supra} note 5, at 337 (arguing for the necessity of stare decisis doctrine to apply in antitrust cases involving professional sports leagues).

\textsuperscript{350} See Margaret N. Kniffen, \textit{Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals}, 51 FORDHAM L. REV. 53, 82–83 (1982) (noting that a goal of stare decisis is the “predictability of judicial decisions”, which allows individuals to behave in accordance with a legal standard, especially when it concerns commercial transactions); Roberts, \textit{supra} note 5, at 404 (posing that results from cases based on unpredictable standards may reach correct conclusions, but more likely will interfere or conflict with antitrust and labor policy). But see Marc J. Yoskowitz, \textit{A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust}, 1988 COLUM. BUS. L. REV. 579, 585–86 (1988) (noting the criticism that has arisen among scholars concerning Major League Baseball’s antitrust exemption, which has been upheld solely because of stare decisis).
to both the complicated rule of reason analysis and rigid per se approach.\textsuperscript{351} However, this was not due to the ingenuity of its method or apparent ease of application. The effectiveness of the quick look technique is due, in part, to the inherent nature of an appellate body and reviewing court.\textsuperscript{352} The necessity of a lengthy analysis was significantly lessened by the availability of a fully fleshed out evidentiary record to examine.\textsuperscript{353} Application of this approach on the trial level, however, may lead to the problematic disguised per se analysis discussed earlier. In an effort to err on the side of caution, the use of the rule of reason approach by trial-level courts allows for the development of a complete factual record.\textsuperscript{354} A full record invariably serves justice by ascertaining relevant information before making hasty or misinformed

\textsuperscript{351} See Peter W. Bellas, NCAA v. Board of Regents: Supreme Court Intercepts Per Se Rule and Rule of Reason, 39 U. MIAMI L. REV. 529, 531–32 (1985) (describing the “quick look” method as the most functional way of analyzing competitive impacts in antitrust cases); Daniel E. Lazaroff, The Influence of Sports Law on American Jurisprudence, 1 VA. SPORTS & ENT. L.J. 1, 15 (2001) (noting the Supreme Court’s decision in NCAA has had a powerful impact on antitrust jurisprudence that extended past sports). But see Wood, \textit{supra} note 41, at 339 (criticizing the “quick look” approach as a superficial analysis that revealed the inherent weakness of the non-statutory exemption).

\textsuperscript{352} See Cont’l Airlines, Inc. v. United Airlines, Inc. 277 F.3d 499, 511 (2002) (noting that the Supreme Court has not approved of a “quick look” analysis based upon anything “less than a full evidentiary hearing, either before an administrative agency or in court”); Thomas C. Arthur, Symposium: The Future Course of the Rule of Reason a Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts, 68 ANTITRUST L.J. 337 (2000) (arguing that restraints that have not already been categorized by the Supreme Court under the per se or quick look analysis require a full rule of reason analysis); see also Yancey, \textit{supra} note 267, at 694 (discussing the potential mistakes that a district court can make in identifying market power or relevant market without the benefit of a full finding at its disposal).

\textsuperscript{353} See Cal. Dental Ass’n v. FTC, 526 U.S. 756, 780 (1999) (stating that the nature of antitrust law increases the necessity of lower courts to explain the logic and the support of their reasoning, rather than use a “quick look” analysis based upon assumptions that are not “obvious”); see also Chul Pak & Willard K. Tom, Symposium: The Future Course of the Rule of Reason: Toward a Flexible Rule of Reason, 68 ANTITRUST L.J. 391 (2000) (discussing the relationship between the various modes of analysis and the risks that the plaintiff and defendant face as a result). See generally NCAA v. Board of Regents, 468 U.S. 85, 105-07 (1984) (engaging in “quick look” analysis based upon the extensive findings of the District Court).

\textsuperscript{354} See Phillip Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ANTITRUST LAW PARA. 1507 (2002) (advocating the evaluation of the evidence under a rule of reason standard by a judge rather than a jury because the court has the obligation to expose the assumptions that underlie its interpretation of the evidence); Yancey, \textit{supra} note 267, at 706 (noting that under the rule of reason standard, courts acquire the evidence that is necessary to make its evaluation). But see Anderson, \textit{supra} note 3, at 150 (arguing that the rule of reason is not necessary in sports antitrust cases because of the amount of judicial experience that has been accumulated about this issue, reducing the chance of a misinformed decision).
decisions.\textsuperscript{355} A finding of an antitrust violation carries swift and heavy penalties to be levied upon the transgressor.\textsuperscript{356} The public is better served by protecting parties from the serious punishments associated with antitrust violations through a comprehensive analysis, rather than a cursory approach in the name of judicial efficiency.\textsuperscript{357} As such, it is proposed that trial level courts limit their analysis to the combined rule-of-reason and least restrictive alternatives approach, reserving the quick look approach for use only by appellate courts.\textsuperscript{358}

\textsuperscript{355} See Sam Stanton, \textit{Burden Shifting and Presumptions Under Section 1 of the Sherman Act after California Dental Ass'n v. FTC}, 53 \textit{RUTGERS L. REV.} 247, 251 (2000) (noting that one of the benefits of the rule of reason analysis over the \textit{per se} analysis is that the restraint at issue could appear to fit into a \textit{per se} category, but may not be unreasonable without further inquiry); see also Joseph P. Bauer, \textit{Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?}, 16 \textit{LOY. CONSUMER L. REV.} 303, 304–15 (2004) (describing the extent of antitrust enforcement by the government and by private citizens). But see Reza Dibadj, \textit{Saving Antitrust}, 75 \textit{U. COLO. L. REV.} 745, 783–85 (2004) (describing the administrative costs and confusion that are associated with the rule of reason test).


\textsuperscript{357} See Clark Havighurst & Nancy King, \textit{Private Credentialing of Health Care Personnel: An Antitrust Perspective}, 9 \textit{AM. J. L. AND MED.} 131, 179 (1983) (positing that "although the antitrust laws do not directly require procedural fairness, procedures are certainly relevant in a total evaluation of a competitor-sponsored credentialing or similar program under the rule of reason to determine whether it affects competition adversely"); James Langenfeld & Louis Silvia, \textit{Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective}, 61 \textit{ANTITRUST L.J.} 653, 685 (1993) (suggesting that between the two extremes of the \textit{per se} and rule of reason approach there "exists a gray area," where judicial efficiency suggests the need for a systematic approach to reviewing agreements among competitors"). But see Mary J. Davis, \textit{Section II. Summary Adjudication Methods in United States Civil Procedure}, 46 \textit{AM. J. COMP. L.} 229, 253–54 (1998) (arguing that complex litigation such as antitrust suits "are well suited to motions for summary judgment in spite of their complexity").

\textsuperscript{358} See Daryl A. Libow, \textit{The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief}, 71 \textit{CORNELL L. REV.} 645, 666 (1986) (arguing that "rule of reason analysis would compel trial courts to employ a specific set of factors in their determinations and provide appellate courts with specific standards against which to review the propriety of lower court decisions"); Manisha M. Sheth, \textit{Formulating Antitrust Policy in Emerging Economies}, 86 \textit{GEO. L.J.} 451, 459 (1997) (noting that "appellate courts have begun to employ a "quick look" rule of reason approach to practices that resemble the \textit{per se} offenses but which have some efficiency justifications due to special extenuating circumstances"); Lawrence A. Sullivan, \textit{Anticipating Antitrust's Centennial: The Viability of the Current Law on Horizontal Restraints}, 75 \textit{CAL. L. REV.} 835, 843 (1987) (discussing the majority opinion in \textit{Broadcast Music}, 441 U.S. at 26, which "defined a more narrow range of situations in which appellate courts would make
VI. END ZONE - CONCLUSION

Clarett v. National Football League highlighted two major categories of antitrust jurisprudence whose constituent case law is inconsistent, obscure, and highly subjective.\textsuperscript{359} While the Clarett result was correct, the district court's analysis reflected the fact-dependant subjective approach to the non-statutory labor exemption explicitly scorned by the Supreme Court.\textsuperscript{360} Also, the district court's approach to determining whether the NFL three-year draft rule was a reasonable restraint of trade illustrated the existence of five applicable doctrines.\textsuperscript{361} The potential manipulation of these approaches by the lower courts is essentially unpredictable. I propose that trial-level courts apply the rule of reason approach, and reserve the quick look approach to appellate courts. This would streamline five standards into two. First, it allows for the development of a full record, including any defenses or justifications offered by a defendant, thereby solving the difficulties encountered using the per se approach. Second, it promotes judicial efficiency by limiting appellate discretion when making determinations of "reasonableness." Currently, these determinations require what is essentially fact-finding by the reviewing court,\textsuperscript{362} which are

the ultimate decision, requiring full inquiry by the trial court whenever both injury to competition and increased efficiency are possible effects of defendant's conduct\textsuperscript{359}. See Clarett, 369 F.3d at 130 (noting that courts "have carved out two categories of labor exemptions to the antitrust laws: the so-called statutory and non-statutory exemptions"); see also Itri, supra note 151, at 315 (acknowledging that it is uncertain how a court would approach the issue presented Clarett); McCormick & McKinnon, supra note 321, at 386 (arguing that while "specific contours of the labor exemption remain uncertain" precedent and court application of the labor exemption doctrine "clearly show that the interests protected by the draft eligibility rule are far removed from those which national labor policy clothes with immunity").

See Jean Wegman Burns, The New Role of Coercion in Antitrust, 60 FORDHAM L. REV. 379, 405 (1991) (positing that "the Supreme Court's apparent elimination of coercion from the rationale, agreement, and standing elements of vertical restraints is consistent with another, often implicit, aspect of the economic efficiency approach – the avoidance of subjective facts in determining the legality of a restraint"); Itri, supra note 151, at 308 (noting that the rule of reason approach "should be limited to an agreement's effect on economic competition only"); McCormick & McKinnon, supra note 321, at 391–92 (arguing that the vagueueness of the Court's approach towards these types of cases "makes a mechanical application of the per se test improper").

See generally Clarett, 369 F.3d at 408 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999), for the proposition that the "categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear").

See Anthony J. Dennis, Most Favored Nation Contract Clauses Under the Antitrust Laws, 20 DAYTON L. REV. 821, 848 (1995) (stating that "the rule of reason, the standard of judicial review mandated for non-per se offenses, dictates a facts and
better made at the trial level. Finally, reducing the number of potential standards from five to two would increase predictability in antitrust suits. This would benefit practitioners in the field as well as promote the doctrine of stare decisis.

circumstances-type of analysis which considers numerous factors); see also Dibadj, supra note 355, at 785 (arguing that creating and enforcing competition law is not the job for the judiciary because it “further burdens an already heavy caseload and stretches the fact-finding capacities of juries”); Handler, supra note 12, at 1324 (positing that antitrust disputes “could be more expeditiously handled administratively rather than judicially at the fact-finding stage”).

363 See Jerome Shuman, The Application of the Antitrust Laws to Regulated Industries, 44 TENN. L. REV. 1, 66-67 (1976) (advancing the theory that in agency reasonableness determinations “Appellate courts would have no way to measure independently the severity of the anticompetitive effects or the magnitude of other public interest benefits”; Andrew Stuart, “I tell ya I don’t get no respect!": The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals; General Agreement on Tariffs and Trade, 23 LAW & POL’Y IN’L BUS. 749 (1992) (noting that “federal courts of appeals review the fact finding of trial judges under the ‘clearly erroneous’ standard, while for constitutional, historical, and political reasons, they review jury “fact finding” (which in reality can involve a fair amount of law application) under the more deferential ‘substantial evidence’ standard”). But see Herbert Hovenkamp, Fact, Value and Theory in Antitrust Adjudication, 1987 DUKE L.J. 897, 905 (1987) (posting that “proponents of the argument for treating all theoretical issues as questions of law argue that trial judges should not be able to make economic or antitrust policy and insulate that policy from review by disguising it as merely ‘factual’”).

364 See Philip C. Kissam, Antitrust Boycott Doctrine, 69 IOWA L. REV. 1165, 1176–77 (1984) (arguing a problem with the rule of reason is it invites courts to engage in ad hoc balancing which may result in incoherent analysis, a lack of predictability, and inconsistency in results); James McNeill, Comment, Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction, 28 CAL. W. IN’T’L L.J. 425, 454 (1998) (noting that “the history of Sherman Act enforcement via the federal courts has proven to be a mixed bag. Predictability of result depends greatly on which circuit hears the case”); see also Donald Turner, Anticipating Antitrust’s Centennial: The Durability, Relevance, and Future of American Antitrust Policy, 75 CAL. L. REV. 797, 798–99 (1987) (finding that “the function of courts is to formulate antitrust rules that promote the economic goals of competition. Ideal rules are clearly predictable in their application and economically rational in that they outlaw anticompetitive conduct but not conduct that is economically beneficial”).

365 See Payne v. Tennessee, 501 U.S. 808, 827 (1991) (finding that “stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”); Lisa M. Constance, Antitrust Law – Exercising the Rule of Reason: Supreme Court Revises Analysis of Vertical Maximum Price-Fixing, Bringing it Closer to Achieving the Goals of the Sherman Act, 75 CAL. L. REV. 797 (1999) (arguing that “the doctrine of stare decisis promotes the predictable development of the law, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process”); Piraino, supra note 256, at 786 (stating that the “lack of clear guidance from the courts and agencies has left both practitioners and business executives confused as to the legality of particular mergers”).